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A

PRACTICAL TREATISE

**WITHDRAWN**  
L. A. CO. L. L.

ON

# THE LAW OF TRUSTS

AND

## TRUSTEES.

BY

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To the Right Honorable Lord St. Leonards,

ETC. ETC. ETC.

MY LORD,

The rare talents and indefatigable industry, which, without any extrinsic aid, have raised your Lordship to the most honorable eminence, command the admiration and respect of every Member of the Profession.

Personally, I feel myself under peculiar obligations. Your Lordship's writings have been the models, and have furnished no small part of the materials, for the present treatise; and your Lordship's appointment of me as one of the Conveyancing Counsel to the Court, has enabled me to bring to the revision of my work an enlarged practical experience.

Permit me, my Lord, on these public and private grounds, to dedicate the following pages to your Lordship; and with the earnest hope that your Lordship's valuable life may long be preserved to the Profession and the community at large,

I remain your Lordship's most obliged and grateful servant,

THE AUTHOR.





## PREFACE.

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IN the present Edition the Author has recast the earlier part of the work, and, besides incorporating recent cases and statutes, and interspersing much additional matter throughout, has appended a supplementary chapter on Pleading and Practice.

The correction of the press was kindly undertaken for the Author by Mr. F. O. Haynes, whose extensive knowledge of law and careful research are well known at the Chancery Bar. Had the labours of Mr. Haynes gone no further, the Author would have felt grateful for the assistance, but in fact, Mr. Haynes, as the sheets passed through his hands, has identified himself with the Author, and examined into the law—has inserted additional authorities which had been inadvertently omitted, and corrected mistakes into which the Author had occasionally fallen. Moot points, also, as they arose have been freely discussed, and the reader has the benefit of the conclusions arrived at. The Author is of course to be held responsible for the errors which remain, but the value of the work (whatever it may be) has been unquestionably much enhanced by the legal acumen and learning which Mr. Haynes has imported into it.

The Index has been compiled for the Author by Mr. P. A. Kingdon, a much esteemed former pupil. The merits of this part of the work will be best tested in the use, but a superficial glance will show that never were more pains taken to render an Index as perfect as possible.

The Author begs in conclusion to thank his coadjutors for their timely

aid, and to assure them that he appreciates his own performance much more highly from the circumstance that two gentlemen of their talents and standing, have condescended to bestow upon it so much of their time and labour.

JULY 4, 1857.

# TABULAR ANALYSIS.

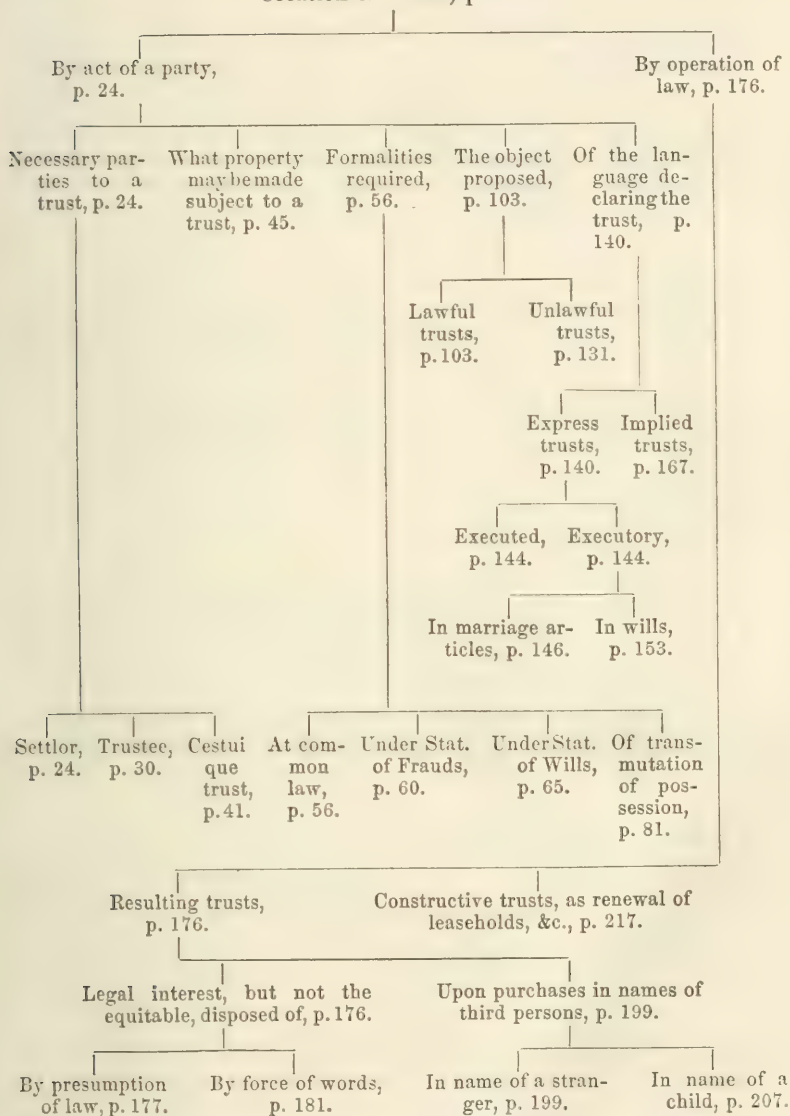
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## PART I.

Definition of a trust, p. 15.

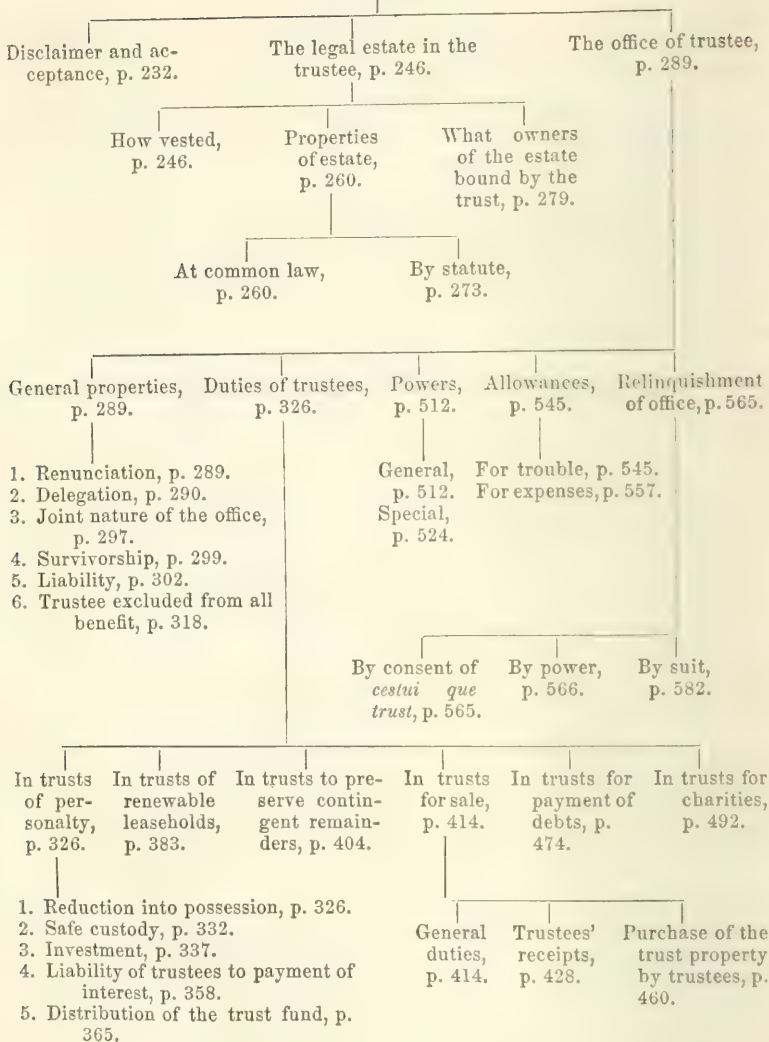
Classification of trusts, p. 21.

Creation of trusts, p. 24.



## PART II.

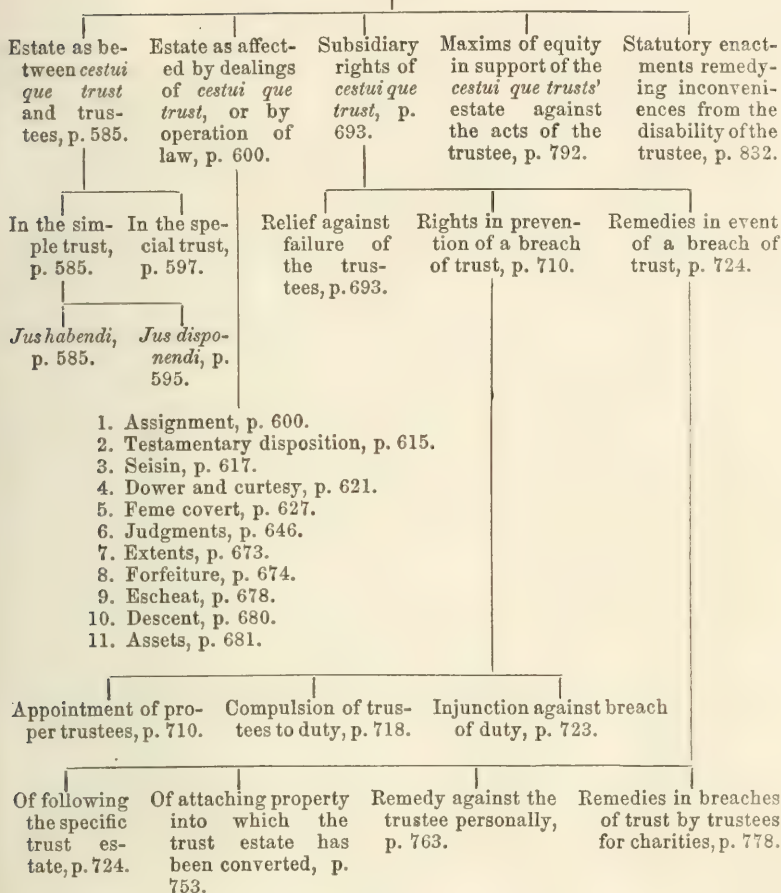
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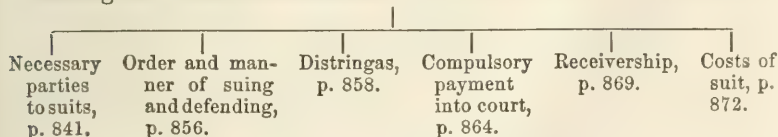
# PART III.

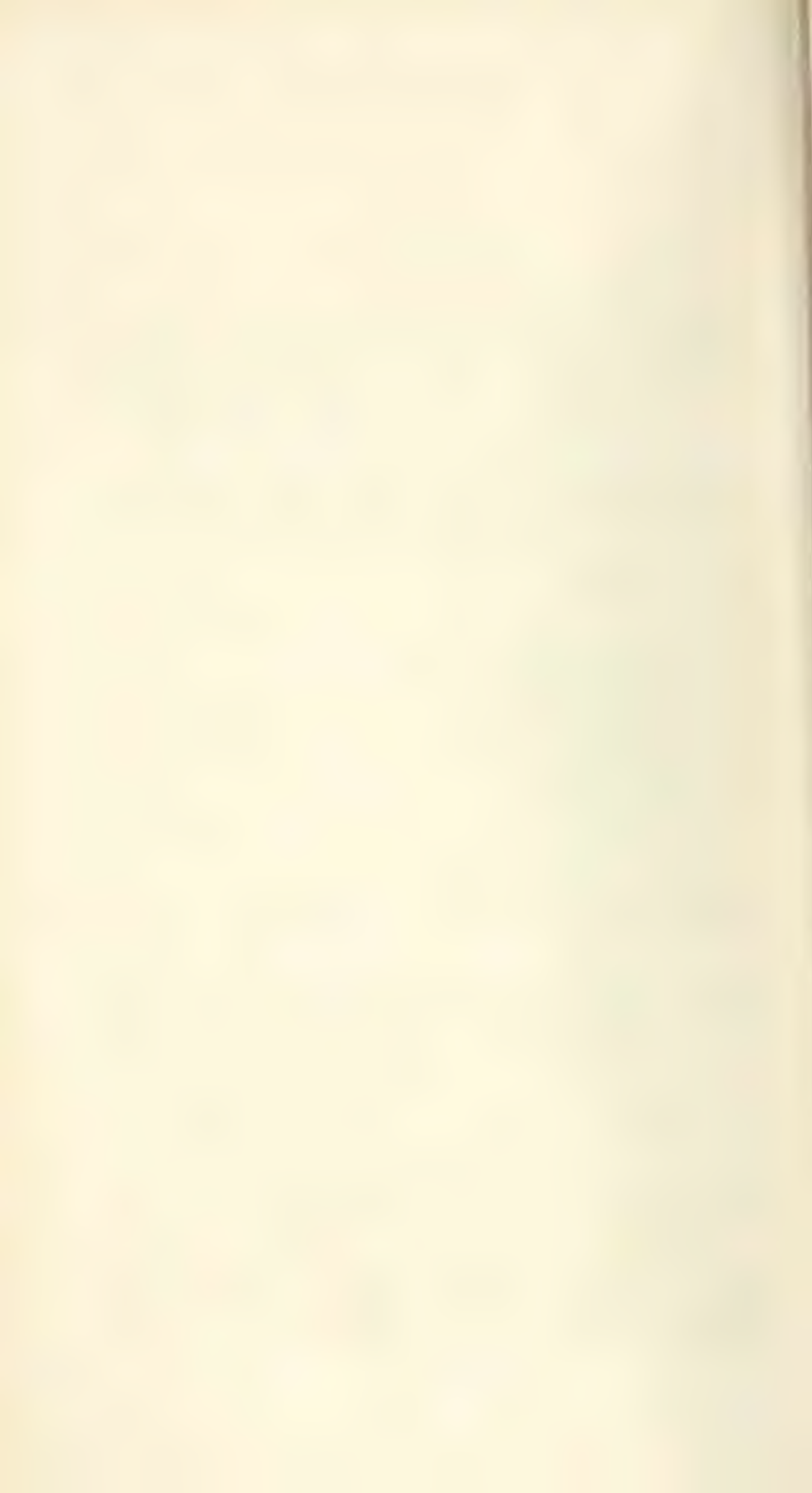
## The *Cestui que Trust*.



# PART IV.

## Pleading and Practice in reference to the Law of Trusts and Trustees.





# CONTENTS.

---

The pages referred to are those between brackets [        ].

## INTRODUCTION.

Origin of trusts, . . . . .	1
Invention of the <i>subpœna</i> , . . . . .	1
The simple trust or use, . . . . .	2
Confidence in the person of the trustee, . . . . .	2
Privity of estate in the trustee, . . . . .	3
Privity as applied to the estate of the <i>cestui que use</i> , . . . . .	3
The special trust, . . . . .	4
Both kinds of trusts applicable to chattels, . . . . .	4
Statute of 1 R. 3, c. 1, . . . . .	5
What trusts within it, . . . . .	5
[Whether a trust could have been declared on an estate for life, . . . . . 6, note (1)]	6
Statute of 27 Hen. 8, c. 10, . . . . .	7
[Mr. Sanders's doctrine, that before this statute no use could have been declared on an estate in tail, or for life, . . . . . 7, note (1)]	7
What trusts within the statute, . . . . .	7
Introduction of the modern trust, . . . . .	8
Statutes against uses not applicable to trusts, . . . . .	8
Trusts at first administered on principles of uses, . . . . .	9
Subsequent improvements of the system, . . . . .	9
In respect of the estate in the trustee, . . . . .	10
In respect of the <i>cestui que trust</i> , . . . . .	11
Principles governing trusts at the present day, . . . . .	13

---

## PART I.

### DEFINITION, DISTRIBUTION, AND CREATION OF TRUSTS.

---

#### CHAPTER I.

##### DEFINITION OF A TRUST.

1. A trust is a confidence, . . . . .	15
2. Reposed in some other, . . . . .	15
How far the equitable merges in the legal estate, . . . . .	16
3. Not issuing out of the land, but collateral to it, . . . . .	18
4. Annexed in privity to the estate, . . . . .	18
5. Annexed in privity to the person, . . . . .	19
6. <i>Cestui que trust</i> has no remedy but by <i>subpœna</i> in Chancery, . . . . .	19



## CHAPTER II.

## CLASSIFICATION OF TRUSTS.

The simple trust, . . . . .	21
The special trust, . . . . .	21
The latter either ministerial, . . . . .	21
Or discretionary, . . . . .	21
Mixture of trust and power, . . . . .	22
Trusts lawful and unlawful, . . . . .	22
Trusts public and private, . . . . .	23

## CHAPTER III.

## OF THE PARTIES TO THE CREATION OF TRUSTS.

## SECTION I.

## OF THE SETTLOR.

Who may create a trust, . . . . .	24
The Crown, . . . . .	24
Corporations, . . . . .	25
A <i>feme covert</i> , . . . . .	25
As to property settled to separate use, . . . . .	26
Infants, . . . . .	26
Lunatics, . . . . .	27
Traitors, felons, and outlaws, . . . . .	28
Bankrupts and Insolvents, . . . . .	29

## SECTION II.

## WHO MAY BE A TRUSTEE.

The Crown, . . . . .	30
A Corporation, . . . . .	31
Bank of England, . . . . .	31
<i>Feme covert</i> ought not to be appointed, . . . . .	34
Nor a <i>feme sole</i> , . . . . .	35
Nor an infant, . . . . .	35
Alien may be a trustee of <i>chattels personal</i> , . . . . .	39
Person domiciled abroad not a fit trustee, . . . . .	40
Bankrupts and insolvents not absolutely disqualified, . . . . .	40
<i>Cestuis que trust</i> should not be appointed trustees, . . . . .	40
Proper number of trustees, . . . . .	40

## SECTION III.

## WHO MAY BE CESTUI QUE TRUST.

The Crown may be, . . . . .	42
A corporation <i>not</i> , so as respects <i>lands</i> , without license from the Crown, . . . . .	43
Nor alien, of <i>lands</i> , . . . . .	43
<i>Secus</i> as to proceeds of sale of land directed to be sold, . . . . .	43

## CHAPTER IV.

## WHAT PROPERTY MAY BE MADE THE SUBJECT OF A TRUST.

Copyholds may be, . . . . .	45
No power to entail equitable interest of copyholds where no custom to entail legal interest, . . . . .	46
Equitable interests in foreign property, . . . . .	46
<i>Equities</i> in relation to West Indian property, . . . . .	47
<i>Equities</i> in respect of lands in Scotland, . . . . .	48
Demerara property, . . . . .	49
Lands in Ireland, . . . . .	50
Covenant to settle lands in Demerara, . . . . .	51
<i>Trusts</i> of lands abroad, . . . . .	53

## CHAPTER V.

## OF THE FORMALITIES REQUIRED FOR THE CREATION OF A TRUST.

## SECTION I.

## OF TRUSTS AT COMMON LAW.

Trusts are averable like uses, . . . . .	56
Averment must not contradict the instrument, . . . . .	56
Trusts not averable where deed requisite to pass the legal estate, . . . . .	57
Nor upon a devise even at <i>Common law</i> , . . . . .	58
Nor on a bequest or appointment of executor, . . . . .	58
Declaration of trust <i>by</i> or <i>to</i> the kin, . . . . .	59

## SECTION II.

## OF THE STATUTE OF FRAUDS.

I. What interests within the Act, . . . . .	60
Copyholds are so, . . . . .	60
And chattels real, . . . . .	61
Chattels personal not so, . . . . .	61
Charitable uses within the Act, . . . . .	61
Whether Crown bound by the statute, . . . . .	62
Land in the Colonies, . . . . .	62
Whether statute must be pleaded, . . . . .	62
II. What formalities required by the statute, . . . . .	62
Trusts to be proved <i>by</i> not declared <i>in</i> writing, . . . . .	62
Letter or recital sufficient, . . . . .	63
Relation to subject-matter and nature of trust must be clear, . . . . .	64
The writing must be signed, . . . . .	64

## SECTION III.

## OF THE STATUTE OF WILLS.

Principle of rejecting declarations not testamentary, . . . . .	65
Case where no trust appears on the will and no fraud exists, . . . . .	68
Where the devisee is made a trustee by the will, and the testator leaves an informal declaration of trust, . . . . .	68
Exceptions to the rule, . . . . .	69
1. General charge of debts and legacies under the old law, . . . . .	69
2. Fraud, . . . . .	70
JANUARY, 1858.—2	

Engagement to execute an unlawful trust, . . . . .	71
Devise to tenants in common with unlawful object, may be good as to one and void as to another, . . . . .	73
Devise not void merely because the devisee means to execute the unlaw- ful trust, . . . . .	73
Engagement by devisee as to undefined part, . . . . .	73
Engagement to execute a trust and none declared, . . . . .	74
Devisee a trustee <i>on the face of the will</i> , and parol undertaking by the devisee to perform the trust, . . . . .	75
In the case of a legal devise with a subsequent <i>parol</i> declaration for chari- table uses, the Statute of Mortmain does not avoid the legal devise, .	78

## SECTION IV.

## TRANSMUTATION OF POSSESSION.

In the absence of valuable consideration question is not whether there has been <i>transmutation</i> , but whether trust has been <i>perfectly created</i> , .	81
(I.) Trusts not <i>perfectly created</i> where settlor contemplates further acts,	81
(II.) Where the settlor declares <i>himself</i> a trustee, the trust is <i>perfectly created</i> , . . . . .	82
(III.) Where a stranger, and not the <i>settlor himself</i> a trustee, distinctions necessary, . . . . .	84
1. If subject-matter a legal interest capable of <i>legal transfer</i> , it must be actually vested in the trustee, . . . . .	84
2. If legal, but not capable of <i>legal transfer</i> , much difficulty,	85
3. If subject-matter an equitable interest, an assignment to the new trustee sufficient, . . . . .	89
Voluntary settlement of <i>real</i> estate defeated by subsequent sale, . . . .	92
Voluntary settlement of <i>real</i> or <i>personal</i> estate by one virtually insolvent void against creditors, . . . . .	93
Specific performance of agreement under seal without valuable considera- tion, . . . . .	93
Meritorious consideration, . . . . .	95
Analogy of covenant to stand seised, . . . . .	95
Analogy from supplying surrender of copyholds, . . . . .	96
Analogy of aiding defective execution of powers, . . . . .	96
Agreement for meritorious consideration not enforced against the settlor,	97
When trust once <i>perfectly created</i> , legal interest revesting in the settlor immaterial, . . . . .	99
Voluntary trust for payment of debts, . . . . .	101

## CHAPTER VI.

## OF THE OBJECT PROPOSED BY THE TRUST.

## SECTION I.

## OF LAWFUL TRUSTS.

The intention in general followed, . . . . .	103
Object not attainable by any limitation of the legal estate may, if not against the policy of the law, be attained by a limitation of the equitable, . . . . .	103
A fee upon a fee in trusts, . . . . .	103
Contingent remainders in trusts, . . . . .	104
Limitations of chattels in trusts, . . . . .	104
Endowments of chapels, . . . . .	104
Gift to the "poor of a parish," . . . . .	105
Advowson upon trust for "parishioners and inhabitants," . . . . .	107

Mode of electing a clerk, . . . . .	109
Trusts for accumulation, . . . . .	110
Thellusson Act, . . . . .	112
Points resolved upon the construction of it, . . . . .	113
To whom the excess shall go, . . . . .	116
Exceptions from the act, . . . . .	119
Settlement to separate use of <i>feme covert</i> , . . . . .	120
The interposition of an express trustee not necessary, . . . . .	121
What words will create a settlement to the separate use, . . . . .	121
Clause against anticipation, . . . . .	123
Effect before marriage of clause against anticipation, . . . . .	124
Effect after marriage of trust for separate use, . . . . .	124
Effect after marriage of clause against anticipation, . . . . .	128
Effect of separate use in case of second marriage, . . . . .	130

## SECTION II.

## OF UNLAWFUL TRUSTS.

Trusts against the policy of the law, . . . . .	131
Illegitimate children, . . . . .	131
Trusts of real estate for corporations, . . . . .	131
Trusts of real estate for alien, . . . . .	132
Trusts of real estate for charity, . . . . .	132
Restriction on alienation, . . . . .	132
Trusts for maintenance, . . . . .	133
Limitation over an alienation, . . . . .	135
Director to purchase presentation, . . . . .	136
Insurances for lives, . . . . .	136
Splitting votes, . . . . .	137
Consequences of creating a trust with an unlawful purpose, . . . . .	137
Property settled with an unlawful purpose may be recovered by those claiming under settlor, . . . . .	138
Or by the settlor himself, where there is no positive fraud, . . . . .	139

## CHAPTER VII.

## IN WHAT LANGUAGE A TRUST MAY BE DECLARED.

## SECTION I.

## OF DIRECT OR EXPRESS DECLARATIONS OF TRUST.

Technical words not necessary, . . . . .	140
If employed must be taken in their technical sense, . . . . .	141
Lord Hardwicke's opinion overruled, . . . . .	141
Whether the rule in Shelly's case applies to trusts, . . . . .	143
Distinction between trusts executed and trusts executory, . . . . .	144
Lord Hardwicke's opinion in Bagshaw v. Spencer, . . . . .	144
Executory trusts in articles and wills distinguished, . . . . .	146
Construction of "heirs of the body" and "issue" in articles, . . . . .	147
Daughters included under "heirs of the body" and "issue," . . . . .	149
Articles to settle chattels on trusts of real estate, . . . . .	149
Limitation over on "dying under 21," or "dying under 21 without issue," . . . . .	150
Joint-tenancy may in articles be construed tenancy in common, . . . . .	152
Words may be supplied in articles, . . . . .	153
Construction of "heirs of the body" and "issue" in executory trusts in wills, . . . . .	153
"Heirs of the body" and "issue" distinguished, . . . . .	155
Daughters included under "heirs of the body" or "issue" in wills . . . . .	156
Limitation to preserve contingent remainders, . . . . .	156



Settlement of gavelkind lands, . . . . .	157
No latitude of construction where testator declares his own limitations formally, . . . . .	157
Direction in wills to settle chattels on trusts of real estate, . . . . .	158
Joint tenancy in wills in what cases may be construed tenancy in common, . . . . .	163
Insertion of powers in settlements, . . . . .	164
"Usual powers," . . . . .	164
"Proper powers," . . . . .	166

## SECTION II.

## OF IMPLIED TRUSTS.

General rule, . . . . .	167
Words precatory, recommendatory, &c., . . . . .	167
No trust where there is uncertainty, . . . . .	168
Either of the objects, . . . . .	169
Or of the subject-matter, . . . . .	170
The implied trust may be negated by <i>indicia</i> of a contrary intention, . . . . .	171
Not so restrictive as a proper trust, . . . . .	172
Court at present leans against implying trusts, . . . . .	173
Surplus does not result, . . . . .	173
Implied trust under agreement for valuable consideration, . . . . .	173
Or under a contract for sale, . . . . .	174

## CHAPTER VIII.

## OF RESULTING TRUSTS.

## SECTION I.

## WHERE THERE IS A DISPOSITION OF THE LEGAL INTEREST AND NOT OF THE EQUITABLE.

General rule, . . . . .	176
Arise either upon presumption or expression of intention, . . . . .	177
In what cases a resulting trust arises upon presumption, . . . . .	177
Distinction between devise upon a partial trust and beneficial devise subject to a charge, . . . . .	179
Recognition of the devisee's relationship evidence of beneficial devise, . . . . .	180
The words "trust" and "trustee" not conclusive that mere trust was intended, . . . . .	180
Heir not excluded from resulting trust on bare conjecture, . . . . .	181
A trust resulting by presumption may be rebutted by parol evidence, . . . . .	181
In what cases a resulting trust arises from intention expressed, . . . . .	181
Parol evidence not admissible to rebut latter kind of trust, . . . . .	182
General observations upon resulting trusts, . . . . .	182
1. Money arising from sale of real estate results to the testator's heir, . . . . .	182
If purposes of the trust only partially fail, the residue results to the heir as personal estate, . . . . .	184
If the purposes of the trust wholly fail, the entirety results to the heir as real estate, . . . . .	184
2. Money bequeathed to be laid out on land results to the testator's next of kin, . . . . .	187
3. Cases of primary disposition of the whole property to A. subject to a charge in favour of B., . . . . .	189
Difference between exception from a devise, . . . . .	191
And charge upon a devise, . . . . .	192
Possible distinction in the case of a legacy to charity, . . . . .	192
Results of the cases, . . . . .	193, 194

4. The resulting interest may be given away from the heir or next of kin by express devise or bequest, . . . . .	194
The word "residue" could not, before the late Wills Act, pass resulting interest in land, . . . . .	195
Gift of testator's "personal estate" will not pass money arising from sale of real estate, . . . . .	195
Such an intention may be collected from the will, . . . . .	196
In what case a lapsed legacy out of proceeds of real estate will pass by gift of the residuary personal estate, . . . . .	196
Resulting interests of personal estate pass by gift of the residue, . . . . .	197
5. Law of resulting trusts, as applicable to charitable gifts, . . . . .	198
Where objects do not exhaust the estate, the surplus, instead of resulting, will be applied to a like charitable object, . . . . .	198
So if the value of the property increase beyond the wants of the charity, . . . . .	198
An interest will result even in charitable gifts, where intention appears that the charity should take only to limited amount, . . . . .	199
Exceptions in charity founded on precedent against principle, . . . . .	199

## SECTION II.

### RESULTING TRUSTS UPON PURCHASES IN THE NAMES OF THIRD PERSONS.

I. Of purchases in the names of strangers, . . . . .	199
Principle applicable to personalty, . . . . .	200
Joint purchases in the name of a third person, . . . . .	200
Joint purchases in the joint names of the purchasers, . . . . .	201
Mortgage to two on a joint advance, . . . . .	201
Copyhold grant to A. for life, and fine paid by B., . . . . .	202
Purchase of a ship, . . . . .	203
Purchase contrary to the Papistry acts, . . . . .	203
Purchase in order to confer a vote, . . . . .	203
Parol evidence, . . . . .	204
Purchase by agent, . . . . .	204
Proof of trust against defendant's denial, . . . . .	205
Of parol evidence after death of the nominal purchaser, . . . . .	205
Of following trust money into land, . . . . .	206
Resulting trust may be rebutted by parol, . . . . .	206
Subsequent declarations, . . . . .	207
Effect of time, . . . . .	207
II. Of purchases in the names of children, . . . . .	207
Advancement, . . . . .	207
The sonship a circumstance of evidence, . . . . .	208
Distinctions:—	
1. Where child an infant, . . . . .	209
2. Where interest is reversionary, . . . . .	209
3. Purchase in joint names of father and son, . . . . .	209
4. Purchase of copyholds granted for lives <i>successive</i> , . . . . .	210
5. Where child already provided for, . . . . .	211
Where child is adult, . . . . .	211
6. Where the father holds possession and child an infant, . . . . .	212
7. The same when son adult, . . . . .	213
Rebutter of the presumption, . . . . .	214
Parol declarations, . . . . .	214
Evidence on the part of the child, . . . . .	215
Illegitimate children, . . . . .	216
Daughters, wife, grandchild, nephew, . . . . .	216
Purchase-money not paid, a debt from parent, . . . . .	216

## CHAPTER IX.

### OF CONSTRUCTIVE TRUSTS.

Renewal of leases, . . . . .	217
Rule applicable to tenant for life, . . . . .	218
To yearly tenant, . . . . .	219
Tenant at will or at sufferance, . . . . .	219
Agent of trustee cannot renew for his own benefit, . . . . .	220
Trustee may not sell right of renewal, . . . . .	220
Trustee's lien for expenses of renewal, . . . . .	222
Expenses of tenant for life, . . . . .	222
Contribution by annuitants, . . . . .	223
Terms of assignment by the trustee, . . . . .	223
Accounting for mesne rents and profits, . . . . .	224
Remedies against purchasers, lessees, &c., . . . . .	224
Limitation of time, . . . . .	224
Case of trustee purchasing the reversion, . . . . .	225
No tenant right where corporation has sold to an individual, . . . . .	225
Factor, agent, &c., a constructive trustee, . . . . .	225
Equitable waste, . . . . .	225
Fraud in Attorney, . . . . .	226
Agent of trustee not a constructive trustee, . . . . .	226
Constructive trust as to title deeds, . . . . .	227
Constructive trusts from notice, . . . . .	228
Statute of frauds as regards trusts by operation of law, . . . . .	228

## PART II.

### ESTATE AND OFFICE OF THE TRUSTEE.

## CHAPTER X.

### OF DISCLAIMER AND ACCEPTANCE OF THE TRUST.

I. Of disclaimer, . . . . .	232
No one compellable to be trustee, . . . . .	232
Heir of a trustee, . . . . .	232
Disclaimer should be by deed, . . . . .	233
And by way of disclaimer and not of conveyance, . . . . .	233
Whether devise of trust estates can be disclaimed in part, . . . . .	234
Disclaimer by answer in Chancery, . . . . .	234
May be evidenced by a person's conduct, . . . . .	235
Trustee, after disclaimer, may act as agent to the trustees, . . . . .	235
What disclaimer necessary for divesting the legal estate, . . . . .	235
Disclaimer of uses, . . . . .	236
Disclaimer of chattels, . . . . .	236
Disclaimer by <i>feme covert</i> , . . . . .	236
Effect of disclaimer as regards the co-trustees, . . . . .	237
II. Of acceptance of the trust, . . . . .	237
Where a trustee agrees by deed to execute the trust, a breach of trust creates a specialty debt, . . . . .	238
What acts will be construed an acceptance, . . . . .	239

Whether taking out probate is acting, . . . . .	239
Voluntary interference with the assets, whether with or without taking out probate, is acting, . . . . .	241
Except the interference was plainly on some other ground, . . . . .	242
Trustee may not act ambiguously, . . . . .	242
Executor becoming a trustee, . . . . .	243
Trustee on acceptance must inform himself of the state of the trust, . . . . .	244
Trustee by mistake, . . . . .	244

## CHAPTER XI.

### OF THE LEGAL ESTATE IN THE TRUSTEE.

#### SECTION I.

##### OF VESTING THE LEGAL ESTATE IN THE TRUSTEE.

What words will vest the legal estate in the trustee, . . . . .	246
I. Under the statute of uses, . . . . .	246
Special trusts not within the statute, . . . . .	247
Trust to permit a person to receive the rent, . . . . .	248
Charge of debts, . . . . .	248
To permit him to receive <i>or</i> to pay him, . . . . .	249
II. What quantity of estate will be vested in the trustee, . . . . .	249
The trustee will, if possible, take an estate sufficient for the execution of the trust, . . . . .	249
Implied devise in the word "trustee," . . . . .	250
Trust to sell confers a fee, . . . . .	250
Limitation to two trustees and heir of survivor, . . . . .	251
The estate will not be greater than is required for the purposes of the trust, . . . . .	252
Uses limited in remainder upon the partial trusts will be executed, . . . . .	253
Harton v. Harton, . . . . .	255
Hawker v. Hawker, . . . . .	256
Warter v. Hutchinson, . . . . .	257
Late Will Act, . . . . .	259

#### SECTION II.

##### THE PROPERTIES AND DEVOLUTION OF THE LEGAL ESTATE.

I. At common law, . . . . .	260
Freehold estate in the trustee is liable to curtesy, dower, &c., . . . . .	260
Personal estate liable to forfeiture for the offence of the trustee, . . . . .	260
Whether term in a trustee requires a prerogative probate, . . . . .	260
May be taken in execution for debt of the trustee, <i>semble</i> , . . . . .	261
Assets a species of trust property at law, . . . . .	261
Legal estate may be conveyed or devised by the trustee, . . . . .	262
In what cases it passes by a general devise, . . . . .	262
Charge of debts, &c., will exclude the trust estate, . . . . .	263
What expressions will or will not do so, . . . . .	264
Distinction as to legal estate in mortgages passing, . . . . .	264
Power of the trustee in equity to devise the trust estate, . . . . .	265
Whether a devisee can execute the trust, . . . . .	266
Estate after contract for sale passes by a general devise, where a mere trust estate would not, . . . . .	268
Legal estate is subject to legal burthens, . . . . .	268
Trustee, the person to bring an action at law, . . . . .	269
To appoint steward of a manor or present to a church, . . . . .	269
To prove in bankruptcy, . . . . .	269
Of voting for coroners, (See note p. 593,) . . . . .	269



For members of Parliament, . . . . .	270
Trustee liable to rates, . . . . .	271
Trustee pays fines of copyholds, . . . . .	272
May be bankrupt, if he trade as trustee, . . . . .	272
II. Of the legal estate in the trustee as regards the construction of certain statutes, . . . . .	273
Of the Bankruptcy Act, . . . . .	273
The legal estate, in the case of a bare trust, does not vest in the assignees, . . . . .	274
Nor the property into which the trust estate may have been converted, . . . . .	274
In whose name actions for recovery of the trust estate from the assignees must be brought, . . . . .	275
If trust estate cannot be traced, the representative of the trust must prove for the value, . . . . .	276
When the bankrupt has an interest, the legal estate vests in the assignees as a general rule, . . . . .	276
Effect of the clause relating to property left in possession of the bankrupt, . . . . .	277
Of the Insolvent Act, . . . . .	278
Of judgments against the trustee, . . . . .	278

## SECTION III.

## WHAT PERSONS TAKING THE LEGAL ESTATE WILL BE BOUND BY THE TRUST.

Heir and executor, . . . . .	279
Devisee, . . . . .	279
Assignees, . . . . .	279
Dowress, tenant by the curtesy, creditors, &c., . . . . .	279
Forfeiture, . . . . .	280
Escheat, . . . . .	280
Escheat in copyholds, . . . . .	283
In customary freeholds, . . . . .	283
Equity of redemption, . . . . .	284
Escheat and Forfeiture Act, . . . . .	285
Trustee Act, 1850, . . . . .	286
Outlawry of the trustee, . . . . .	287
Bankruptcy of the trustee, . . . . .	287
Disseisor not bound by the trust, . . . . .	287

## CHAPTER XII.

## GENERAL PROPERTIES OF THE OFFICE OF TRUSTEE.

I. A trustee having accepted the office cannot renounce it, . . . . .	289
So an executor, . . . . .	289
Though he may not have proved, . . . . .	290
II. Trustee cannot delegate the office, . . . . .	290
Unless the settlor so directed, . . . . .	291
Trustee acting as agent, . . . . .	292
Delegation allowed where moral necessity for it, . . . . .	292
Trustee not required to take security, . . . . .	295
How trust money to be transmitted, . . . . .	295
Payments at bank must be to account of trust, . . . . .	296
Rule at law as to liability of executors, . . . . .	296
Delegation of discretionary trust void, . . . . .	296
Even to a co-executor or co-trustee, . . . . .	297
A power does not pass with the estate, . . . . .	297
Delegation distinguished from appointment of an attorney, . . . . .	297
III. Co-trustees exercise a joint office, . . . . .	297
In public trusts the majority binds, . . . . .	298

IV. On death of one trustee the office survives, . . . . .	299
Though there be a power of appointment of new trustees, . . . . .	301
V. A trustee not liable for the acts of his co-trustee, . . . . .	302
Not responsible for having joined in receipts, . . . . .	304
<i>Onus probandi</i> lies on each trustee to prove he did not receive the money, . . . . .	305
Is liable for joint receipts if money be improperly raised, . . . . .	305
Must not let it lie in the hands of a co-trustee, . . . . .	306
Executor liable for joining in receipts, . . . . .	310
Lord Northington's doctrine in <i>Westley v. Clark</i> , . . . . .	310
Lord Harcourt's opinion that an executor is liable to creditors, but not to legatees, . . . . .	313
Executors liable for joining in drawing or indorsing bills, . . . . .	314
Not liable where joining was as necessary as in case of trustees, . . . . .	314
Must see that the act is in accordance with the trust, . . . . .	315
Must not leave the money in the hands of the co-executor, . . . . .	316
Not answerable for so much as was well applied, . . . . .	316
Co-administrators on same footing as co-executors, . . . . .	316
Liability of trustee for concealment of breach of trust by a co-trustee, . . . . .	317
Indemnity clauses, . . . . .	317
VI. Trustee can derive no advantage from the trust, . . . . .	318
Not entitled to the game, . . . . .	318
Or to present to an advowson, . . . . .	318
Cannot buy up debts, . . . . .	318
How far mortgagee regarded as a trustee, . . . . .	318
Trustee trading with the trust estate must account for the profits, . . . . .	319
Must not be receiver with a salary, . . . . .	319
Trustee who is a factor, &c., cannot make a profit in the way of his business from the trust, . . . . .	320
Case of solicitor trustee, . . . . .	320
Attorneys, guardians, &c., in the same position as trustees, . . . . .	320
Trustee may derive an accidental advantage, . . . . .	321
Purchaser dying without heir after payment of purchase-money, and before conveyance, . . . . .	322
Of mortgagor dying without heirs, . . . . .	322
Of <i>cestui que trust</i> attainted for felony, . . . . .	323
Whether on creation of trust in fee there can be any reverter to the creator of the trust, . . . . .	323
Trustee cannot enforce his beneficial interest in equity, . . . . .	323
May obtain possession at law, . . . . .	324
On death of <i>cestui que trust</i> of a chattel without next of kin, the Crown entitled, . . . . .	324

## CHAPTER XIII.

## DUTIES OF TRUSTEES OF CHATTELS PERSONAL.

## SECTION I.

## OF REDUCTION INTO POSSESSION.

There must be no delay in getting in <i>choses en action</i> , . . . . .	326
Executor must not allow assets to remain out upon personal security, . . . . .	328
May upon mortgage, . . . . .	329

## SECTION II.

## AS TO THE SAFE CUSTODY OF THE CHATTEL.

Trustees must exercise same care as a man would for himself, . . . . .	332
Robbery of the trust property, . . . . .	332

Insurance of leaseholds, . . . . .	332
Money may be deposited temporarily in a responsible bank, . . . . .	332
The deposit must be to the account of the trust, . . . . .	332
Must not be put out of the control of the trustee, . . . . .	334
Or under the sole control of the co-trustee, . . . . .	334
Responsible for failure of bank if he ought to have invested, . . . . .	336
Mixing trust fund with private property, . . . . .	337

## SECTION III.

## OF INVESTMENT.

As to the proper investment of trust money, . . . . .	337
Trustee may not lend on personal security, . . . . .	337
Unless expressly authorised, . . . . .	338
A power to lend on personal security does not extend to an accommodation, . . . . .	339
Power to lend with consent, . . . . .	340
Investment in trade, . . . . .	340
Loan by way of annuity, . . . . .	341
On personal security where it should have been real security or stock, . . . . .	341
Trustee may not invest on stock of any private company, . . . . .	341
Exchequer bills are government securities, . . . . .	342
Whether he may invest on mortgage, . . . . .	342
Mortgage to replace stock and pay interim dividends, . . . . .	344
Points to be attended to in loans on mortgage, . . . . .	345
Value of the security, . . . . .	345
In loan of trust money the trust kept out of sight, . . . . .	346
When authorized to lend on real estates in England, may now lend on estates in Ireland, . . . . .	347
Investment on leaseholds for lives, . . . . .	349
On leaseholds for years, . . . . .	349
Purchase of house property, . . . . .	349
Copyholds for lives, . . . . .	350
Second mortgage, . . . . .	350
Mixing trust money in mortgage, . . . . .	350
Mortgage of a reversion, . . . . .	350
Loan upon a judgment, . . . . .	350
Safest investment (where no power) in 3 per cent. Bank Annuities, . . . . .	351
Other government securities, . . . . .	352
Where successive estates limited, government securities other than the 3 per cent. must be converted into that fund, . . . . .	352
Tenant for life must refund what surplus interest he has received, . . . . .	353
No conversion directed where stock is devised specifically, . . . . .	354
Investment in 3 per cent. reduced, ordered by court under special circumstances, . . . . .	354
Mortgages need not be called in, . . . . .	354
Assets in India may be invested on the securities of the company, though yielding 10 or 12 per cent., . . . . .	355
Trustees neglecting direction to purchase stock answerable for the amount that might have been purchased, . . . . .	355
Trustees selling out improperly liable to <i>cestui que trust</i> , at his option, for specific stock or proceeds, with interest at 5 per cent., . . . . .	356
Trustees must not put the fund under the control of one of themselves singly, . . . . .	357

## SECTION IV.

## LIABILITY OF TRUSTEES TO PAYMENT OF INTEREST.

Trustees charged with interest for improper retainer, . . . . .	358
So executors, . . . . .	358

And assignees of bankrupts, &c., . . . . .	359
Delay may be explained, . . . . .	359
No excuse that they did not use the money, . . . . .	360
Formerly an executor was considered entitled to use the assets, . . . . .	360
At least where solvent, . . . . .	360
Unless assets specifically bequeathed, . . . . .	360
Rule general now that executor must account for assets, . . . . .	360
Where trust money used in trade <i>cestui que trust</i> may claim either interest or the actual profit, . . . . .	361
General rate of interest 4 per cent., . . . . .	361
Under what circumstances compound interest charged, . . . . .	361
Trustee charged 5 per cent. where gross misconduct, . . . . .	362
Whether simple or compound interest chargeable where moneys used in trade, . . . . .	363
Where accumulation directed, compound interest, . . . . .	364
Time from which interest charged, . . . . .	364
Interest on money lost that never came to hand, . . . . .	364

## SECTION V.

## OF THE DISTRIBUTION OF THE TRUST FUND.

Mistake is at the risk of the trustee, . . . . .	365
Advice of counsel, . . . . .	366
Suit, . . . . .	367
<i>Cestui que trust a feme covert</i> whose husband is bankrupt or insolvent, . . . . .	369
Equity to settlement, . . . . .	370
Collusive reduction into possession of <i>feme's chose en action</i> , . . . . .	370
Authority from <i>cestui que trust</i> to receive, . . . . .	372
Genuineness of the authority, . . . . .	372
Payment to an infant, . . . . .	373
Payment to a partner, . . . . .	373
Release, . . . . .	373
Act for the relief of trustees, . . . . .	376

## CHAPTER XIV.

## DUTIES OF TRUSTEES OF RENEWABLE LEASEHOLDS.

I. In what cases the obligation to renew is imposed, . . . . .	383
No such obligation from mere circumstance of successive estates limited, . . . . .	383
Mere interposition of trustee will not create the obligation, . . . . .	384
Nor the circumstance that the settlement was on marriage, . . . . .	385
If renewable leaseholds be articted to be settled, the court inserts a clause for renewal, . . . . .	385
Direction to renew may be in the form of a power, . . . . .	386
II. In what manner the fines upon renewals are to be levied, . . . . .	386
Where the fines are directed to be raised from "rents and profits," and the leaseholds are for years, . . . . .	386
Fines to be levied out of rents and profits or by mortgage, . . . . .	387
Where the leaseholds are for lives or years determinable on lives, . . . . .	388
Mode lately adopted by the court for raising the fines, . . . . .	390
Of raising fines by insurance, . . . . .	391
Power of charging freeholds for raising the fines, . . . . .	391
Who shall have the rents applicable to fines where no renewal can be obtained, . . . . .	392
Mode of redress where rents applicable to fines not levied, . . . . .	392
Case of direction to renew and fund for raising the fines not specified, . . . . .	393
Mortgage seldom feasible, . . . . .	393



Application to the court, . . . . .	393
Old rule of contribution as between tenant for life and remainderman, . . . . .	395
Canons laid down in <i>Nightingale v. Lawson</i> , . . . . .	396
How rule of contribution to be applied to leaseholds for lives, . . . . .	398
Where no trustee interposed tenant for life is trustee, . . . . .	402
Receiver appointed where tenant for life threatens not to renew, . . . . .	402
No suit for compensation until after death of tenant for life, . . . . .	402
Admission fines to copyholds, . . . . .	402

## CHAPTER XV.

DUTIES OF TRUSTEES TO PRESERVE CONTINGENT  
REMAINDERS.

Forms in which settlements containing such a trust are drawn, . . . . .	404
What duties imposed in each form, . . . . .	404
I. Duties until the eldest son has attained twenty-one, . . . . .	405
Imperative upon the trustees not to destroy the contingent remainders, . . . . .	405
Though the settlement was voluntary, . . . . .	406
Remedy where the remainders have been destroyed, . . . . .	406
Collateral heir of the husband not entitled to compensation, . . . . .	406
Heir apparent not entitled during the lifetime of the father, . . . . .	406
Court has no jurisdiction to destroy the remainders, . . . . .	407
Exceptions in <i>Platt v. Sprigg</i> and <i>Bassett v. Clapham</i> , . . . . .	407, 408
II. Duties after the eldest son has attained twenty-one, . . . . .	408
Destruction of remainders matter of discretion, . . . . .	408
Proper, where object is to resettle estate on marriage of eldest son, . . . . .	409
Improper, where no purpose, or none that is reasonable, . . . . .	409
Of distinction between settlements and wills, . . . . .	410
Effect of the Fines and Recoveries Act, . . . . .	411
Contingent remainders no longer destructible by forfeiture, surrender, or merger, . . . . .	413

## CHAPTER XVI.

## DUTIES OF TRUSTEES FOR SALE.

## SECTION I.

## GENERAL DUTIES OF TRUSTEES FOR SALE.

May sell without application to the Court, . . . . .	414
Must consult the advantage of the <i>cestuis que trust</i> , . . . . .	414
Each trustee responsible, . . . . .	415
Trustees allowed reasonable time to sell, . . . . .	415
May not lease, . . . . .	416
Nor, as a general rule, mortgage, . . . . .	416
Trust to mortgage will not authorize a sale, . . . . .	417
Nor a power of sale a partition, . . . . .	417
Sale under usual power in settlement, . . . . .	417
Special cases in powers of sale, . . . . .	419
Raising portions, . . . . .	420
Should ascertain value of the estate, . . . . .	421
And whether good title can be made, . . . . .	421
Where the estate is settled, may not sell the timber exclusively, . . . . .	421
May sell by auction or private contract, . . . . .	422
May employ agents, . . . . .	422
If sale by auction, proper advertisements must be given, . . . . .	422



Of conditions of sale, . . . . .	423
Of selling in lots, . . . . .	423
Of buying in, . . . . .	423
Of auction duty, . . . . .	424
Of letting into possession, . . . . .	424
Of the conveyance, . . . . .	424
Of covenants, . . . . .	425
Attested copies and covenant for production, . . . . .	425
Sale of leaseholds, . . . . .	426
Of sale by mortgagee under a power, . . . . .	427
As to <i>cestuis que trust</i> joining in the conveyance, . . . . .	427
Trustees bound to answer inquiries, . . . . .	427
Custody of vouchers, . . . . .	428
Land discharged when money raised, . . . . .	428

SECTION II.

POWER OF TRUSTEES FOR SALE TO SIGN DISCHARGES.

Trust for sale for payment of debts, . . . . .	428
Sale of more than the purpose requires, . . . . .	429
Sale of estate charged with legacies not yet payable, . . . . .	430
Principle of seeing to the application of purchase-money, . . . . .	430
Trust to sell implies power in some one to sign discharges, . . . . .	431
Case of infant <i>cestuis que trust</i> , . . . . .	432
Special trust declared of the proceeds of the sale, . . . . .	432
Power to sell and invest in new purchase, . . . . .	433
Trust to lay out and invest, . . . . .	433
Trust to pay debts, . . . . .	434
Trust to pay scheduled debts or legacies, . . . . .	435
Power to sign receipts, a question of intention at date of the instrument of trust, . . . . .	436
Forbes v. Peacock, . . . . .	437
Cases upon power to give receipts where a testator merely <i>charges</i> an estate with payment of debts, . . . . .	440
1. Devise to trustees subject to a charge of debts, . . . . .	440
2. Devise to a person beneficially subject to a charge of debts, . . . . .	443
3. Charge of debts and no devise, . . . . .	444
4. Charge of debts and a subsequent devise to a devisee who dies in the testator's lifetime, . . . . .	447
5. Charge of debts and the estate subsequently devised upon various limitations, . . . . .	447
General consideration of trustees' power to give receipts resumed, . . . . .	448
Receipts of person to whom the trust has been delegated, . . . . .	449
Receipts of trustees appointed by the court, . . . . .	449
Receipts after breach of trust, . . . . .	450
Suggestions, where no power of signing receipts, . . . . .	451
New principle suggested, . . . . .	452
<i>Cestui que trust</i> abroad, . . . . .	453
Receipts of executors, . . . . .	453
Notice of the will, . . . . .	454
Fraud, . . . . .	455
Sale for nominal consideration, . . . . .	456
Sale by executor for payment of his own debt, . . . . .	456
For other private purposes, . . . . .	457
Sale of specific chattel, and notice that debts have been paid, . . . . .	458
Payment to executor who will probably misapply the money, . . . . .	458
Payment after long interval from testator's death, . . . . .	458
Sale by executor's banker, . . . . .	459
Who may impeach the sale, . . . . .	459
Effect of time, . . . . .	459

## SECTION III.

## OF PURCHASES BY THE TRUSTEES OF THE TRUST PROPERTY.

Principle of the rule that trustees cannot purchase,	460
Lord Rosslyn's opinion,	461
Trustees cannot buy as agents for others,	462
Or employ an agent to buy for themselves,	462
Cannot lease to one of themselves,	462
Trustee who has disclaimed,	462
Trustees may purchase from <i>cestui que trust</i> ,	463
But the relation of trustee and <i>cestue que trust</i> must first be dissolved,	463
Instances where purchases by trustees from <i>cestui que trust</i> have been allowed,	464
Said that <i>cestui's que trust</i> solicitor must be specially authorised to deal with the trustee,	464
Where creditors, all must join,	464
Court will not authorise trustee to bid,	465
Case of infant <i>cestuis que trust</i> ,	465
Rule applicable to executors, assignees, &c.,	465
Of the terms upon which the sale will be set aside,	465
<i>Cestui que trust</i> may recover specific estate,	466
Allowances will be made for improvements and repairs,	466
Exception where actual fraud,	466
Case of purchase-money paid into court and a rise of stock,	467
Immediate conveyance ordered,	467
Titles of lessees not prejudiced,	467
<i>Cestui que trust</i> may pray a resale,	467
Estate will be put up at the purchase-money,	468
Expense of repairs and improvements will be added to the purchase-money,	468
As to resale in lots,	468
Any creditor may insist on a resale,	469
Case of subsequent sale by the trustee to purchaser without notice,	469
Case of resale of shares in mines,	469
Of the costs of suit,	469
Within what time <i>cestui que trust</i> may set aside the sale,	470
<i>Laches</i> not imputed to <i>femes covert</i> and infants,	471
Not to creditors in same degree as to individuals,	471
No <i>laches</i> where <i>cestui que trust</i> was ignorant of his right,	471
Or was in distress,	471
Of confirmation of the sale,	471

## CHAPTER XVII.

## DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.

Trust created by will,	474
By act <i>inter vivos</i> ,	474
1. Where person is not a trader,	474
Insolvent Debtor's Act,	475
Trust attended with fraud,	476
Voluntary trust,	476
Terms of the composition must be observed,	476
2. Where person is a trader,	477
Bankruptcy Act,	477
Creditors acquiescing,	479
Late act allows a composition,	479
Trader may assign part of his property,	480
Division of trusts for payment of debts,	480
1. Irrevocable trusts,	481
2. Revocable trusts,	481

Duties of trustees for payment of debts, . . . . .	481
What debts are to be paid, . . . . .	481
Debts barred by Statute of Limitations, . . . . .	484
Infants' debts, . . . . .	485
Mortgage with covenant, . . . . .	485
Creditors to come in within a certain time, . . . . .	486
Discretion given to trustees, . . . . .	486
Order of payment, . . . . .	487
Creditors and legatees, . . . . .	487
All creditors paid <i>pari passu</i> , . . . . .	488
Specialty creditors, . . . . .	488
Trustee who is also executor, . . . . .	488
Allowance of interest, . . . . .	489
Specialty debts, . . . . .	491
Bond creditors, . . . . .	491

## CHAPTER XVIII.

## DUTIES OF TRUSTEES FOR CHARITIES.

Charities either in the hands of trustees or incorporated, . . . . .	492
Prefatory remarks on the visitatorial power, . . . . .	492
Distinction between original endowment and new donations, . . . . .	494
The Lord Chancellor in certain cases the visitor, . . . . .	495
Duties of trustees for charities, . . . . .	495
Must not divert the fund to other charitable purposes, . . . . .	495
Chapels, . . . . .	496
Trust in aid of rates, . . . . .	496
Trust for maintaining the worship of God, . . . . .	497
Appointment of new trustees, . . . . .	498
Meeting-house, . . . . .	498
A corporation with power of making bye-laws, . . . . .	498
Whether Court can sanction aberration from founder's intention, . . . . .	499
No total alteration without authority of Parliament, . . . . .	499
The application of the fund may in certain cases contravene the letter of the endowment, . . . . .	499
Free Grammar School, . . . . .	499
Grammar School Act, (3 & 4 Vict. c. 77), . . . . .	500
"Finding a master," . . . . .	501
"Relief of poor," . . . . .	501
"Repairing," . . . . .	501
Augmentation and reduction of salaries, . . . . .	502
Loans, . . . . .	502
Retainer of charity revenue, . . . . .	502
Of alienations of the charity estate, . . . . .	502
Recent charity Acts, . . . . .	504
Accumulations, . . . . .	504
Trustees cannot lease the charity lands to one of themselves, . . . . .	505
As to discretion of taking fines or reserving rents upon leases, . . . . .	505
Of inadequate consideration for the lease, . . . . .	506
Of unreasonable extent of the term, . . . . .	507
Of husbandry or farm leases, . . . . .	508
Leases on lives, . . . . .	509
Of building leases, . . . . .	510
Foregoing rules subject to donor's intention to the contrary, . . . . .	510
Improvements by lessees, . . . . .	511
Disabling effect of the Charitable Trusts Amendment, . . . . .	511

## CHAPTER XIX.

### THE POWERS OF TRUSTEES.

#### SECTION I.

##### OF THE GENERAL POWERS OF TRUSTEES.

Powers at law distinguished from those in equity, . . . . .	512
Rule in the simple trust, . . . . .	512
Rule in the special trust, . . . . .	512
Trustee may exercise discretion under circumstances, . . . . .	513
Trustee may do without suit what is compellable by suit, . . . . .	513
Repairs, . . . . .	513
Cutting timber, . . . . .	515
Opposing bill in Parliament, . . . . .	515
Insurance, . . . . .	516
Executor may appropriate a legacy, . . . . .	517
May allow maintenance to infant out of the interest of his legacy, . . . . .	517
And, under certain circumstances, out of the principal, . . . . .	517
May sink part of the capital for infant's advancement, where he could not for his maintenance, . . . . .	518
Cannot apply principal where limitation over, . . . . .	519
Except the limitation be by way of survivorship among the children themselves, . . . . .	519
Has power to release or compound debts, . . . . .	520
Whether a trustee mortgagee can release part of the land in mortgage, . . . . .	521
May reimburse himself a payment made in his own protection as trustee, . . . . .	521
May grant reasonable leases, . . . . .	522
Power of varying securities, . . . . .	523
Case of suit instituted, . . . . .	523
Case of suit and no decree, . . . . .	524

#### SECTION II.

##### OF THE SPECIAL POWERS OF TRUSTEES.

I. Of the different kind of powers, . . . . .	524
Distinction between legal and equitable powers, . . . . .	524
Equitable powers whether annexed to the estate or simply collateral, . . . . .	525
Distinction between mere powers and powers coupled with a trust, . . . . .	526
Between strict and directory powers, . . . . .	527
II. Of the construction of powers, . . . . .	527
Power to A. and B. and "their heirs," . . . . .	527
To A. and his "assigns," . . . . .	529
Power indicating personal confidence to A. and his "executors," . . . . .	530
To "executors," "sons in law," "trustees," . . . . .	530
To trustees and the "survivors of them," . . . . .	531
Power during continuance of the trust, . . . . .	531
III. Of the effect of <i>disclaimer</i> , <i>assignment</i> , and <i>survivorship</i> of the estate, . . . . .	532
Effect of disclaimer upon powers, . . . . .	532
Of assignment of the estate, . . . . .	533
Whether power will remain in trustee after alienation of the estate, . . . . .	534
Case of real and personal estate blended together, . . . . .	534
The Court may sanction the severance of the estate from the powers, . . . . .	535
Of <i>survivorship</i> among the trustees, . . . . .	536
[Remarks upon powers before the Statute of Uses, . . . . .]	537, note (1)]
Survivorship where power given to the trustees by name, . . . . .	537
Powers not annexed to the trust, . . . . .	538
IV. Of the control exercised by the Court over powers, . . . . .	538



The Court will not control mere powers, . . . . .	538
Except there be fraud, . . . . .	543
Or suit has been instituted, . . . . .	544

## CHAPTER XX.

## OF ALLOWANCES TO TRUSTEES.

## SECTION I.

## ALLOWANCES FOR TIME AND TROUBLE.

No allowance in general for time and trouble, . . . . .	545
Rule applies to executors, mortgagees, &c., . . . . .	546
Trustees for absentees of West India estates are allowed a commission, . . . . .	546
Rate of commission in Jamaica, . . . . .	546
Mortgagees in possession of West India estates, . . . . .	546
Of the commission allowed to executors in the East Indies, . . . . .	547
Person constructively a trustee may be paid for his trouble in the management of a trade, . . . . .	548
But not an express trustee, . . . . .	549
Solicitors and attorneys allowed expenses out of pocket only, . . . . .	549
The author of the trust may order an allowance, . . . . .	550
Where <i>quantum</i> not specified, . . . . .	551
Of contracts between trustees and <i>cestui que trust</i> for an allowance, . . . . .	551
The contract must be fulfilled to the letter, . . . . .	553
Trustees may contract with the Court, . . . . .	553
Usury law prevents a mortgagee bargaining for compensation, . . . . .	556
But he may save his own trouble by employment of agents, . . . . .	556
Or a collector of rents, bailiff, attorney, or accountant, . . . . .	556

## SECTION II.

## ALLOWANCES TO TRUSTEES FOR EXPENSES.

Allowance will be made to trustee for all actual expenses, . . . . .	557
Though remunerated for his trouble besides, . . . . .	558
Case of trustee who has not kept account of expenses, . . . . .	559
Trustee will be reimbursed a payment made for his own protection, . . . . .	559
Trustee's expenses a <i>lien</i> upon the estate, . . . . .	560
<i>Trott v. Dawson</i> , . . . . .	560
No <i>lien</i> in favour of agents of the trustee, . . . . .	561
How expenses recoverable when no trust estate, . . . . .	562
Claim against the <i>cestui que trust</i> personally, . . . . .	563
Funds out of which expenses payable, . . . . .	564

## CHAPTER XXI.

## HOW A TRUSTEE MAY OBTAIN HIS DISCHARGE FROM THE OFFICE.

I. May retire with consent of all the <i>cestuis que trust</i> , . . . . .	565
If all be <i>sui juris</i> , . . . . .	565
II. May retire by virtue of a special power in the trust deed, . . . . .	566
The usual power stated, . . . . .	566
Whether a new trustee actually such until the estate has been transferred, . . . . .	567
Mode of vesting the trust estate, . . . . .	568
Construction of the power, . . . . .	570



Sharp v. Sharp, . . . . .	570
Meaning of the word "survivor," . . . . .	570
Meaning of the word "acting," . . . . .	571
"Refusing or declining" includes "disclaiming," . . . . .	571
"Refusing or declining" means also after having acted, . . . . .	572
Morris v. Preston, . . . . .	573
Power to tenant for life <i>with</i> trustee, . . . . .	573
Trustee becoming bankrupt " <i>unfit</i> ," . . . . .	574
Trustee resident abroad, . . . . .	574
Two trustees cannot relinquish in favour of one, . . . . .	574
Case of one trustee substituting more than one in his place, . . . . .	577
One trustee cannot relinquish to the other, . . . . .	577
Appointment of one trustee in the place of several, . . . . .	578
Appointment of two trustees at once, . . . . .	579
Appointment of a <i>cestui que trust</i> , or near relation, as trustee, . . . . .	579
Of severing a trusteeship, . . . . .	580
Of powers of appointment of a directory character, . . . . .	580
Power will be no protection where there is fraud, . . . . .	581
Result where a new trustee is ineffectually appointed, . . . . .	581
III. Trustee may get himself discharged by application to a court of equity, . . . . .	582
Where no new trustee can be found, . . . . .	582
How application should be made, . . . . .	583
Costs, . . . . .	583
Application by representative of deceased trustee, . . . . .	584
Complication of trusts by acts of tenant for life, . . . . .	584

## PART III.

### THE ESTATE OF THE CESTUI QUE TRUST.

#### CHAPTER XXII.

#### IN WHAT THE ESTATE OF CESTUI QUE TRUST CONSISTS.

##### SECTION I.

##### THE ESTATE OF CESTUI QUE TRUST IN THE SIMPLE TRUST.

1. The <i>jus habendi</i> , or <i>cestui's que trust</i> right to the pernaney of the profits, . . . . .	585
Entitled to the possession of lands, . . . . .	585
Except there be some interest in another person, . . . . .	586
Right to the possession recognized in equity only, not at law, . . . . .	590
Lord Mansfield's doctrines, since overruled, . . . . .	590
Possession of title deeds, . . . . .	591
<i>Cestui que trust</i> qualified to be a juror, . . . . .	592
So, before late Game Act qualified to sport, . . . . .	593
As to right of <i>cestui que trust</i> to vote for coroner, . . . . .	592
Has right to vote at elections for members of Parliament, . . . . .	593
Of his right to the possession of trust chattels, . . . . .	593
How usually empowered to receive dividends, . . . . .	594
2. Of <i>cestui que trust's jus disponendi</i> , . . . . .	595
Trustee's conveyance, . . . . .	596
Trustee to bar dower, . . . . .	596
Intermediate trusts, . . . . .	596

## SECTION II.

The estate of <i>cestui que trust</i> in the special trust	597
Where only one <i>cestui que trust</i> , or all <i>cestuis que trust</i> of one mind, the special trust same as a simple trust,	597
But special trust continues until election expressed,	598
The special trust must be a lawful one,	599

## CHAPTER XXIII.

OF THE PROPERTIES OF THE CESTUI'S QUE TRUST ESTATE  
AS AFFECTED BY HIS ACTS OR BY OPERATION OF LAW.

## SECTION I.

## OF ASSIGNMENT.

Form of assignment,	600
Power of equitable tenant in tail,	601
Summary of law before the Fines and Recoveries Act,	604
Cautions in assignments of equitable interests,	604
Priority of charge from priority of notice,	605
The principle of the doctrine,	605
Distinction between real and personal estate,	607
Notice in respect of real estate,	607
Second incumbrancer giving notice but making no inquiries,	608
Notice to one of several co-trustees,	609
Death of single trustee to whom notice given,	610
Notice to all the trustees, and all dying,	611
Time of giving notice,	612
To whom notice should be given,	612
Case of the fund being in Court,	613
Notice to trustee where fund in Court, and neither assignee obtains a stop order,	614
Case where there is no trustee,	614

## SECTION II.

## OF TESTAMENTARY DISPOSITION.

How trust of freeholds to be devised,	615
Trust of copyholds,	615
Where no custom to devise the legal estate of copyholds,	616
Of customary freeholds,	617
Late Wills Act,	617

## SECTION III.

## OF SEISIN AND DISSEISIN.

Equitable seisin,	617
<i>Possessio fratris</i> of a trust,	618
What is equitable disseisin,	618
Marquis of Cholmondeley v. Clinton,	618

## SECTION IV.

## OF DOWER AND CURTESY.

Dower and curtesy of a trust,	621
-------------------------------	-----

Freebench, . . . . .	621
What seisin required to give curtesy, . . . . .	622
Curtesy where there is separate use, . . . . .	623
Distinction between dower and curtesy, . . . . .	624
How curtesy came to be allowed, and not dower, . . . . .	625
Late Dower Act, . . . . .	626

## SECTION V.

## OF THE ESTATE OF A FEME COVERT CESTUI QUE TRUST.

1. In pure personal estate not settled to separate use, . . . . .	627
Equity to a settlement, . . . . .	628
Right by survivorship, . . . . .	628
2. Equitable chattels real of <i>feme covert</i> , . . . . .	629
Whether wife entitled to a settlement out of equitable chattels real, . . . . .	629
Result of decisions, . . . . .	630
Effect of getting in legal estate in wife's equitable term, . . . . .	630
Estate by elegit in trust for a <i>feme covert</i> , . . . . .	630
Mortgage term in trust for a <i>feme covert</i> , . . . . .	631
Equitable term in trust for separate use, . . . . .	631
3. Wife's equitable interest in lands of freehold or inheritance, . . . . .	631
4. The wife's separate estate, . . . . .	632
General rule, . . . . .	632
General engagements of a <i>feme covert</i> in writing, . . . . .	633
General engagements not in writing, . . . . .	634
Lord Brougham's exposition of the principles regulating the liability of the separate estate, . . . . .	635
Lord Cottenham's view, . . . . .	636
Result of judgments of Lord Brougham and Lord Cottenham, . . . . .	638
Observations of V. C. Kindersley respecting <i>feme's</i> verbal engagements, . . . . .	638
Case of clear contradiction of intention, . . . . .	639
Breach of trust by <i>feme covert</i> , . . . . .	639
View of Lord St. Leonards in reference to breaches of trust by a <i>feme covert</i> having a separate estate, . . . . .	640
Nature of the relief against the separate estate, . . . . .	640
Where no power of anticipation, . . . . .	641
Stock settled to separate use, . . . . .	642
Creditors' suit after death of <i>feme covert</i> , . . . . .	642
Power of disposition by will of separate estate, . . . . .	642
Separate estate undisposed of survives to the husband, . . . . .	642
Arrears of separate estate, . . . . .	642
Case of <i>feme covert</i> non compos, . . . . .	644
Special consideration of separate use in reference to real estate, . . . . .	644
No acknowledgment needed of conveyance of real estate settled to separate use, . . . . .	646

## SECTION VI.

## JUDGMENTS AGAINST THE CESTUI QUE TRUST.

Writs of execution at common law, . . . . .	646
Statute of Westminster, . . . . .	647
From what time chattel interests in land bound, . . . . .	647
<i>Fieri facias</i> as regards trusts, . . . . .	648
Trusts not bound by it before execution sent out, . . . . .	648
Nor where legal estate not liable, . . . . .	648
Equity of redemption, . . . . .	649
<i>Leviri facias</i> , . . . . .	649
Whether equity can adopt the elegit by analogy, . . . . .	649
Trust at one time held not to be subject to elegit, . . . . .	650
<i>Sciens</i> now, . . . . .	650

Doctrine laid down by Sir J. Leach, . . . . .	652
Land to be converted into personalty not bound formerly by a judgment, . . . . .	653
Judgment entered up against vendor after contract to sell, . . . . .	654
Whether in case of conveyance upon trust to sell for limited purpose, surplus proceeds bound by a judgment, . . . . .	656
Altered state of the law, . . . . .	656
Practical result, . . . . .	657
How much of the estate might be taken in execution, . . . . .	657
Grounds on which he may come into equity, . . . . .	658
Entitled to moiety only of a trust, . . . . .	658
But to entirety of equity of redemption, . . . . .	660
Case of trust by way of mortgage, . . . . .	661
Whether necessary before suit to take out actual <i>elegit</i> , . . . . .	662
Bill of judgment creditor after the death of the consor, . . . . .	663
Of execution against the trust estate under Statute of Frauds, . . . . .	664
Whether equitable <i>elegit</i> where no legal <i>elegit</i> of a trust, . . . . .	665
Statute of 1 & 2 Vict. c. 110, ss. 11, 13, 18, and 19, . . . . .	666
3 & 4 Vict. c. 82, . . . . .	668
18 & 19 Vict. c. 15, . . . . .	669
Construction of the Acts, . . . . .	669
Consideration of the <i>charging order</i> provisions of the 1 & 2 Vict. c. 110, . . . . .	669
1. By whom the charging order should be made, . . . . .	670
2. Charging order will be made without deciding on the quantum of interest charged, . . . . .	670
3. Bank, &c., bound to pay trustee notwithstanding charging order on interest of <i>cestui que trust</i> , . . . . .	671
4. Proviso at end of s. 14 does not prohibit a suit for merely <i>protecting</i> interest charged, . . . . .	671
5. Effect of charging order in reference to other incumbrances, . . . . .	671
Case of lands lying in a register county, . . . . .	672
Judgment postponed to subsequent purchase or mortgage without notice, . . . . .	672
Case where subsequent purchaser or mortgagee has notice, . . . . .	672

## SECTION VII.

## OF EXTENTS FROM THE CROWN.

Trusts subject to extents, . . . . .	673
May be sold under 25 G. 3, c. 35, . . . . .	673
Equity of redemption, . . . . .	674

## SECTION VIII.

## OF FORFEITURE.

Trusts not forfeitable for attainder at common law, . . . . .	674
Forfeitable for treason by enactment, . . . . .	674
Equities of redemption forfeitable, . . . . .	677
Trusts for aliens forfeitable at common law, . . . . .	677
Trusts for chattels forfeitable, . . . . .	677
Forfeiture by tenant for life, . . . . .	678

## SECTION IX.

## OF ESCHEAT.

Trust not subject to escheat, . . . . .	678
Burgess v. Wheate, . . . . .	678

## SECTION X.

## OF DESCENT OF THE TRUST.

Trust descends as the legal estate, . . . . .	680
---	-----

Though there be <i>lex loci</i> , as gavelkind, . . . . .	680
<i>Possessio fratris</i> of a trust, . . . . .	680
Proceeds from sale of gavelkind lands, . . . . .	680
Limitation to heirs as purchasers, . . . . .	681

## SECTION XI.

## OF ASSETS.

Trusts of chattels always assets, . . . . .	681
Whether trusts of freeholds assets before Statute of Frauds, . . . . .	681
Construction of that statute, . . . . .	684
Late Act for more effectual payment of debts, . . . . .	685
Whether trusts of chattels are legal or equitable assets, . . . . .	685
Whether trusts in fee are legal or equitable assets, . . . . .	688
Construction of late Act for more effectual payment of debts, . . . . .	691

## CHAPTER XXIV.

## CESTUI QUE TRUST RELIEF AGAINST THE FAILURE OF THE TRUSTEE.

Where the terms of the trust can be ascertained, equity follows the estate, . . . . .	693
Trustee dying in the testator's lifetime or otherwise failing, . . . . .	693
Direction to sell and trustee not named, . . . . .	694
Gift to separate use, and no trustee named, . . . . .	694
If the trust be in form of a power, the Court, on failure of trustee, will execute it, . . . . .	694
Where rule to go by, the Court exercises the discretion for the trustee, . . . . .	696
[Construction of bequest to poor relations, . . . . . 698, note (1.)]	
How the Court will exercise the power where the settlor has laid down no rule, . . . . .	699
In such a case the Court adopts the maxim that equality is equity, . . . . .	700
Words of "gift" and words of "power" distinguished, . . . . .	700
Upon trust for the children of A. as B. shall appoint, . . . . .	700
Upon trust to dispose amongst the children of A., . . . . .	700
Discretion as to the objects of the power, . . . . .	701
In favour of what objects the Court will exercise a power imperative, . . . . .	703
Where immediate exercise contemplated, . . . . .	703
Where immediate exercise not contemplated, . . . . .	704
1. Where power testamentary, . . . . .	704
2. Where not merely so, . . . . .	704
How Court will execute power in favour of "relations," . . . . .	705
As to persons amongst whom, . . . . .	705
As to shares in which, . . . . .	706
Case of power of selecting one of a class, . . . . .	707

## CHAPTER XXV.

## RIGHTS OF CESTUI QUE TRUST IN PREVENTION OF A BREACH OF TRUST.

I. <i>Cestui que trust</i> entitled to appointment of proper trustees and proper number of trustees, . . . . .	710
Of substitution of trustees on death, incapacity to discharge the office, &c., . . . . .	710
Of trustees not answering description of "inhabitants," . . . . .	711
Court will not dismiss trustee from caprice of <i>cestui que trust</i> , . . . . .	712



Trustee substituted by the Court has not the special powers of the original trustee, . . . . .	712
Appointment of new trustee under Sir E. Sugden's Act, . . . . .	713
Under the Trustee Act, 1850, . . . . .	714
Under the Bankruptcy Act, . . . . .	714
Case of charitable trusts, . . . . .	716
Jurisdiction under 5 & 6 W. 4, c. 76, . . . . .	716
Charitable Trusts Act, . . . . .	718
II. <i>Cestui que trust</i> may compel trustee to the observance of any act of duty, . . . . .	718
Sir J. Jekyll's dictum, that <i>laches</i> of trustee shall not prejudice <i>cestui que trust</i> , . . . . .	719
Consideration of the recent Statute of Limitations, . . . . .	719
Allen v. Sayer, . . . . .	720
Where tenant for life misapplies proceeds of renewable leaseholds, receiver appointed, . . . . .	722
Case of trustee required to give security, . . . . .	723
III. <i>Cestui que trust</i> may restrain trustee from committing a breach of trust by injunction, . . . . .	723
And whether damage irremediable or not, . . . . .	723

## CHAPTER XXVI.

## REMEDIES OF CESTUI QUE TRUST IN EVENT OF A BREACH OF TRUST.

## SECTION I.

## OF FOLLOWING THE TRUST ESTATE INTO HANDS OF A STRANGER.

General rule, . . . . .	724
I. If the alienee be a volunteer, . . . . .	724
Purchaser without notice from a purchaser with notice, . . . . .	726
Purchaser with notice from a purchaser without notice, . . . . .	726
How far purchaser bound by notice of a doubtful equity, . . . . .	727
II. No time bars a direct trust; otherwise in a constructive trust, . . . . .	729
1. Of the bar in equity by analogy to a statute of limitation, . . . . .	731
Period limited for recovery of lands is 20 years, . . . . .	732
Ignorance or mistake of plaintiff no excuse, . . . . .	733
Time does not run in case of fraud undiscovered, . . . . .	734
How statute must be taken advantage of, . . . . .	734
2. Of presumption of some act in bar of the plaintiff's claim, . . . . .	735
Time within which the presumption arises, . . . . .	735
Ground of Court's raising the presumption, . . . . .	736
Waiver. Acquiescence, . . . . .	737
No presumption during ignorance or mistake, &c., . . . . .	737
Presumption cannot be taken advantage of by demurrer, . . . . .	738
3. Of the bar in equity arising from great public or private inconvenience, . . . . .	739
Bar from length of time, . . . . .	741
Late Act for Limitation of Actions and Suits, . . . . .	743
III. Of accounting for mesne rents and profits, . . . . .	750
Defendant <i>prima facie</i> must account from commencement of wrongful title, . . . . .	751
Several exceptions to the rule, . . . . .	752
Bill for relief followed by bill for account, . . . . .	752
Wording of the order, . . . . .	752
Liability of trustee for mesne rents and profits, . . . . .	752
[The subject of accounting for mesne rents and profits considered generally, 752, note (1.)]	

## SECTION II.

RIGHT OF ATTACHING THE PROPERTY INTO WHICH THE TRUST ESTATE HAS BEEN  
WRONGLY CONVERTED.

General rule, . . . . .	753
"Money has no earmark," . . . . .	757
Trust money mixed with trustee's money, . . . . .	759
Following money into land, . . . . .	762
Whether <i>cestui que trust</i> can take the estate, or has only a <i>lien</i> , . . . . .	763

## SECTION III.

OF CESTUI'S QUE TRUST REMEDY AGAINST TRUSTEE PERSONALLY FOR COMPENSA-  
TION.

Land tortiously sold, . . . . .	763
Neglect to purchase stock, . . . . .	764
Policy forfeited, . . . . .	764
Person acting as trustee but not such, . . . . .	765
Trustee and his assets liable for damage to trust estate as for a simple contract debt, . . . . .	765
Immaterial whether trustee was a gainer by the breach of trust or not, . . . . .	765
Or whether loss would have occurred had no breach been committed, . . . . .	766
Trustee not charged with imaginary values, &c., . . . . .	766
Where co-trustees, all must be made parties, but each liable <i>in toto</i> , . . . . .	767
Corporators, . . . . .	767
As amongst the parties to the breach of trust the person benefited or the contriver of the fraud suffers, . . . . .	768
Interest of party to a breach of trust may be stopped to make compensation, . . . . .	771
Proof against estate of bankrupt trustee, . . . . .	771
How far trust debt barred by the certificate, . . . . .	772
Bankruptcy of co-trustees, . . . . .	773
Of <i>cestui's que trust</i> concurrence in the breach of trust, . . . . .	773
<i>Femes covert</i> and infants cannot concur, . . . . .	774
Coverture and infancy no protection in case of fraud, . . . . .	774
<i>Feme covert</i> bound by concurrence in regard to a fund settled to her separate use, . . . . .	775
Of acquiescence, . . . . .	775
Fluctuating body, . . . . .	777
Creditors, . . . . .	777
Of release and confirmation, . . . . .	777

## SECTION IV.

## OF REDRESS IN BREACHES OF TRUST BY TRUSTEES FOR CHARITIES.

I. <i>Mode</i> of redress, . . . . .	778
Of commissions under Statute of Charitable Uses, . . . . .	779
52 Geo. 3, c. 101, or Sir S. Romilly's Act, . . . . .	779
Points resolved upon that Act, . . . . .	780-783
Acts appointing Commissioners of Inquiry, . . . . .	783
Charitable Trusts Act, 1853, . . . . .	784
Charitable Trusts Amendment Act, . . . . .	785
II. Of the <i>extent</i> of redress, . . . . .	786
To what period of time the account of <i>mesne</i> rents and profits against trustees of charities will be restricted, . . . . .	786
1. Statutes of limitation not applicable, . . . . .	786
2. How far presumption applicable, . . . . .	786
3. Bar arising from inconvenience, . . . . .	787
Distinction between trustees and individuals in respect of implied notice, . . . . .	790
Breach of trust by a parish, . . . . .	791
Mode of attaching corporation property, . . . . .	791

## CHAPTER XXVII.

MAXIMS OF EQUITY FOR SUSTAINING THE TRUE CHARACTER  
OF THE TRUST ESTATE AGAINST THE LACHES OR TORT OF  
THE TRUSTEE.

## SECTION I.

## WHAT OUGHT TO BE DONE SHALL BE CONSIDERED AS DONE.

Money to be laid out on land shall be taken as land, and land to be turned into money shall be taken as money, . . . . .	793
Money to be laid out on land is subject to curtesy, . . . . .	793
Whether subject to dower, . . . . .	793
Not subject to escheat, . . . . .	795
Could not have been devised by an infant, . . . . .	796
Passes in will by description of "lands," . . . . .	796
Bound by judgments, &c., . . . . .	796
Not to be brought into hotchpot by child claiming an orphanage share, . . . . .	797
In what cases will go to heir of person upon whom the land is directed to be settled, . . . . .	797
Will belong to heir claiming the money from a stranger, . . . . .	797
Or claiming from the executor of his own ancestor, if any limitation of the money be outstanding, . . . . .	798
Otherwise, if the money be "at home," . . . . .	800
Chichester v. Bickerstaff, . . . . .	800
Pulteney v. Darlington, . . . . .	803
Money is "at home" when actually received, . . . . .	804
Bequest of money to be laid out on lands to be settled to testator's right heirs, . . . . .	805
Voluntary covenant to purchase lands to be settled to covenantor in fee, . . . . .	805
Direction for conversion, to create a notional conversion, must be imperative, . . . . .	806
Cases of direction deemed imperative where the uses were exclusively applicable to real estate, . . . . .	806
Conversion at "the request" of a party, . . . . .	807
Land to be turned into money passes by bequest of "personal estate," &c., . . . . .	807
Alien, . . . . .	807
Charity, . . . . .	808
The conversion must be imperative, . . . . .	808
Implied conversion in bequests of wasting property to persons in succession, . . . . .	808
Intention to confer enjoyment <i>in specie</i> may be collected from the bequest, . . . . .	809
Instances of the general rule, . . . . .	809-812
Rule where property not wasting, but of a class not authorised by the Court, . . . . .	812
Direction for investment of personal estate and accumulation of income, . . . . .	813
Devise of real estate upon trust to sell and invest proceeds and rents until sale, . . . . .	813
Produce during first year from testator's death, . . . . .	813
Where funds are in the state they ought to be, . . . . .	814
Where the proper investment is made before the end of the year, . . . . .	814
Where the funds are not in the state they ought to be, . . . . .	814
Discretion expressly given by the testator, . . . . .	815
Rents of devised estate, . . . . .	816
Election, . . . . .	816
Who may elect, . . . . .	816
Of infants, lunatics, and <i>femes covert</i> , . . . . .	816
Power of <i>feme covert</i> over money-land, . . . . .	816
Special power of married women under Fines and Recoveries Act, . . . . .	817
Of remainder-men, . . . . .	818

Of several parties interested, . . . . .	819
Of tenant in tail, . . . . .	820
39 & 40 G. 3, c. 56, . . . . .	821
Effect of Fines and Recoveries Act, . . . . .	822
In what manner election may be made, . . . . .	823
Of presumption of election, . . . . .	823
How election may be expressed, . . . . .	824
Money to be turned into lands may be passed by will not attested, . . . . .	824

## SECTION II.

## THE ACT OF THE TRUSTEE SHALL NOT ALTER THE NATURE OF CESTUI'S QUE TRUST ESTATE.

Where conversion is wrongful, equity neutralizes it, . . . . .	825
Trustee for a lunatic cannot convert, unless beneficial to lunatic himself, . . . . .	825
Interest of lunatic's successors not consulted, . . . . .	826
Heir <i>ex parte paterna</i> has no equity against heir <i>ex parte materna</i> , . . . . .	826
Of payment of lunatic's debts out of his real estate, . . . . .	826
Of fall of lunatic's timber, . . . . .	826
Of redemption of lunatic's mortgage debts, . . . . .	827
Of actions in lunatic's name, . . . . .	827
Of improvements, repairs, &c., . . . . .	827
Conversion will not be made unnecessarily, . . . . .	828
Distinction between lunatics and infants, . . . . .	829
Purchases for infants can only be made <i>sub conditione</i> , . . . . .	829
Timber cut on infant's land continues real estate, . . . . .	829
Money paid in discharge of mortgage debts continues personalty, . . . . .	830
Conversion allowable for necessary expenses, . . . . .	830
Late Wills Act, . . . . .	831

## CHAPTER XXVIII.

## OF STATUTORY ENACTMENTS FOR REMEDYING INCONVENIENCES ARISING FROM THE DISABILITY OF THE TRUSTEE.

Statute of 7th Anne, c. 19, . . . . .	832
Construction of Act, . . . . .	832
Statute of 4 Geo. 2, c. 10, . . . . .	833
Lord St. Leonards' Act, (11 G. 4, & 1 W. 4, c. 60,) . . . . .	834
Trustee Act, 1850, . . . . .	840

## CHAPTER XXIX.

## PLEADING AND PRACTICE IN REFERENCE TO THE LAW OF TRUSTS.

## SECTION I.

## OF NECESSARY PARTIES.

1. General rule in suits by or against strangers, . . . . .	841
One of several <i>cestuis que trust</i> cannot foreclose or redeem alone, . . . . .	842
Mortgagee coming to foreclose and mortgagor to redeem must make all <i>cestuis que trust</i> parties, . . . . .	842
Legal tenant a necessary party, . . . . .	842
Error in Lord Redesdale's Treatise as to trustees for creditors, . . . . .	843
Similar error, . . . . .	843

Suits for specific performance, . . . . .	844
Marriage articles, . . . . .	844
Representation specially constituted, . . . . .	844
2. Suits by parties interested, " <i>inter se</i> ," . . . . .	845
In suits by <i>cestuis que trust</i> against their trustees, all the latter necessary parties, . . . . .	845
Rule the same though equities between them cannot be adjusted, . . . . .	845
Quasi-trustee a necessary party, . . . . .	846
Stranger who has dealt with the trust fund <i>without notice</i> not a necessary party, . . . . .	846
Distinction between cases of a mere breach of trust and those of a "delictum," . . . . .	846
Representatives of trustee who had no interest not necessary parties, . . . . .	847
Nor trustee who disclaims, . . . . .	847
Nor a trustee out of the jurisdiction, . . . . .	847
Nor representative of a deceased insolvent trustee, . . . . .	847
Nor trustee of an outstanding term, . . . . .	848
Nor trustee of a mere equity, . . . . .	848
Nor a trustee who has assigned, . . . . .	848
Nor a trustee who is a mere agent, . . . . .	848
Trusteeship survives, . . . . .	849
One of two classes of trustees may be sued, . . . . .	849
All <i>cestuis que trust</i> necessary parties as a general rule, . . . . .	849
<i>Cestuis que trust</i> abroad, . . . . .	849
<i>Cestui que trust</i> standing out process, . . . . .	850
Or assigning his interest, . . . . .	850
<i>Cestui que trust</i> of an aliquot share, . . . . .	850
3. Exceptional cases.	
Suit to recover a trust fund, . . . . .	850
Where <i>cestuis que trust</i> extremely numerous, some may sue on behalf of all, . . . . .	851
So some may defend on behalf, &c., . . . . .	851
Requisites to entitle some to sue, &c., . . . . .	851
What number sufficient to dispense with the strict rule, . . . . .	852
4. Special enactments and General Orders varying the practice, 30th	
Order of 26th August, 1841, . . . . .	852
Decisions thereon, . . . . .	852
32nd Order of 26th August, 1841, . . . . .	853
Decisions thereon, . . . . .	853
New rules as to parties under the 15 & 16 Vic. c. 86, s. 42, . . . . .	854
General working of new rules, . . . . .	855
Decisions on rule 9, . . . . .	855
47th section of 15 & 16 Vict. c. 86, . . . . .	856
51st section of same Act, . . . . .	856

## SECTION II.

OF THE ORDER AND MANNER IN WHICH TRUSTEES AND CESTUIS QUE TRUST OUGHT TO APPEAR UPON THE RECORD, AS WHETHER JOINTLY OR SEVERALLY AS PLAINTIFFS OR DEFENDANTS.

Sir Anthony Hart's statement of the proper course, . . . . .	856
Trustees and <i>cestuis que trust</i> ought to join in defence, . . . . .	857
In suits " <i>inter se</i> ," <i>cestuis que trust</i> in same interest should join as plaintiffs, . . . . .	857
Trustees should defend jointly, . . . . .	857
How <i>feme covert cestui que trust</i> should sue and defend, . . . . .	858



### SECTION III.

#### OF DISTRINGAS.

Danger to which stock, &c., exposed, in consequence of the legal title only being recognised,	858
Origin of the Writ of Distringas,	859
Practice continued notwithstanding 4 Anne, c. 16, and 39 & 40 G. 3. c. 36,	859
Process transferred to Chancery on the abolition of the Equity Exchequer,	859
Additional remedy given by 5 Vict. c. 5, s. 4,	860
Practice under the 4th section,	860
Transfer of the old Writ of Distringas,	861
Form of new Writ,	861
Orders of the Court of Chancery regulating the practice,	861
Form of Affidavit,	862
As to discharging writ,	862
Effect of service of writ,	862
Affidavit to be filed,	862
Present practice,	862
Distinctions between remedies under the 4th & 5th sections of the Act,	863
Both remedies available in the case of stock,	863

### SECTION IV.

#### OF COMPULSORY PAYMENT INTO COURT.

General rule,	864
Plaintiff may move upon a possible title,	865
Motion must be founded on admissions in answer,	865
Answer should contain an admission of probable title,	866
Payment into Court must be on the footing of an equity alleged by the bill,	866
Not necessary that fund should be actually in defendant's hands,	866
Payments not mentioned in answer may be verified by affidavit,	867
Payment not ordered on a mere admission of circumstances showing a liability,	867
Special case of a trustee who is a debtor to his trust estate,	868
Payment into Court at the hearing,	868
Time allowed for payment into Court,	869

### SECTION V.

#### OF RECEIVERSHIP.

Receiver will be appointed at the instance of all the <i>cestuis que trust</i> ,	869
Also where trustee is guilty of misconduct, or is insolvent, bankrupt, &c.,	870
Where executrix a <i>feme covert</i> and husband abroad,	870
Receiver where trust estate unprotected,	870
Receiver not granted on slight grounds,	870
Receiver not discharged at the mere instance of the party procuring his appointment,	871

### SECTION VI.

#### OF COSTS OF SUIT.

I. Costs as between trustees and strangers,	872
Where trustees cannot make a title,	872
Trustee made a defendant as a necessary party,	872

Plaintiff failing, not necessarily to pay costs of a trustee,	872
Trustee has costs as between party and party only,	872
Costs in creditor's suit,	873
Executor (though not so formerly) now held entitled to his costs in preference to the plaintiff in creditor's suit,	873
II. Costs as between trustees and <i>cestuis que trust, inter se</i> ,	873
Trustees entitled to costs as a general rule,	873
Trustee not appearing,	874
Decree passed,	874
Disclaimer,	874
Suit originated by trustees' misconduct,	875
Where misconduct proved only in part,	875
Setting aside a purchase by trustees, and absence of fraud,	876
Mistake or slight neglect of trustee,	876
Administration suit mainly caused by a breach of trust,	876
Misconduct of the trustee discovered in the progress of the suit,	876
Costs of discussing a doubtful point of law,	876
Costs paid in part and received in part by trustee,	877
Trivial misconduct,	877
Trustee instituting a suit for his private ends,	877
Trustee falsely denying the plaintiff's claims,	877
Trustee misstating his accounts,	877
Corporation (trustee) pleading ignorance falsely,	878
Corporation (trustee) suppressing documents,	878
Trustee setting up title of his own,	878
Executor denying relationship of next of kin,	878
Costs where executor charged with interest,	878

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## STATUTES, WITH NOTES OF DECISIONS THEREON.

Trustee Act, 1850,	880
Trustee Extension Act, 1852,	903

---

## APPENDIX.

No. I. Strode v. Winchester,	909
II. Abbot v. Lee,	909
III. Cogan v. Stevens,	911
IV. Appointment of new Trustee of Stock,	922
V. Appointment of new Trustee of Chattels,	923
VI. Appointment of new Trustee of Freeholds (single deed,)	924
VII. Appointment of New Trustee of Freeholds (two deeds,)	925
VIII. Sands v. Nugee,	927
IX. Cases on Gifts to Relations,	929
X. Allen v. Sayer,	931



## TABLE OF CASES.

---

The pages referred to are those between brackets [        ].

- |   |  |
|---|--|
| <p> Abbot v. Gibbs, 435.<br/> —— v. Lee, 189, 797, 806.<br/> Abington's case, 675, 677.<br/> Abney v. Miller, 217.<br/> Acherley v. Acherley, 60.<br/> —— v. Roe, 752.<br/> Acheson v. Fair, 220.<br/> Ackland v. Lutby, 251, 255, 256.<br/> Ackroyd v. Smithson, 182, 183.<br/> Acland v. Gaisford, 174, 175.<br/> Acton v. Peirce, 661, 685.<br/> —— v. White, 123.<br/> —— v. Woodgate, 476, 481, 482.<br/> Adair v. Shaw, 725, 766, 873.<br/> —— v. New River Company, 851.<br/> Adams v. Adams, 252, 254, 259.<br/> —— v. Broke, 419.<br/> —— v. Buckland, 300.<br/> —— v. Claxton, 332.<br/> —— v. Clifton, 290, 472, 778, 875.<br/> —— v. Gale, 360.<br/> —— v. Paynter, 577, 650.<br/> —— v. St. Leger, 840, 849.<br/> —— v. Taunton, 237, 449, 533.<br/> Adamson v. Armitage, 121.<br/> Adey v. Arnold, 239.<br/> Adye v. Feuilletau or Fennilletteau,<br/> 337, 338, 341, 360, 361.<br/> Adlington v. Cann, 56, 57, 61, 62, 66,<br/> 67, 68, 71, 79, 615.<br/> Agar v. Fairfax, 755.<br/> Aggas v. Pickerell, 731, 734.<br/> Aguilar v. Aguilar, 635, 639.<br/> Alcock v. Sloper, 354, 811,<br/> Alden v. Gregory, 734,<br/> Alderman v. Neate, 106, 107.<br/> Alderson v. Temple, 477, 480.<br/> Aldridge v. Westbrooke, 584, 858.<br/> Alexander v. Alexander, 296.<br/> —— v. Crosbie, 427, 656.<br/> —— v. Duke of Wellington, 25, 101.<br/> —— v. Newman, 137.<br/> —— v. Mullins, 850.<br/> Alison's case, 71. </p> | <p> Allam v. Heber, 488.<br/> Allan v. Backhouse, 389, 393, 401.<br/> Allason v. Spark, 106, 107.<br/> Allen's will, <i>in re</i>, 379.<br/> Allen v. Allen, 37, 603.<br/> —— v. Imlett, 19, 20, 269,<br/> —— v. Papworth, 633.<br/> —— v. Sayer, 720.<br/> Alleyne v. Darcy, 226, 358, 562, 766.<br/> Altham v. Anglesey, 7.<br/> Alven v. Bond, 465.<br/> Amand v. Bradburne, 558.<br/> Ambrose v. Ambrose, 63, 200, 204.<br/> Ames v. Parkinson, 330, 341, 346, 356.<br/> Amhurst v. Dawling, 269.<br/> Amler v. Amler, 806.<br/> Amphlett v. Parke, 181, 183, 196, 197.<br/> Anandale (Marquis of) v. Marchioness<br/> of Anandale, 827, 828.<br/> Anderson, <i>ex parte</i>, 583, 835.<br/> —— <i>in re</i>, 580, 583, 713, 838.<br/> —— v. Stather, 842.<br/> Andrew v. Trinity Hall, Camb., 233.<br/> —— v. Wrigley, 454, 455, 456, 460,<br/> 726, 730.<br/> Andrews, <i>ex parte</i>, 318, 325, 332, 516.<br/> —— v. Brown, 484.<br/> —— v. Bousfield, 605.<br/> —— v. Partington, 517.<br/> Angelo, <i>re</i>, 881, 882.<br/> Angell v. Dawson, 352, 513, 523.<br/> —— v. Draper, 648.<br/> Angerstein v. Martin, 346, 814.<br/> Angier v. Stannard, 367, 595, 596.<br/> Angle, <i>ex parte</i>, 767.<br/> Angus v. Angus, 47.<br/> Annand v. Honeywood, 797.<br/> Annesley, <i>ex parte</i>, 106, 107.<br/> —— v. Ashurst, 524.<br/> —— v. Simeon, 591.<br/> Anonymous case (Keilway,) 3.<br/> —— (Jenkyns, 244, c. 30,) 5.<br/> —— (1 P. W. 445,) 12.<br/> —— (2 Sim. N. S. 71,) 28. </p> |
|---|--|

Anonymous case, (2 Vent. 349,) 105.

- (7 Vin. 96,) 122.
- (8 Vin. Ab. 72,) 169.
- (1 Com. 345,) 181, 195.
- (2 Vent. 361,) 200.
- (Carth. 16,) 201.
- (2 Ch. Ca. 207,) 217.
- (4 Leon. 207,) 235.
- (Mos. 36,) 291.
- (12 Mod. 560,) 295, 302.
- (Mos. 35,) 305.
- (Dyer, 210 a,) 310.
- (1 Salk. 155,) 318.
- (3 Ves. 515,) 319.
- (Lofft. 492,) 337.
- (2 Ves. 630,) 361.
- (6 Mad. 10,) 414, 423.
- (1 Salk. 153,) 428.
- (Mos. 96,) 434, 435.
- (Pr. Ch. 434,) 456, 459.
- (2 Russ. 350,) 465.
- (6 Ves. 632,) 471.
- (2 Vern. 133,) 487.
- (2 Ch. Ca. 54,) 488.
- (1 Salk. 154,) 491.
- (2 Sw. 300, 302,) 504.
- (10 Ves. 104,) 524.
- (10 Ves. 103,) 546.
- (2 P. W. 261,) 616.
- (18 Ves. 258,) 642.
- (1 P. W. 445,) 648.
- (2 Moll. 483,) 659.
- (2 Atk. 223,) 677.
- (1 Roll. Rep. 56,) 685.
- (2 Vent. 349,) 693.
- (1 P. W. 327,) 698.
- (4 Ir. Eq. Rep. 700,) 710.
- (6 Mad. 10,) 723.
- (6 Ves. 632,) 738.
- (Sel. Ch. Ca. 57,) 754, 762.
- (1 Vern. 105,) 755.
- (1 Salk. 126,) 758.
- (2 Freem. 114,) 828.
- (1 Ves. jun. 462, and 3 B. C. C. 515,) 829.
- (3 P. W. 389,) 832.
- (5 Sim. 322,) 835.
- (1 Y. & C. 75,) 839.
- (1 Y. & C. 538,) 858.
- (4 Sim. 359,) 867.
- (12 Ves. 4,) 870, 871.
- (12 Ves. 5,) 870.
- Anthony v. Rees, 247, 250.
- Antrim (Lord) v. Duke of Buckingham, 34.
- Antrobus v. Smith, 85, 97, 99.
- Aplyn v. Brewer, 305, 310.
- Appleyard v. Wood, 45, 616.
- Archer v. Rooke, 121, 125.
- Ardill v. Savage, 583.
- Arglasse v. Muschamp, 48.
- Armstrong v. Peirse, 590.
- v. Walker, 659.
- Arnold v. Chapman, 182, 193, 194.

- Arnold v. Garner, 319, 546.
- Arran v. Tyrawley, 734.
- Arthur v. Arthur, 121, 643.
- Asby v. Doyl, 173.
- Ashburnham v. Thompson, 359, 875, 878.
- Ashburton v. Ashburton, 829.
- Ashby v. Ashby, 628.
- v. Blackwell, 372.
- v. Palmer, 807, 816, 823.
- Ashton v. Ashton, 156.
- v. M'Dougall, 131.
- Aston v. Aston, 643, 644.
- Atcherley v. Vernon, 122, 250.
- Atkins v. Rowe, 205.
- Atkinson, *re*, 607.
- Atkyns v. Wright, 170.
- Attorney-General v. Alford, 361, 362, 376, 377.
- v. Andrew, 659, 665.
- v. Andrews, 516, 616.
- v. Arnold, 198.
- v. Aspinall, 23, 25, 31.
- v. Backhouse, 508, 509, 510.
- v. Baliol College, 511, 850.
- v. Corporation of Bedford, 493.
- v. Corporation of Berwick-upon-Tweed, 790.
- v. Black, 495.
- v. Blizard, 106, 496.
- v. Boulden, 178.
- v. Bovill, 105, 496.
- v. Brandreth, 496.
- v. Master of Brentwood School, 502.
- v. Brettingham, 503, 790.
- v. Brewers' Company, 753, 786, 788, 877.
- v. Brickdale, 298.
- v. Corporation of Bristol, 781.
- v. Mayor of Bristol, 198, 199.
- v. Brooke, 503, 507, 508, 509.
- v. Browne's Hospital, 493.
- v. Brown, 846.
- v. Buckland, 698.
- v. Buller, 263, 503.
- v. Caius College, 31, 199, 500, 712, 790, 876.
- v. Corporation of Carlisle, 790.
- v. Master of Catherine Hall, Cambridge, 198, 492, 507.
- v. Dean of Christchurch, 499, 502, 790.
- v. Christ's Hospital, 199, 730, 735, 790, 878.
- v. Clack, 524, 544, 582.
- v. Clapham, 497.
- v. Clare Hall, 494.
- v. Earl of Clarendon, 31, 462, 493, 495, 505.
- v. Coopers' Company, 198, 712.
- v. Cordwainers' Company,
- v. Mayor of Coventry, 198.
- v. Cowper, 711.



Attorney-General v. Crook, 492, 510.  
 — v. St. Cross Hospital, 493.  
 — v. Cross, 506, 508, 509.  
 — v. Cuming, 107, 298, 300, 712, 777,  
 779, 857, 874, 301, 527.  
 — v. Davy, 109.  
 — v. Day, 504, 511.  
 — v. Dew, 854.  
 — v. Dixie, 332, 493, 495, 500, 505.  
 506, 507, 508.  
 — v. Lady Downing, 693, 694, 696.  
 — v. Doyley, 233.  
 — v. Drapers' Company, 199, 789,  
 790, 876, 878.  
 — v. Drummond, 876.  
 — v. Lord Dudley, 461, 466, 469, 470,  
 738.  
 — v. Dulwich College, 493.  
 — v. Duplessis, 71.  
 — v. Corporation of Exeter, 105, 496,  
 790.  
 — v. Mayor of Exeter, 717, 729, 731,  
 739, 786, 787, 788, 790.  
 — v. Fishmongers' Company, 730.  
 — v. Flint, 745.  
 — v. Floyer, 301, 527, 580, 751.  
 — v. Foley, 107.  
 — v. Foord, 506, 510.  
 — v. Forster, 107, 108, 109, 269, 779.  
 — v. The Foundling Hospital, 31, 493,  
 723.  
 — v. Foyster, 502.  
 — v. Gascoigne, 199, 500.  
 — v. Gaunt, 492.  
 — v. Gibson, 505.  
 — v. Glegg, 22, 297, 299, 300, 543.  
 — v. Goldsmiths' Company, 495.  
 — v. Lord Gore, 585.  
 — v. Lord Gower, 506.  
 — v. Green, 503, 508, 511, 782.  
 — v. Greenhouse, 766.  
 — v. Griffith, 507, 509.  
 — v. Haberdashers' Company, 198,  
 500, 783.  
 — v. Hall, 169, 171, 509.  
 — v. Governors of Harrow School,  
 538, 544.  
 — v. Heelis, 23, 851, 852.  
 — v. Herrick, 198.  
 — v. Hickman, 696.  
 — v. Higham, 328, 338.  
 — v. Hobert, 875.  
 — v. Holland, 317, 502.  
 — v. Lord Hotham, 509.  
 — v. Hungerford, 503.  
 — v. Hurst, 713.  
 — v. Jackson, 500.  
 — v. Johnson, 198, 199.  
 — v. Johnstone, 196, 197.  
 — v. Kell, 496.  
 — v. Kerr, 503, 509, 511.  
 — v. Ladyman, 500.  
 — v. Landerfield, 31.  
 — v. Duke of Leeds, 283, 285.

Attorney-General v. Corporation of Lei-  
 ceester, 226, 227, 562, 763, 853.  
 — v. Lewin, 106.  
 — v. Corporation of Lichfield, 31.  
 — v. Bishop of Lichfield, 300, 301,  
 527, 580.  
 — v. Mayor of Liverpool, 723.  
 — v. Lock, 301, 492, 493.  
 — v. Lockley, 57.  
 — v. City of London, 873.  
 — v. Corporation of London, 31.  
 — v. Magdalen College, Oxford, 493.  
 — v. Magdalen College, 503, 722, 745,  
 749.  
 — v. Magwood, 506.  
 — v. Earl of Mansfield, 496, 499, 500,  
 504.  
 — v. Mercers' Company, 502.  
 — v. Merchant Venturers' Society,  
 199.  
 — v. Middleton, 493.  
 — v. Milner, 190.  
 — v. Minshull, 198.  
 — v. Moor, 735.  
 — v. Morgan, 506.  
 — v. Munby, 132.  
 — v. Munro, 325, 498.  
 — v. Murdoch, 497.  
 — v. Newark, 503, 791.  
 — v. Newbury, 789, 790.  
 — v. Newbury Corporation, 495, 717,  
 789, 845.  
 — v. Newcombe, 107, 108, 269, 779.  
 — v. Mayor of Norwich, 557, 559.  
 — v. Corporation of Norwich, 516.  
 — v. Owen, 507, 508, 509, 510, 523.  
 — v. Pargeter, 503, 508.  
 — v. Parker, 108, 109, 269, 779.  
 — v. Parnter, 644.  
 — v. Pearson, 131, 497, 498, 499, 559,  
 577, 711, 853.  
 — v. Persse, 746, 750.  
 — v. Pomfret, 833.  
 — v. Borough of Poole, 31.  
 — v. Poulden, 113, 114, 118.  
 — v. Pretymann, 790.  
 — v. Price, 706.  
 — v. Randall, 306, 332.  
 — v. Randles, 836.  
 — v. East Retford Grammar School,  
 781.  
 — v. Burgesses of East Retford, 764,  
 790, 791, 878.  
 — v. Rigby, 790.  
 — v. Mayor of Rochester, 511.  
 — v. Rutter, 109.  
 — v. Sands, 2, 43, 103, 131, 321, 673,  
 674, 676, 677, 678, 681, 682.  
 — v. Scott, 22, 57, 107, 247, 297, 527,  
 621, 625, 777.  
 — v. Shearman, 298.  
 — v. Sherborne School, 495.  
 — v. Shore, 711.  
 — v. Corporation of Shrewsbury, 23.

- Attorney-General v. Smythies, 199.  
 — v. Solly, 363, 364.  
 — v. Guardians of Poor of Southampton, 516.  
 — v. Corporation of Southmolton, 199.  
 — v. South Sea Company, 503, 515.  
 — v. Sparks, 198.  
 — v. Corporation of Stafford, 788.  
 — v. Mayor of Stamford, 31, 500, 501, 505, 506, 507, 711, 783.  
 — v. Stephens, 693, 696.  
 — v. Vivian, 496, 779.  
 — v. Warren, 503, 504, 507, 508.  
 — v. Whiteley, 499.  
 — v. Whorwood, 10, 31.  
 — v. Wilkinson, 105.  
 — v. Wilson, 25, 177, 198, 504, 767, 768, 845, 846, 847, 875.  
 — v. Bishop of Worcester, 782.  
 — v. Archbishop of York, 492.  
 Austen v. Taylor, 141, 142, 144, 145, 158, 246.  
 Austin v. The Bank of England, 33.  
 Aveling v. Knipe, 200, 201, 202.  
 Averall v. Wade, 52.  
 Avery v. Osborne, 877.  
 Awdley v. Awdley, 18, 828, 830.  
 Ayles v. Cox, 893, 896, 903.  
 Ayliff v. Murray, 460, 463, 545, 552.  
 Aylwyn v. Bray, 777.  
 Aynsworth v. The Bank, 33.  
  
 Babington's case, 673.  
 Back v. Andrews, 210, 216.  
 — v. Gooch, 478, 479.  
 Backhouse v. Backhouse, 693.  
 — v. Middleton, 725.  
 Bacon v. Bacon, 284, 293.  
 — v. Proctor, 111.  
 Badcock, *in re*, 828.  
 Badcocke, *ex parte*, 462, 465.  
 Baden v. Earl of Pembroke, 796.  
 Bage, *ex parte*, 465.  
 Baggett v. Meux, 44, 645.  
 Bagshaw v. Spencer, 142, 153, 156, 247, 251, 256.  
 — v. Winter, 369, 370.  
 Bailey, *ex parte*, 477.  
 — v. Ekins, 238, 441, 443, 488.  
 — v. Gould, 328, 329, 332, 877.  
 — v. Jackson, 633, 635.  
 Bain v. Lescher, 122.  
 Bainbridge v. Lord Ashburton, 264.  
 Bainbridge v. Blair, 320, 549, 554, 555, 711, 870, 871.  
 — v. Burton, 852.  
 Baker, *ex parte*, 826.  
 — v. Carter, 460, 465, 470, 774, 875.  
 — v. Hall, 194.  
 — v. Martin, 551.  
 — v. Read, 470.  
 Balch v. Wastall, 648.  
 Balchen v. Scott, 240, 291.  
  
 Baldock, *ex parte*, 424.  
 Baldwin v. Baldwin, 628.  
 — v. Banister, 319.  
 Bale v. Coleman, 141, 144, 146, 256.  
 Balfour v. Welland, 432, 433, 436.  
 Balgney v. Hamilton, 206, 756.  
 Ball v. Harris, 416, 440, 441, 442, 454.  
 — v. Montgomery, 878.  
 Ballet v. Spranger, 395.  
 Balls v. Strutt, 723.  
 Balsh v. Hyham, 522, 559, 562.  
 — v. Wastall, 12.  
 Bamford v. Baron, 479.  
 Banbury v. Briscoe, 227.  
 Band v. Fardell, 352, 353.  
 Bangle's Trust, 381.  
 Bank of England v. Lunn, 32, 33.  
 — v. Moffatt, 32, 33.  
 — v. Parsons, 32, 33.  
 Bankes v. Le Despencer, 157, 538.  
 — v. Sutton, 621, 625, 680, 794, 795.  
 Barber, *ex parte*, 265.  
 — v. Barber, 735.  
 Barclay v. Raine, 227.  
 — v. Russell, 198, 325.  
 Bardswell v. Bardswell, 168, 170.  
 Barff, *ex parte*, 771.  
 Barfield v. Rogers, 836.  
 Barker v. Boucher, 489.  
 — v. Greenwood, 247, 248.  
 — v. Duke of Devonshire, 435.  
 — v. Lea, 369.  
 — v. May, 20, 688.  
 Barkley v. Reay, Lord, 871.  
 Barlow v. Grant, 517, 518.  
 Barnard v. Heaton, 397.  
 — v. Hunter, 729.  
 — v. Large, 408, 409, 410, 411.  
 — v. Proby, 145.  
 Barnardiston v. Soame, 20.  
 Barnes v. Crow, 591.  
 Barnwall v. Barnwall, 660, 663, 664, 754, 755.  
 Barnwell v. Barnwell, 658.  
 Barret v. Glubb, 269.  
 Barrett v. Buck, 118, 177.  
 Barrington v. Hereford, 194.  
 — v. Liddle, 119, 120.  
 Barrow v. Greenough, 70.  
 Barry, *in re*, 835.  
 — v. Marriott, 343, 346.  
 — v. Woodham, 858.  
 Bartholomew's Trust, *in re*, 380.  
 Barthrop v. West, 681.  
 Bartlett v. Bartlett, 865.  
 — v. Green, 149.  
 — v. Pickersgill, 200, 204, 205.  
 Bartley v. Bartley, 450, 533.  
 Barton v. Briscoe, 130, 631.  
 Barwell v. Parker, 489, 490, 491.  
 Baskerville v. Baskerville, 144, 156.  
 Basset's (Sir W.) case, 184.  
 — v. Clapham, 408.  
 Bastard v. Proby, 156.

- Bate v. Hooper, 340, 353, 373.  
 — v. Scales, 356.  
 Bateman v. Davis, 340, 774, 777.  
 — v. Hotchkin, 111, 119, 238.  
 — v. Margerison, 491, 852.  
 Bates v. Dandy, 631.  
 Bath (Earl of) v. Abney, 272.  
 — v. Earl of Bradford, 414, 489, 491, 513, 820.  
 Batson v. Lindegreen, 488.  
 Batteley v. Windle, 180.  
 Battersby's Trust, 895.  
 Battier, *ex parte*, 269.  
 Baugh v. Price, 466, 472.  
 Baugham, *ex parte*, 380.  
 Baxter v. Pritchard, 478.  
 Baxter's Will, 891.  
 Bayley v. Boulcott, 56, 61.  
 — v. Mansell, 713.  
 — v. Powell, 184, 878.  
 Baylies v. Baylies, 589.  
 Baylis v. Newton, 177, 214.  
 Bayly v. Cumming, 237, 533.  
 Baynard v. Wolley, 768, 851.  
 Baynes v. Baynes, 839.  
 Beale v. Symonds, 285, 322, 679.  
 Beales v. Spencer, 122.  
 Bean v. Sykes, 372.  
 Beanland v. Halliwell, 813.  
 Beard v. Nuttall, 94.  
 Beatson v. Beatson, 91.  
 Beatty v. Johnstone, 847.  
 Beauclerk v. Ashburnham, 349, 542.  
 Beaumont v. Beaumont, 869.  
 — v. Meredith, 866.  
 — v. Salisbury (Marquis,) 253.  
 Beavan v. Lord Oxford, 280, 666, 668, 672.  
 Beckett v. Cordley, 39.  
 Beckford v. Beckford, 215, 216.  
 — v. Close, 734.  
 — v. Wade, 730, 731.  
 Bedford (Duke of) v. Marquis of Abercorn, 164, 165.  
 — Charity, *in re*, 493, 780.  
 — v. Leigh, 658.  
 — v. Woodham, 456.  
 Bedwell v. Froome, 207.  
 Beech v. Keep, 81, 84.  
 — v. St. Vincent, 119.  
 Beer (in the goods of,) 234.  
 Beere v. Head, 669.  
 Begbie v. Crook, 236.  
 Beilby, *ex parte*, 123, 773.  
 Belch v. Harvey, 731.  
 Belchier, *ex parte*, 293, 295, 305, 310, 332, 422.  
 Belke's Charity, 718.  
 Bell v. Bell, 721, 724, 725, 729, 730, 733.  
 Bell v. Hyde, 34.  
 Bellamy, *ex parte*, 833.  
 — v. Burrow, 63.  
 Bellasis v. Compton, 56, 61.  
 Bellingham v. Lowther, 98.  
 Beloved Wilkes's Charity, *in re*, 543.  
 Benbow v. Townsend, 56, 61, 207.  
 Benn v. Dixon, 808.  
 Bennet, *ex parte*, 136, 476.  
 — v. Box, 682, 683.  
 — v. Davis, 121, 173, 260, 276, 279, 623, 624, 694.  
 — v. Going, 873.  
 — v. Mayhew, 758.  
 — v. Whitehead, 755.  
 Bennett v. Atkins, 873, 876.  
 — v. Burgis, 244.  
 — *ex parte*, 460, 461, 462, 463, 465, 466, 467.  
 — v. Colley, 392, 395, 402, 722, 729, 737, 778.  
 — v. Honeywood, 542, 706.  
 — v. Powell, 648, 652, 663.  
 Benson v. Benson, 125, 130, 238, 631, 820, 822.  
 — v. Whittam, 172.  
 Bentham v. Wiltshire, 445.  
 Bentley v. Craven, 225, 318.  
 — v. Mackay, 63, 83.  
 Berkhamstead Free School, *ex parte*, 493, 543, 782.  
 Berrington v. Evans, 661.  
 Berry v. Usher, 183, 195, 196.  
 Bessey v. Windham, 478.  
 Bethune v. Kennedy, 354, 810, 812.  
 Bevan's case, 827.  
 Bevant v. Pope, 260.  
 Beveridge, *ex parte*, 715.  
 Beverley v. Beverley, 603.  
 Beynon v. Gollins, 435.  
 Bick v. Motly, 315, 362, 771, 772.  
 Bickham v. Freeman, 489.  
 Bicknell v. Gough, 734.  
 Biddulph, *ex parte*, 772.  
 — v. Biddulph, 796.  
 Bifield v. Taylor, 841, 844.  
 Biggs, *in re*, 376.  
 — v. Andrews, 807.  
 — v. Penn, 854.  
 Bignold v. Springfield, 782.  
 Bill v. Cureton, 93.  
 Billing v. Webb, 837.  
 Billingsley v. Mathew, 300.  
 Billingsly v. Critchet, 518.  
 Binford v. Bawden, 817.  
 Bingham v. Clanmorris, 236.  
 — v. Woodgate, 284, 616.  
 Bingley School, *in re*, 785.  
 Binion v. Stone, 209.  
 Binks v. Lord Rokeby, 427, 431, 435.  
 Birch v. Blagrave, 178, 215.  
 — v. Cropper, 575.  
 — v. Wade, 167, 703, 704.  
 Bird v. Johnson, 132.  
 — v. Lockey, 351, 361.  
 — v. Peagram, 642.  
 Birks v. Betty, 767.  
 Birmingham School, *in re*, 492.

- Discoe v. Kennedy, 634.  
 — v. Perkins, 247, 405, 408, 409, 410, 411.  
 Bishop v. Colebrook, 372.  
 — v. Talbot, 68.  
 Black v. Creighton, 866.  
 Blackburn v. Stables, 147, 153, 154.  
 Blackburne, *ex parte*, 536.  
 Blacklow v. Laws, 122.  
 Blackston v. Hemsworth Hospital, 502.  
 Blackwood v. Borrowes, 317, 338, 419, 773, 777.  
 Blagrove v. Blossom, 258.  
 Blair v. Bromley, 734.  
 — v. Ormond, 742.  
 — v. Nugent, 745.  
 Blake v. Bunbury, 586.  
 — v. Foster, 733.  
 Blakely v. Brady, 87.  
 Bland v. Bland, 169, 171.  
 — v. Wilkins, 193.  
 Blann v. Bell, 810, 813.  
 Blatch v. Wilder, 173, 488.  
 Blennerhassett v. Day, 423, 734.  
 Blewitt v. Millett, 220, 224.  
 — v. Thomas, 734.  
 Blinkhorne v. Feast, 39.  
 Bliss v. Bridgwater, 238.  
 Blithe's case, 34, 526.  
 Blomfield v. Eyre, 753.  
 Bloye's Trust, *in re*, 379, 380, 460, 461, 462.  
 Blue v. Marshall, 521.  
 Boardman v. Mosman, 317.  
 Boddy v. Esdaile, 274, 275.  
 Bodenham v. Hoskyns, 227, 459, 562.  
 Boden's Trust, *in re*, 888.  
 Bold v. Hutchinson, 149.  
 Bolton v. Bolton, 97, 99.  
 — (Duke of) v. Deane, 754, 755.  
 — v. Williams, 634, 635, 639.  
 Bond v. Hopkins, 732.  
 — v. Nurse, 19.  
 Bone v. Cook, 306, 317.  
 Bonham v. Newcomb, 97.  
 Bonifant v. Greenfield, 235, 236, 237.  
 Bonithon v. Hockmore, 545, 546, 556.  
 Bonner v. Bonner, 370.  
 Bonney v. Ridgard, 453, 454, 455, 457, 460, 730, 731.  
 Booth, *ex parte*, 290.  
 — v. Booth, 239, 240, 290, 317, 768, 774.  
 — v. Warrington, 734.  
 Boreham v. Bignall, 368.  
 Bosanquet, *ex parte*, 835.  
 Boschetti v. Power, 866.  
 Boson v. Statham, 56, 61, 67, 68, 74, 80.  
 Boss v. Godsall, 339.  
 Bostock v. Blakeney, 356, 512, 514.  
 Bosvil v. Brander, 628.  
 Bosworth v. Forard, 251.  
 Boteler v. Allington, 16.  
 Bothomly v. Lord Fairfax, 489, 621.  
 Boughton v. James, 111.  
 — v. Langley, 248.  
 Boulton v. Beard, 366.  
 Bourne v. Buckton, 118, 119.  
 — v. Bourne, 808.  
 — v. Mole, 867.  
 Bovey v. Smith, 725, 726, 727.  
 Bowater v. Elly, 603.  
 Bowden v. Bowden, 810.  
 Bowes, *ex parte*, 263, 264, 835.  
 — v. East London Waterworks' Company, 522, 752, 778.  
 — v. Earl of Shaftesbury, 805.  
 Bowker v. Burdekin, 477, 479.  
 Bowles v. Rogers, 277.  
 — v. Stewart, 223, 224, 778.  
 — v. Weeks, 713.  
 Bowyer v. Rivitt, 659.  
 Bowra v. Wright, 694.  
 Box v. Box, 372.  
 — v. Jackson, 629.  
 Boyce v. Corbally, 533.  
 Brace v. Duchess of Marlborough, 280.  
 Brackenbury v. Brackenbury, 138.  
 Bradburne, *in re*, 837.  
 Bradford v. Belfield, 296, 297.  
 Bradgate v. Ridlington, 487.  
 Bradish v. Gee, 823, 824.  
 Bradshaw, *ex parte*, 890.  
 — v. Bradshaw, 300.  
 — v. Fane, 417.  
 Bradwell v. Catchpole, 304, 726.  
 Brandlyn v. Ord, 726.  
 Brandon v. Aston, 136, 520.  
 — v. Robinson, 132.  
 Brasier v. Hudson, 431.  
 Brassey v. Chalmers, 417, 530, 533.  
 Bray, *ex parte*, 557.  
 — v. West, 235.  
 Braybroke (Lord) v. Inskip, 262, 263, 264, 449.  
 Brearcliff v. Dorrington, 614.  
 Breedon v. Breedon, 432.  
 Brest v. Offley, 167.  
 Brett v. Greenwell, 369.  
 Brettell, *ex parte*, 263, 264.  
 Brewer v. Swirles, 640, 775.  
 Brewster v. Angell, 164, 165, 166.  
 Brice v. Stokes, 304, 305, 306, 311, 312, 316, 317, 774, 775.  
 Bridgenorth (Corporation of) v. Collins, 116.  
 Bridge v. Bridge, 65, 81, 83, 84, 89, 94.  
 — v. Brown, 513, 517, 557.  
 Bridger v. Rice, 415.  
 Bridgett v. Hames, 851.  
 Briggs v. Chamberlain, 818.  
 — v. Oxford (Earl of), 112.  
 — v. Penny, 68, 78, 168, 169, 173.  
 Bright v. North, 516, 559.  
 Bright's Trust, *in re*, 613.  
 Bristed v. Wilkins, 671.  
 Bristol (Countess of) v. Hungerford, 183, 184.



- Bristow v. Pegge, 590.  
 Britten v. Cole, 647.  
 Britton v. Twining, 142.  
 Broadhurst v. Balguy, 306, 775, 778.  
 Brocksopp v. Barnes, 545, 549, 553.  
 Brodie v. Barry, 643, 869.  
 — v. St. Paul, 872.  
 Bromfield, *ex parte*, 826, 827, 828, 829, 830.  
 — v. Wytherley, 360.  
 Bromley v. Holland, 842, 848.  
 — v. Lingard, 773.  
 — v. Smith, 851.  
 Brook v. Brook, 35.  
 — (Earl) v. Bulkeley, 725.  
 Brookes v. Burt, 848.  
 Brookman v. Hales, 182, 218.  
 — v. Rothschild, 225.  
 Brooksbank v. Smith, 733.  
 Broom v. Broom, 839.  
 — v. Summers, 497.  
 Brougham (Lord) v. Poulett (Lord), 564.  
 Broughton v. Broughton, 320, 549, 550.  
 — v. James, 641.  
 — v. Langley, 246.  
 Browell v. Read, 237, 424, 869, 871.  
 Brown, *ex parte*, 781.  
 — v. Bamford, 129.  
 — v. Bigg, 196.  
 — v. Brown, 713.  
 — v. Dawson, 498.  
 — v. De Tastet, 548.  
 — v. Groombridge, 564.  
 — v. Higgs, 168, 197, 526, 695, 696, 701, 702, 703, 706, 708, 709.  
 — v. How, 585, 875.  
 — v. Jones, 182, 191.  
 — v. Like, 123.  
 — v. Litton, 343, 360, 361, 548.  
 — v. Pocock, 124, 128, 701, 704.  
 — v. Raindle, 260.  
 — v. Sansome, 361, 364.  
 — v. Whiteway, 255.  
 Browne v. Blount, 849.  
 — v. Cavendish, 481, 482, 483, 653.  
 — v. Cross, 742, 776.  
 — v. DeLaet, 189.  
 — v. Elton, 628.  
 — v. Lockhart, 857.  
 — v. Southouse, 359, 361.  
 — v. Stoughton, 111.  
 Brudenell v. Boughton, 65.  
 Bruere v. Pemberton, 359.  
 Brummell v. Macpherson, 42.  
 Brunson v. Woolredge, 542, 699, 706.  
 Byran v. Collins, 116.  
 — v. Brydges, 142.  
 Buchanan v. Hamilton, 710.  
 Buck v. Shippam, 486.  
 Buckeridge v. Glasse, 237, 711, 756, 774, 775, 778.  
 — v. Ingram, 393, 396.  
 Buckingham (Earl of) v. Drury, 39, 792.  
 Buckle v. Mitchell, 93.  
 Buckley's Trust, *in re*, 375.  
 Buckley v. Lanauze, 218.  
 Buffery, *ex parte*, 716.  
 Bugden v. Bignold, 608.  
 Buggins v. Yates, 169, 170, 180, 183.  
 Bulkly v. Wilford, 226.  
 Bull v. Birkbeck, 403.  
 — v. Vardy, 172.  
 Bullock v. Knight, 629.  
 — v. Wheatley, 328.  
 Bullpin v. Clarke, 634, 641.  
 Bunnett v. Foster, 183, 851.  
 Bunting, *in re*, 226.  
 Burbridge, *ex parte*, 278.  
 Burchett v. Durdant, 248.  
 Burden v. Burden, 549.  
 Burdett v. Rockey, 261.  
 — v. Willet, 754.  
 Burdon v. Burdon, 643.  
 Burdon v. Kennedy, 649, 665.  
 Burge v. Brutton, 320, 550.  
 Burgess v. Wheate, 10, 11, 12, 13, 14, 15, 30, 42, 43, 57, 103, 269, 270, 280, 281, 282, 283, 284, 285, 318, 321, 322, 323, 593, 600, 615, 622, 625, 629, 675, 677, 678, 680, 724, 725, 792, 795, 872.  
 Burgh v. Burgh, 280.  
 — v. Francis, 279.  
 Burke v. Jones, 484.  
 Burn v. Carvalho, 92.  
 Burney v. Macdonald, 43, 72, 132, 472.  
 Burnie v. Getting, 342.  
 Burntree Building Society, *in re*, 837.  
 Burrell v. Egremont (Lord), 733.  
 Burridge v. Row, 771.  
 Burrough v. Philcox, 703, 704.  
 Burroughs v. Elton, 659.  
 — v. McCreight, 748.  
 Burrowes v. Lock, 605.  
 Burrows v. Greenwood, 875.  
 — v. Walls, 599, 778.  
 Burt, *re*, 882, 901.  
 — v. Dennet, 846.  
 — v. Ingram, 339.  
 — v. Sturt, 119, 120.  
 Burtin v. Stonard, 459.  
 Burton, *ex parte*, 226, 768.  
 — v. Hastings, 148, 149.  
 — v. Hodson, 807.  
 — v. Mount, 810.  
 — v. Pierpoint, 121, 694.  
 — v. Wookey, 546.  
 Burt's Trust, *re*, 297.  
 — Estate, *re*, 534, 267, 533.  
 Bush v. Allen, 250.  
 Butcher v. Easto, 477.  
 Butler & Baker's case, 235, 236.  
 Butler's Trust, *re*, 381.  
 Butler, *ex parte*, 274.  
 — v. Bray, 299, 536.  
 — v. Portarlington, 63.  
 — v. Prendergast, 842, 847.  
 Buxton, *ex parte*, 423.



- Buxton v. Buxton, 329, 415.  
 Byam v. Byam, 450, 533, 536, 543.  
 Byrchall v. Bradford, 243, 764, 774.  
 Byrne, *re*, 713.  
 — v. Frere, 733, 734, 738.  
 Cadogan v. Earl of Essex, 349, 542.  
 — v. Kennet, 594.  
 Cafe v. Bent, 524, 544, 582, 812.  
 Caffrey v. Darby, 326, 557, 558, 766, 875.  
 Caillaud v. Estwick, 649.  
 Caldecott v. Brown, 514.  
 — v. Caldecott, 354, 814, 815.  
 Callaghan v. Egan, 839.  
 Callow v. Howle, 633, 634.  
 Calvert v. Godfrey, 840.  
 Calverley v. Phelps, 842.  
 Cambridge v. Rous, 195, 197.  
 Camden v. Anderson, 203.  
 Camoys (Lord) v. Best, 566, 578.  
 Campbell v. Campbell, 547.  
 — v. Ferrall, 662.  
 — v. Graham, 739.  
 — v. Home, 367, 595.  
 — v. Walker, 421, 460, 461, 462, 464, 465, 466, 467, 468, 470, 471, 472, 473.  
 Caney v. Bond, 328.  
 Cann v. Cann, 472.  
 Canning v. Hicks, 18.  
 Cant, *ex parte*, 901.  
 Cantley, *re*, 264.  
 Cape v. Cape, 122.  
 Capel v. Wood, 384.  
 Car v. Burlington, 489, 490, 491.  
 — v. Ellison, 272, 816.  
 Carbis, *ex parte*, 612, 613.  
 Carew v. Johnston, 546.  
 Carleton v. Earl of Dorset, 631.  
 Carlisle (Corporation of) v. Wilson, 753.  
 Carlson v. Farlar, 662.  
 Carmichael v. Wilson, 361, 517.  
 Carpenter, *in re*, 882.  
 — v. Carpenter, 603.  
 — v. Heriot, 472.  
 — v. Marnell, 274, 275, 276.  
 Carr v. Bedford, 538, 707.  
 — v. Ellison, 816.  
 — v. Errol, 163.  
 Carrick v. Errington, 182.  
 Carsey v. Barsham, 305.  
 Carter v. Barnardiston, 251, 428.  
 — v. Horne, 225, 318.  
 — v. Taggart, 369, 370.  
 — v. Waine, 474.  
 Carteret (Lord) v. Paschal, 630.  
 — (Lord) v. Petty, 50.  
 Cartwright, *ex parte*, 714, 716.  
 Carvill v. Carvill, 173.  
 Carwardine v. Carwardine, 246.  
 Cary v. Cary, 167, 168, 169.  
 Casamajor v. Strode, 816.  
 Casborne v. Scarfe, 262, 263, 264, 621, 623, 680.  
 Casburne v. Casburne, 11, 625.  
 Casey's Trust, *in re*, 136.  
 Cathorpe, *ex parte*, 343.  
 Cator v. Croydon Railway Company, 763.  
 — v. Earl of Pembroke, 758.  
 Cave v. Roberts, 325.  
 Cavendish v. Mercer, 520.  
 Cawkwell, *ex parte*, 479.  
 Cawthorn, *in re*, 380.  
 Cazneau's Legacy, 378.  
 Chadwick v. Heatley, 373.  
 — v. Holt, 667.  
 Challen v. Shippam, 357.  
 Chalmer v. Bradley, 289, 470, 471, 472, 729, 737, 819.  
 Chaloner v. Butcher, 824.  
 Chamberlain v. Agar, 71.  
 Chamberlaine v. Chamberlaine, 70.  
 Chambers, *ex parte*, 517.  
 — v. Chambers, 149, 810.  
 — v. Goldwin, 546, 556.  
 — v. Minchin, 290, 291, 293, 305, 311, 312, 315.  
 — v. Waters, 462.  
 Champion, *ex parte*, 351.  
 — v. Rigby, 470.  
 Chancellor v. Morecraft, 851.  
 Chandler, *in re*, 763.  
 Chancey v. May, 851.  
 Chase v. Goble, 477.  
 Chaplin, *ex parte*, 342.  
 — v. Chaplin, 57, 138, 178, 621, 625.  
 — v. Horner, 797, 798, 805, 819.  
 Chapman v. Blisset, 104, 246, 247.  
 — v. Gibson, 96.  
 Charity Corporation v. Sutton, 290, 545, 846.  
 Chastenev, *ex parte*, 833.  
 Chedworth v. Edwards, 337, 756, 758.  
 Chelmsford, (Poor of) v. Mildmay, 493.  
 Chertsey Market, *in re*, 317, 415, 493, 723, 767, 777, 781, 783, 787, 845.  
 Chester v. Platt, 635.  
 — v. Rolfe, 517, 774.  
 Chesterfield (Earl of) v. Jansen, 471, 472, 473, 778.  
 Chetham v. Lord Audley, 547.  
 Chichester v. Bickerstaff, 800.  
 Child v. Gibson, 360.  
 — v. Stephens, 488.  
 Chion, *ex parte*, 274, 754.  
 Chipping-Sodbury School, *in re*, 783.  
 Chirton's case, 673.  
 Chitty v. Parker, 183, 184.  
 Cholmondley v. Cholmondley, 168.  
 — (The Marquis of) v. Lord Clinton, 618, 730, 732, 733, 737.  
 Christian v. Devereux, 744.  
 Christophers v. White, 320.  
 Christ's Hospital v. Budgin, 177, 216.  
 — v. Grainger, 23, 717.  
 Christy v. Courtenay, 207, 209, 212, 214, 215.  
 Chumley, *ex parte*, 826.

- Churchill v. Bank of England, 671.  
 — v. Dibben, 645.  
 — v. Lady Hobson, 241, 291, 310, 313.  
 — v. Marks, 136.  
 City of London v. Garway, 182, 183.  
 — v. Richmond, 851.  
 Clack v. Holland, 329, 729, 764.  
 Clapham (Inhabitants of) v. Hewer, 779.  
 Clare v. Earl of Bedford, 39.  
 Clare v. Ormond, 599.  
 — v. Wood, 657.  
 Clark v. Burgh, 629.  
 — v. Cook, 630.  
 Clarke's Charity, *in re*, 781.  
 Clarke v. Danvers, 199, 202, 216.  
 — v. Earl of Ormonde, 428.  
 — v. Parker, 533.  
 — v. Pistor, 123.  
 — v. Swaile, 464, 471.  
 — v. Turner, 707.  
 Clay v. Sharpe, 427.  
 — v. Willis, 687, 688.  
 Clegg v. Edmondson, 742.  
 Clerk v. Miller, 633.  
 Clerkson v. Bowyer, 18.  
 Clifton v. Lombe, 168.  
 Clinton v. Willes, 637.  
 Clough v. Bond, 291, 293, 328, 337, 351,  
 766.  
 — v. Dixon, 314, 336, 357.  
 Clowdsley v. Pellham, 167.  
 Clowes v. Waters, 490, 491.  
 Clutton, *ex parte*, 40, 579.  
 Coape v. Arnold, 142, 144, 146, 155.  
 Cochran v. Robinson, 426.  
 Cock v. Goodfellow, 340, 480.  
 Cockburn v. Thompson, 851.  
 Cockell v. Pugh, 838, 839.  
 — v. Taylor, 729.  
 Cocker v. Quayle, 340, 596, 766, 774,  
 775.  
 Cockerell v. Cholmley, 472, 778.  
 Cogan v. Stevens, 189.  
 Coke's case, (Sir E.) 646, 673.  
 Colchester v. Lowten, 25.  
 Cole v. Gibson, 472.  
 — v. Moore, 615, 723, 724, 725.  
 — v. Muddle, 771.  
 — v. Wade, 22, 297, 526, 528, 530,  
 533, 534, 580, 712.  
 Colebrooke's (Sir George) case, 464,  
 473.  
 Colegrave v. Manby, 392.  
 Coles v. Trecothick, 460, 462, 463, 464,  
 Collard v. Hare, 730.  
 Collett v. Morrison, 137.  
 Collingwood v. Pace, 677.  
 Collins v. Archer, 753.  
 — v. Carey, 320, 549.  
 — v. Collins, 354, 810.  
 — v. Reece, 486.  
 — v. Vining, 538, 542.  
 — v. Wakeman, 182, 183, 195, 196.  
 Collinson v. Collinson, 209, 214.  
 Collinson v. Lister, 456, 563.  
 — v. Patrick, 81, 91.  
 Collis v. Collis, 338, 867.  
 Colman v. Sarel, 84, 94, 97, 874.  
 Colmore v. Tyndal, 253.  
 Colston v. Lilley, 427.  
 Colt v. Colt, 12, 621.  
 Colwall v. Shadwell, 819.  
 Commissioners of Charitable Donations  
 v. Archbold, 710, 711.  
 — v. Wybrants, 441, 443, 722, 726  
 745, 746, 748, 749.  
 Compton v. Bedford, 477, 480.  
 — v. Collinson, 34, 35.  
 — v. Compton, 658.  
 — (Lord) v. Oxenden, 798.  
 Congreve, *ex parte*, 715.  
 Coningham v. Mellish, 180.  
 — v. Plunkett, 84.  
 Conolly v. Parsons, 421, 424.  
 Consett v. Bell, 101, 846.  
 Conry v. Caulfield, 325, 845.  
 Conyngham v. Conyngham, 243.  
 Cook v. Arnham, 734, 752.  
 — v. Duckenfield, 180.  
 — v. Fountain, 173.  
 — v. Fryer, 243.  
 — v. Gregson, 688.  
 — v. Gwavas, 179.  
 — v. Hutchinson, 177, 180, 181.  
 — v. Parsons, 513.  
 Cooke, *ex parte*, 136.  
 — v. Blake, 252.  
 — v. Cholmondeley, 218.  
 — v. Crawford, 237, 265, 266, 528,  
 532, 533.  
 — v. Stationers' Company, 182, 190,  
 193, 194, 195, 197.  
 Cookson v. Cookson, 823, 824.  
 — v. Reay, 806, 816.  
 Coope v. Carter, 765.  
 Cooper, *ex parte*, 613.  
 — v. Douglas, 517.  
 — v. Fynmore, 605.  
 — v. Jones, 893.  
 — v. Thornton, 596.  
 — v. Wyatt, 135, 136.  
 Cooper's Trust, *in re*, 191, 193, 808.  
 Cooth v. Jackson, 205.  
 Cope v. Parry, 842.  
 Copeman v. Gallant, 274, 275, 277, 278.  
 Copper Mining Company v. Beach, 425.  
 Copperthwaite v. Tuite, 633.  
 Coppin v. Fernyhough, 218, 222, 224,  
 384, 397, 398, 729.  
 — v. Gray, 634.  
 Corbett v. Barker, 733.  
 Cordal's case, 251.  
 Corder v. Morgan, 427.  
 Cordwell v. Mackrill, 727, 728.  
 Cornbury (Lord) v. Middleton, 12, 600,  
 615.  
 Cornish v. Mew, 395.  
 Cornthwaite v. Frith, 481, 482.

- Cory v. Gertcken, 39.  
 Coryton v. Helyar, 8.  
 Costeker v. Horrox, 867.  
 Cotham v. West, 517.  
 Cotteen v. Missing, 81, 91.  
 Cotterell v. Purchase, 734.  
 Cottingham v. Shrewsbury, 845.  
 Cottingham v. Fletcher, 62, 63, 137, 178, 179.  
 Cotton v. Clark, 877.  
 Court v. Jeffery, 458, 849.  
 Courtenay v. Courtenay, 583.  
 Courthorpe v. Heyman, 12, 600.  
 Courtois, *in re*, 378.  
 Cousen, *ex parte*, 276, 714.  
 Coventry (Mayor of) v. Coventry, 97, 584.  
 — v. Atty.-Gen., 711.  
 — v. Hall, 751.  
 Covington, *in re*, 380.  
 Cowdery v. Way, 633.  
 Cowgill v. Lord Oxmantown, 418.  
 Cowley v. Hartstonge, 538, 806, 808.  
 Cowman v. Harrison, 171.  
 Cowstad v. Cely, 847.  
 Cowper v. Earl Cowper, 680.  
 Cox v. Barnard, 94, 853.  
 — v. Bateman, 204, 238, 757.  
 — v. Cox, 376, 433.  
 — v. Dolman, 748, 749.  
 — v. Parker, 14, 321, 679.  
 Cox's case (Sir Charles), 687.  
 Coysegame, *ex parte*, 277.  
 Crabb v. Crabb, 56, 61.  
 Crabtree v. Bramble, 792, 794, 805, 806, 823, 824.  
 Crackelt v. Bethune, 357, 359, 362, 875.  
 Cradock v. Piper, 320, 550, 655.  
 Craigdallie v. Aikman, 497.  
 Crallan v. Oulton, 484.  
 Cramer v. Cramer, 890, 904.  
 Cranch v. Cranch, 808.  
 Crane v. Drake, 455, 456, 459.  
 Cranstoun v. Johnston, 48.  
 Crawford, *ex parte*, 479.  
 Crawley v. Crawley, 118, 808.  
 Crawshaw v. Collins, 321, 548.  
 Creagh v. Blood, 16, 232.  
 Creed v. Covile, 12, 683.  
 — v. Creed, 236, 847.  
 — v. Perry, 372.  
 Creuze v. Hunter, 489.  
 Crewe v. Dicken, 233, 237, 297, 449, 531, 532, 533, 534.  
 Cripps v. Jee, 178.  
 Crisp v. Heath, 650.  
 — v. Spranger, 226, 292, 459.  
 Crispe v. Blake, 606.  
 Croft v. Adam, 696.  
 — v. Slee, 183, 190.  
 Crofton v. Ormsby, 725.  
 Crofts v. Middleton, 634.  
 Crompton v. North, 181.  
 Crook v. Ingoldsby, 572.  
 Crooke v. Brooking, 63, 76, 77.  
 Crop v. Norton, 63, 200, 218.  
 Cropper v. Mellersh, 855.  
 Crosby v. Church, 635, 640, 645.  
 Crosley v. Archdeacon of Sudbury, 261.  
 Crosse v. Smith, 296.  
 Crossley v. Crowther, 718.  
 Crouch v. Citizens of Worcester, 506, 508.  
 Crowe v. Ballard, 460, 470, 472, 473.  
 — v. Crisford, 810.  
 Croyden's Trust, 380.  
 Crozier v. Crozier, 156.  
 Cruse v. Barley, 182, 183, 190, 195.  
 Cruwys v. Colman, 167, 169, 704, 706.  
 Cuddy v. Waldron, 857.  
 Cuff v. Hall, 416, 527.  
 Cullingworth v. Lloyd, 486.  
 Culpepper v. Aston, 179, 414, 428, 429, 434, 435.  
 Cummins v. Cummins, 238, 239, 240, 319.  
 Cunliffe v. Cunliffe, 168.  
 Cunningham v. Moody, 621, 680, 793, 794, 819, 820.  
 Curling v. May, 806.  
 Currant v. Jago, 216.  
 Curre v. Bowyer, 655.  
 Currer v. Walkley, 435.  
 Currie, *ex parte*, 833.  
 Curteis v. Candler, 367.  
 Curtis v. Curtis, 621, 622, 753, 755.  
 — v. Lukin, 111, 112, 597.  
 — v. Price, 253.  
 — v. Rippon, 169, 171.  
 Cusack v. Cusack, 147.  
 Custance v. Bradshaw, 807.  
 — v. Cunningham, 179.  
 Cuthbert v. Baker, 432.  
 Cutterback v. Smith, 488.  
 Dack's case (Sir John), 43, 677, 678.  
 Dakins v. Berisford, 122.  
 Dalbiac v. Dalbiac, 643.  
 Dale, *ex parte*, 278.  
 D'Almaine v. Anderson, 575.  
 Daniel v. Ubley, 35.  
 — v. Warren, 368, 810.  
 Daniels v. Davison, 725.  
 D'Arcy v. Blake, 622, 625, 626, 755.  
 Darcy v. Hall, 318.  
 Darke v. Martyn, 337.  
 Darley v. Darley, 97, 121, 122, 123.  
 Darlington, *ex parte*, 517.  
 D'Arnay v. Chesneau, 276.  
 Darwell v. Darwell, 310.  
 Davall v. New River Company, 321, 679.  
 Davenport v. Coltman, 182, 183, 184.  
 — v. Stafford, 356.  
 Davenport's Charity, *re*, 718, 899.  
 Davers v. Dewes, 196, 197.  
 Davey v. Miller, 885.  
 David v. Frowd, 375.

- Davidson v. Foley, 179, 191, 650.  
 — v. Gardner, 460, 633.  
 Davies, *re*, 895, 901.  
 — v. Ashford, 823.  
 — v. Austen, 518.  
 — v. Davies, 147, 258, 727.  
 — v. Goodhew, 806, 807.  
 — v. Thornycroft, 128.  
 — v. Weld, 407.  
 — v. Westcomb, 421.  
 Davis, *ex parte*, 575.  
 — v. Dendy, 556.  
 — v. Dysart, 227.  
 — v. Jenkins, 498, 779.  
 — v. Kirk, 680.  
 — v. Prout, 121.  
 — v. Spurling, 226, 290, 292, 293, 459.  
 — v. Strathmore (Earl of) 672.  
 Davy v. Hooper, 700.  
 — v. Pepys, 646.  
 — v. Seys, 873.  
 Dawson v. Clarke, 179, 180, 181, 197, 317, 557.  
 — v. Hearn, 597.  
 — v. Massey, 359.  
 Day v. Croft, 557, 870.  
 Dean v. Allen, 426.  
 Dearden, *in re*, 836.  
 Dearle v. Hall, 605, 607.  
 De Clifford, *in re*, 836.  
 Deerhurst (Lord) v. Duke of St. Albans, 163.  
 Deeth v. Hale, 597, 819.  
 Deg v. Deg, 63, 204, 206, 238, 757.  
 Degg's case, 828.  
 Delane v. Delane, 207.  
 Delauney v. Barker, 274, 275.  
 Deloraine (Lord) v. Browne, 732, 734, 735, 738.  
 De Manneville v. Crompton, 543.  
 Dennis v. Badd, 227, 830.  
 Denton v. Davies, 64, 757, 762, 764.  
 — v. Denton, 589, 592.  
 Deptford (Churchwardens of) v. Sketchley, 106, 107.  
 Derbshire v. Home, 633, 765, 775, 778.  
 Devenish v. Baines, 60, 71.  
 Devey v. Peace, 575.  
 — v. Thornton, 367, 595, 876.  
 Devon v. Watts, 477, 480.  
 Dew v. Clarke, 834.  
 Dewdney, *ex parte*, 731.  
 Dibbs v. Goren, 373.  
 Dickenson v. Dickenson, 420, 430.  
 Dickinson v. Shaw, 211.  
 Dickenson v. Player, 340.  
 Dickson, *re*, 558, 562.  
 Digby v. Howard, 643.  
 — v. Irvine, 635, 666, 669.  
 — v. Langworth, 602.  
 — v. Legard, 182, 183.  
 Dike v. Ricks, 429.  
 Dillon v. Coppin, 81, 84, 94.  
 Dillon v. Plaskett, 662.  
 Dimes v. Scott, 291, 353, 815.  
 Dimsdale v. Dimsdale, 94.  
 Dinwiddie v. Bailey, 753.  
 Disher v. Disher, 797.  
 Dix v. Burford, 243.  
 Dixon v. Olmius, 71, 122.  
 — v. Dawson, 181.  
 — v. Gayfere, 745, 816, 823.  
 — v. Saville, 621, 625.  
 Dobson v. Carpenter, 426.  
 — v. Land, 319, 332, 165.  
 Docker v. Somes, 318, 319, 321, 361, 362.  
 Docksey v. Docksey, 181.  
 Dod v. Dod, 147.  
 Dodson v. Hay, 154, 156, 621, 622, 793.  
 Doe v. Amey, 667.  
 — v. Ball, 478.  
 — v. Barrell, 667.  
 — v. Barthrop, 253.  
 — v. Bennett, 264.  
 — v. Biggs, 249.  
 — v. Bolton, 252.  
 — v. Cadogan, 258.  
 — v. Cafe, 141, 253, 254, 259.  
 — v. Claridge, 247.  
 — v. Cockell, 106, 107.  
 — v. Danvers, 61, 617.  
 — v. Edlin, 247.  
 — v. Ewart, 252.  
 — v. Field, 247.  
 — v. Godwin, 301, 419.  
 — v. Greenhill, 665.  
 — v. Harris, 182, 233, 236, 237, 243.  
 — v. Hawkins, 505.  
 — v. Hawthorn, 132.  
 — v. Hicks, 253.  
 — v. Hiley, 106, 107.  
 — v. Homfray, 247, 250.  
 — v. Hughes, 441, 442, 444, 445, 447.  
 — v. Ironmonger, 254.  
 — v. Jones, 498, 590.  
 — v. Keen, 753.  
 — v. Lea, 251, 255.  
 — v. Lightfoot, 265.  
 — v. M'Kaeg, 498, 590.  
 — v. Munro, 132.  
 — v. Nicholls, 249, 253.  
 — v. Norton, 717.  
 — v. Passingham, 247.  
 — v. Phillips, 586, 748.  
 — v. Pott, 591.  
 — v. Pratt, 250.  
 — v. Price, 288.  
 — v. Roe, 527, 580.  
 — v. Rusham, 93.  
 — v. Shotter, 250.  
 — v. Simpson, 250, 251, 254, 259.  
 — v. Smyth, 236.  
 — v. Sotheron, 252.  
 — v. Staple, 590, 591.  
 — v. Sybourn, 591.  
 — v. Terry, 106, 107.



- Doe v. Thompson, 45.  
 — v. Underdown, 195.  
 — v. Willan, 256.  
 — v. Woodhouse, 250.  
 — v. Wroot, 591.  
 Dolder v. Bank of England, 865.  
 Dollond v. Johnson, 689.  
 Dolman v. Pritman, 489.  
 Dolton v. Hewen, 435.  
 — v. Young, 444.  
 Dommett v. Bedford, 136.  
 Donaldson v. Donaldson, 81, 91.  
 Donne v. Hart, 26, 629.  
 Donohoe v. Conrahy, 65.  
 Doody v. Higgins, 856.  
 Doolan v. Blake, 632.  
 Doran v. Wiltshire, 433, 435.  
 Dorchester (Lord) v. Earl of Effingham, 332.  
 Dormer's case, 826, 827.  
 — v. Fortescue, 409, 751, 752, 753, 754, 755, 756.  
 Dornford v. Dornford, 358, 359, 364, 766, 771, 772.  
 Douglas v. Allen, 484.  
 — v. Browne, 290.  
 — v. Congreve, 815.  
 — v. Horsfall, 844.  
 Dove v. Everard, 235, 242.  
 Dovenby Hospital, *in re*, 782.  
 Dover, *ex parte*, 243, 838, 880.  
 Dowling v. Belton, 830.  
 — v. Hudson, 434.  
 Dowling v. Maguire, 632, 634, 635.  
 Downe (Viscount) v. Morris, 14, 18, 283, 285, 322.  
 Downs v. Thomas, 850.  
 — v. Worrali, 700.  
 Downes v. Grazebrook, 414, 461, 463, 464.  
 Downing v. Townsend, 95.  
 Dowtie's case, 676.  
 Doyle v. Blake, 232, 240, 289, 292, 310, 311, 313, 366.  
 Doyley v. Attorney-General, 297, 533, 534, 696, 700, 704, 712.  
 Doyly v. Sherratt, 298.  
 Drake v. Whitmore, 417.  
 Drakeford v. Wilks, 70.  
 Drakeley's Trust, *in re*, 118.  
 Drant v. Vause, 808.  
 Drayson v. Pocock, 414, 450, 712.  
 Drew v. Harman, 842.  
 Drever v. Mawdesley, 541.  
 Drohan v. Drohan, 456, 522.  
 Drosier v. Brereton, 82, 345, 350.  
 Drummond v. Duke of St. Alban's, 751, 756.  
 Drury v. Scott, 642.  
 Duberley v. Day, 26, 629.  
 Dubless v. Flint, 864, 866.  
 Dubois, *ex parte*, 269.  
 Dudgeon v. Cormley, 858.  
 Dudley (Lord) v. Lady Dudley, 794.  
 Du Hourmelin v. Sheldon, 43, 807.  
 Dumas, *ex parte*, 274, 276.  
 Dummer v. Corporation of Chippenham, 31.  
 Dumoncel v. Dumoncel, 43, 132, 621.  
 Dunbar v. Tredennick, 466, 469, 470, 472, 473, 725.  
 Duncan v. Chamberlayne, 613.  
 Dunch v. Kent, 318, 428, 435, 486.  
 Duncombe v. Mayer, 592.  
 — v. Nelson, 517.  
 Dundas v. Blake, 746.  
 — v. Dutens, 648.  
 Dunkley v. Dunkley, 369, 370.  
 Dunman, *ex parte*, 422.  
 Dunnage v. White, 181.  
 Dunne v. Dunne, 514.  
 Dunster v. Glengal, 608.  
 Durour v. Motteux, 196, 197.  
 Dutton v. Morrison, 476, 477, 478, 479.  
 Dyer v. Dyer, 200, 207, 209, 211, 212, 213.  
 Eade v. Eade, 167, 169, 171.  
 Eales v. England, 167, 169, 283.  
 Earlom v. Saunders, 792, 796, 806, 816.  
 East v. Ryall, 506, 876.  
 East Greenstead's case, 726.  
 East India Company v. Henschman, 225.  
 Eaton v. Smith, 531.  
 Ebrand v. Dancer, 200, 216.  
 Eccleston v. Skelmersdale, 845.  
 Eckhardt v. Wilson, 477, 479.  
 Eddleston v. Collins, 36.  
 Eden v. Foster, 492, 493, 499.  
 Edenborough v. Archbishop of Canterbury, 107, 109, 110, 777, 874.  
 Edmonds v. Dennington, 631.  
 — v. Peake, 427.  
 Edwards v. Fashion, 202.  
 — v. Freeman, 20.  
 — v. Graves, 19.  
 — v. Harvey, 421, 872.  
 — v. Jones, 81, 88.  
 — v. Lewis, 220.  
 — v. Morgan, 751, 756.  
 — v. Pike, 80, 205.  
 — v. Tuck, 118, 119.  
 — v. Countess of Warwick, 797, 805, 806, 820, 822, 824.  
 Eidsforth v. Armstead, 441, 446, 447.  
 Eland v. Eland, 435, 436, 437, 444, 456, 458.  
 Elborne v. Goode, 116, 118.  
 Eldridge v. Knott, 736.  
 Elibank (Lady) v. Montolieu, 628.  
 Ellerthorpe, *in re*, 883.  
 Ellice, *ex parte*, 343.  
 Elliot v. Brown, 202.  
 — v. Edwards, 725.  
 — v. Elliot, 177, 207, 211, 214, 215.  
 — v. Merriman, 435, 441, 444, 455, 738.  
 Ellis, *ex parte*, 274.



- Ellis v. Atkinson, 123.  
 — v. Maxwell, 116.  
 — v. Nimmo, 96, 97, 99.  
 — v. Selby, 182.  
 Ellison v. Airey, 551.  
 — v. Ellison, 81, 84, 89, 99.  
 — v. Elwin, 628.  
 Ellison's Trust *in re*, 236, 895.  
 Elliston, *ex parte*, 277.  
 Elmsley v. Young, 707.  
 Else v. Osborn, 407.  
 Elsee, *ex parte*, 557.  
 Eltham (Inhabitants of) v. Warreyn, 198, 506.  
 Elton v. Harrison, 444.  
 Emblyn v. Freeman, 182.  
 Emelie v. Emelie, 341.  
 Emmett v. Dewhurst, 486.  
 Emuss v. Smith, 808.  
 England (Bank of) v. Lunn, 32, 33.  
 — v. Moffat, 32, 33.  
 — v. Parsons, 32, 33.  
 England (Mary), *in re*, 408.  
 — v. Downs, 131, 244.  
 Entwistle v. Markland, 813.  
 Erskine's Trust, *in re*, 380.  
 Estwick v. Caillaud, 474, 475, 476, 477, 480, 648.  
 Etty v. Bridges, 608, 611, 614, 863.  
 Evans v. Bagwell, 482, 483.  
 — v. Bicknell, 592, 775.  
 — v. Brown, 14, 18, 285.  
 — v. Coventry, 870.  
 — v. Hellier, 114, 117, 119.  
 — v. Jackson, 416, 523.  
 — v. John, 241.  
 — v. Stokes, 852.  
 — v. Tweedy, 485.  
 Evelyn v. Forster, 835, 839.  
 — v. Templar, 93, 94, 97, 99.  
 Everett, *in re*, 377.  
 — v. Prythergch, 870.  
 Evroy v. Nicholas, 39.  
 Ewer v. Corbet, 455, 456, 458.  
 Exel v. Wallace, 145.  
 Eyre's case, 820.  
 Eyre v. Dolphin, 218, 220, 224.  
 — v. Marsden, 118, 119, 183.  
 — v. Countess of Shaftesbury, 299, 300, 536.  
 Fagg's Trust, *in re*, 380, 577.  
 Fain v. Ayres, 227.  
 Falkland, Lord v. Bertie, 753.  
 Falkner v. Lord Wynford, 700.  
 Fane v. Fane, 59, 61.  
 Farquharson v. Seton, 845.  
 Farr v. Newman, 261, 262, 274, 278.  
 — v. Sheriffe, 857, 858.  
 Farrar v. Winterton, 655.  
 Farrell v. Smith, 375.  
 Farrington v. Knightly, 19.  
 Faulkner v. Elger, 109.  
 Fauntleroy, *in re*, 713.  
 Fawcet v. Lowther, 680.  
 Fawcett v. Whitehouse, 225.  
 Fearn v. Young, 558, 808.  
 Fearon v. Webb, 107, 108.  
 Featherstonhaugh v. Fenwick, 218, 220.  
 Fell v. Brown, 849.  
 — v. Lutwidge, 875.  
 Fellowes v. Till, 839.  
 — v. Mitchell, 304, 305, 337, 774.  
 Fellows's Settlement, *in re*, 897, 901.  
 Feltham's Trusts, *in re*, 380.  
 Fenniliteau, *ex parte*, 835.  
 Fenwick v. Greenwell, 700, 765.  
 Feoffees of Heriot's Hospital v. Ross, 557, 561.  
 Fergus (Executors of) v. Gore, 484.  
 Ferguson v. Livingstone, 734.  
 — v. Tadman, 174.  
 Ferraby v. Hobson, 505, 506.  
 Fernie v. Maguire, 331.  
 Ferrars v. Cherry, 725, 726.  
 Fettiplace v. Gorges, 642.  
 Fidgeon v. Sharp, 480.  
 Field's Trust, *in re*, 381.  
 — Mortgage, 265.  
 Field, *ex parte*, 860.  
 — v. Donoughmore, 367, 486, 595.  
 — v. Evans, 123.  
 — v. Lonsdale, 101.  
 — v. Sowle, 634, 635, 640, 641.  
 Finch's case (Sir Moyle), 4, 9, 16, 18, 56, 287.  
 Finch v. Finch, 200, 207, 209, 215.  
 — v. Earl of Winchelsea, 99, 174, 279, 280.  
 — v. Hollingsworth, 701, 704.  
 Finden v. Stephens, 102.  
 Finlay v. Howard, 710.  
 Fishbourne, *in re*, 451.  
 Fish v. Klein, 39.  
 Fitch v. Weber, 182, 184.  
 Fitzgerald, *in re*, 583, 713.  
 — v. Fitzgerald, 631.  
 — v. Jervoise, 415, 792, 816.  
 — v. O'Flaherty, 876.  
 — v. Pringle, 341, 877.  
 Fitzgibbon v. Blake, 634, 642.  
 Fitzroy v. Howard, 384.  
 Flack's settlement, *in re*, 378.  
 Flanagan v. Flanagan, 177.  
 — v. Nolan, 365, 876, 877.  
 Flanders v. Clark, 536, 696.  
 Flemming v. Page, 725.  
 Fletcher, *ex parte*, 381.  
 — v. Ashburner, 177, 183, 793, 819.  
 — v. Chapman, 189.  
 — v. Fletcher, 81, 94, 719.  
 — v. Robinson, 794.  
 — v. Sidley, 93.  
 — v. Stevenson, 375, 426.  
 — v. Walker, 333.  
 Flint v. Warren, 184.  
 Flitcroft, *in re*, 893.  
 Fogin v. Andrews, 877, 979.

- Foley, *ex parte*, 849.  
 — v. Burnell, 152, 161, 163, 261, 280, 718.  
 — v. Hill, 731, 732.  
 — v. Parry, 167.  
 — v. Wontner, 301, 419, 497, 498, 527, 580.  
 Follett v. Tyrer, 623.  
 Foly's case, 488, 489.  
 Foone v. Blount, 792, 796.  
 Foord, *ex parte*, 477.  
 Footner v. Sturgis, 662.  
 Forbes v. Ball, 167, 706.  
 — v. Peacock, 430, 434, 435, 437, 440, 441, 442, 445, 453, 458.  
 — v. Ross, 339, 359, 361, 365.  
 Ford v. Hopkins, 758.  
 — v. Ryan, 331, 433, 453.  
 — v. White, 729.  
 Ford's Charity, *in re*, 785.  
 Forder v. Wade, 621, 751.  
 Fordham v. Wallis, 373.  
 Fordyce v. Bridges, 533, 712.  
 — v. Willis, 25, 56, 57, 59, 61, 267.  
 Forrest v. Elwes,  
 Forshaw v. Higginson, 583, 584.  
 Forster v. Hale, 61, 62, 63, 64, 65.  
 Fortescue v. Barnett, 86.  
 Forth v. Duke of Norfolk, 650, 653, 655, 665.  
 Fosbrooke v. Balguy, 217, 225, 318, 319.  
 Foster v. Blackstone, 605, 608, 612, 650, 653, 656.  
 — v. Crabb, 592.  
 — v. Cockerell, 608.  
 — v. Deacon, 174.  
 — v. Foster, 359.  
 — v. Handley, 692.  
 — v. Hodgson, 734.  
 Fothergill v. Fothergill, 97.  
 — v. Kendrick, 650.  
 Fountaine v. Pellett, 559.  
 Fourdrin v. Gowdey, 43.  
 Fowler v. Churchill, 671.  
 — v. Fowler, 643, 644.  
 — v. Garlike, 181.  
 — v. Reynall, 346.  
 Fowlser, *ex parte*, 791.  
 Fox v. Bishop of Chester, 136.  
 — v. Fisher, 277.  
 — v. Mackreth, 460, 469, 473.  
 Foxall, *in re*, 713.  
 Fozard's Trust, *in re*, 379, 816.  
 Fozier v. Andrews, 877, 879.  
 France v. Woods, 332.  
 Francis v. Francis, 345, 561.  
 Francis v. Grover, 746.  
 Francis v. Wigsell, 635, 640.  
 Franco v. Franco, 317, 629, 851.  
 Frank v. Frank, 816.  
 Franklin v. The Bank of England, 32.  
 — v. Frith, 351, 359, 875, 878.  
 — v. Green, 519.  
 Franklyn, *ex parte*, 343.  
 Franks v. Price, 157.  
 Fraser v. Palmer, 320, 549.  
 Frazer v. Moor, 734.  
 Freake v. Cranefeldt, 485.  
 Frederick v. Aynscombe, 796.  
 — v. Frederick, 806.  
 Freeman v. Fairlie, 547, 599, 864, 867.  
 — v. Tatham, 64.  
 — v. Taylor, 650.  
 Freemoult v. Dedire, 174, 488.  
 Freme v. Woods, 332.  
 Fremington School, *in re*, 781.  
 French, *ex parte*, 348.  
 — v. Baron, 546.  
 — v. Davidson, 538, 539, 543.  
 — v. Hobson, 777.  
 Frewin v. Charleton, 409.  
 Friendly Society, *ex parte*, 783.  
 Frost's Settlement, *in re*, 895.  
 Fulham, *in re*, 901.  
 — v. Jones, 796.  
 Fuller v. Knight, 349, 415, 771.  
 — v. Lance, 476.  
 Fussell v. Elwin, 854.  
 Fulton v. Gilmour, 374.  
 Fursaker v. Robinson, 94.  
 Fust, *ex parte*, 343.  
 Futter v. Jackson, 867.  
 Fyler v. Fyler, 226, 358, 562, 766, 774.  
 Fyson v. Pole, 734.  
 Gaffee, *in re*, 131.  
 Gainsborough v. Gainsborough, 181.  
 Gale v. Pitt, 356.  
 — v. Williamson, 477.  
 Galliers v. Moss, 264.  
 Galway v. Butler, 857.  
 Gannon v. White, 89.  
 Gardiner v. Fell, 62, 753, 754.  
 Gardiner v. Marshall, 370.  
 — v. Rowe, 63.  
 Garey v. Whittingham, 858.  
 Garfoot v. Garfoot, 173.  
 Garland, *ex parte*, 273.  
 Garrard v. Lauderdale, 81, 84, 99, 101, 476, 482, 483.  
 — v. Tuck, 586, 590, 748.  
 Garrat v. Cullum, 275.  
 Garratt v. Lancefield, 426.  
 Garrett v. Noble, 415.  
 — v. Wilkinson, 216.  
 Garth v. Baldwin, 141, 142, 247.  
 — v. Cotton, 156, 408, 753.  
 Gascoigne v. Thwing, 204, 205.  
 Gaskell v. Gaskell, 100.  
 — v. Harman, 792.  
 — v. Holmes, 368.  
 Gaston v. Frankum, 634.  
 Gaunt v. Taylor, 857, 858.  
 Gayner's case, 477.  
 Geary v. Bearcroft, 57, 260, 590.  
 Geaves, *ex parte*, 277, 772.  
 Gennys, *ex parte*, 274, 276.

- Gent v. Harris, 369, 370.  
 George v. Bank of England, 61.  
     — v. Howard, 179.  
 Gibbons v. Baddall, 725.  
 Gibbs v. Glamis, 482.  
     — v. Herring, 313.  
     — v. Ougier, 183.  
     — v. Rumsey, 181, 182, 183, 195.  
 Gibson v. Bott, 814, 815.  
     — v. Jeyes, 460, 461, 463.  
     — v. Lord Montford, 251.  
     — v. Rogers, 616.  
     — v. Winter, 269.  
 Giddings v. Giddings, 218, 220, 221,  
     223, 224, 225, 397, 398.  
 Gifford v. Hort, 733.  
     — v. Manley, 238.  
 Gilchrist v. Cator, 370.  
 Giles v. Dyson, 557.  
 Gill v. Attorney-General, 314.  
 Gillam, *ex parte*, 833.  
 Gillespie v. Alexander, 375.  
 Gillett v. Peppercorn, 225.  
 Gillibrand v. Goold, 421, 430.  
 Gillies v. Longlands, 818, 819, 823.  
 Girling v. Lee, 488.  
 Gladding v. Yapp, 182.  
 Gladdon v. Stoneman, 870.  
 Gladstone v. Hadwen, 274.  
 Glaister v. Hewer, 216.  
 Glass v. Oxenham, 847.  
 Glenorchy (Lord) v. Bosville, 141, 144,  
     154.  
 Glover v. Monckton, 251, 256.  
     — v. Strothoff, 53.  
 Glynn v. Lock, 330, 433.  
 Gobe v. The Earl of Carlisle, 18.  
 Goddard, *in re*, 836.  
 Goddard v. Macaulay, 835, 881.  
 Godden v. Crowhurst, 134.  
 Godfrey v. Dixon, 43, 132.  
     — v. Furzo, 274.  
     — v. Watson, 556, 557.  
 Godolphin v. Godolphin, 34, 525, 526.  
 Godsall v. Webb, 91.  
 Godwin v. Winsmore, 621, 622.  
 Goffe v. Whalley, 684.  
 Golding v. Yapp, 59, 69.  
 Goldsmid v. Stonehewer, 855.  
 Gomley v. Wood, 549, 550.  
 Goode v. West, 376, 377.  
 Goodenough v. Goodenough, 755.  
     — v. Tremamondo, 810.  
 Goodere v. Lloyd, 181.  
 Goodrick v. Brown, 602, 604.  
 Goodright v. Hodges, 60, 199, 203, 205,  
     207.  
     — v. Opie, 195.  
     — v. Wells, 15, 16, 61, 591.  
 Goodson v. Ellisson, 367, 595, 600, 850.  
 Goodtitle v. Jones, 591.  
     — v. Layman, 252.  
     — v. Whitby, 251, 255.  
 Goodwin v. Gosnell, 763.  
 Goodwin v. Lister, 832.  
 Gordon v. Gordon, 97.  
     — v. Trail, 558.  
 Gore's Charity, *in re*, 836, 837.  
     — v. Bowser, 238, 648, 663.  
 Gorge's (Lady) case, 209, 212, 216.  
     — v. Chansey, 521.  
 Goring v. Bickerstaff, 12, 600.  
     — v. Nash, 94, 97, 99.  
 Gorst v. Lowndes, 113.  
 Gosling v. Carter, 435, 441, 442, 444,  
     446, 447.  
     — v. Dorney, 487.  
 Goss v. Neale, 474, 475.  
 Gough v. Birch, 458.  
     — v. Bult, 729, 748.  
 Gould v. Fleetwood, 545, 553.  
 Gouldsworth v. Knight, 107, 299.  
 Governess's Institution v. Rusbridger,  
     868.  
 Gover, *ex parte*, 424.  
 Gower v. Eyre, 514.  
     — v. Grosvenor, 144, 150, 158.  
     — v. Mainwaring, 22, 526, 697, 699.  
 Gowland v. De Faria, 738.  
 Grace, *ex parte*, 218.  
 Graham v. Birkenhead, 737, 775.  
     — v. Fitch, 633.  
     — v. Lord Londonderry, 386, 395.  
 Grange v. Tiving, 35, 36, 37.  
 Grant v. Lynam, 705.  
     — v. Mills, 276, 725.  
 Gravenor v. Hallum, 194.  
 Graves v. Dolphin, 132, 133.  
 Gray, *ex parte*, 269.  
     — v. Chaplin, 852.  
     — v. Gray, 83.  
     — v. Haig, 599.  
 Greatley v. Noble, 634, 639, 756.  
 Greaves v. Powell, 487.  
 Greedy v. Lavender, 628.  
 Green, *ex parte*, 269, 517.  
     — v. Ekins, 148.  
     — v. Holden, 836.  
     — v. Howard, 699, 707.  
     — v. Jackson, 197.  
     — v. Marsden, 170, 171.  
     — v. Pledger, 866.  
     — v. Rutherford, 10, 31, 492, 494.  
     — v. Spicer, 132, 133.  
     — v. Stephens, 158, 796.  
 Greenfell v. Girdlestone, 736, 737.  
 Greenhill v. Greenhill, 615, 616.  
 Greenhouse, *ex parte*, 496, 711.  
 Greening v. Beckford, 613.  
 Greenwell v. Greenwell, 520.  
 Greenwood v. Churchill, 478.  
     — v. Evans, 387, 390, 391, 400, 401.  
     — v. Taylor, 485.  
     — v. Wakeford, 583, 584, 768.  
 Gregory v. Gregory, 305, 306, 310, 462,  
     470, 471.  
     — v. Henderson, 246, 248.  
     — v. Lockyer, 642.

- Greisley v. Chesterfield (Earl of), 813.  
 Grenville (Lord) v. Blyth, 279.  
 Greswold v. Marsham, 650.  
 Grey v. Colville, 12, 682, 689.  
 — v. Grey, 177, 200, 207, 210, 211,  
 212, 213, 214.  
 Grierson v. Eyre, 753.  
 Griesbach v. Freemantle, 823, 824.  
 Grieveson v. Kirksopp, 696, 701, 704,  
 807, 808.  
 Griffin, *ex parte*, 294, 298, 332, 357.  
 — v. Griffin, 217, 220.  
 Griffith v. Evans, 168, 170.  
 — v. Buckle, 147.  
 — v. Ricketts, 807.  
 Griffiths v. Vere, 114, 117.  
 Grigby v. Cox, 632.  
 Grimstone, *ex parte*, 825, 826, 827, 830.  
 Grogan v. Cooke, 648, 649.  
 Groom v. Booth, 851.  
 Grosvenor v. Cartwright, 360.  
 Groves v. Groves, 138, 200, 204, 205, 207.  
 Gubbins v. Creed, 318.  
 Gude v. Worthington, 543, 696.  
 Guiberts' Trust, 577.  
 Guidot v. Guidot, 792, 796, 806.  
 Gurner, *ex parte*, 357, 772.  
 Guthrie v. Crossley, 480.  
 Gwilliams v. Rowel, 173, 300.  
  
 Haberdasher's Company v. Attorney-  
 General, 875.  
 Habergham v. Vincent, 17, 66, 69, 181.  
 Hackett v. M'Namara, 416.  
 Hadley, *in re*, 572, 895.  
 Hagger, *ex parte*, 838.  
 Halcott v. Markant, 204, 205, 206.  
 Haldenby v. Spofforth, 416.  
 Hale v. Allnutt, 480.  
 — v. Lamb, 94, 97, 221.  
 Haley v. Bannister, 114, 118.  
 Halford v. Stains, 118, 120, 177.  
 Hall, *in re*, 763.  
 — v. Austin, 854.  
 — v. Coventry, 752.  
 — v. Dewes, 301, 528.  
 — v. Hallett, 46, 358, 359, 361, 460,  
 465, 469, 470, 873.  
 — v. Hugonin, 372.  
 — v. Jones, 300.  
 — v. Laver, 101, 561.  
 — v. Noyes, 461, 470.  
 Hall's Charity, *in re*, 781.  
 Halliburton v. Leslie, 36.  
 Halliday v. Hudson, 179, 181.  
 Hamer's Devisees, 285.  
 Ham's Trust, 380.  
 Hamilton v. Ball, 138.  
 — v. Fry, 582, 583.  
 — v. Grant, 731.  
 — v. Hancock, 833.  
 — v. Houghton, 488, 489.  
 — v. Mainwaring, 131.  
 — v. Wright, 318.  
  
 Hamond v. Hicks, 729.  
 Hampshire v. Bradley, 875.  
 Hampton v. Spencer, 63, 64.  
 Hanbury v. Kirkland, 306, 317, 351.  
 Hancom v. Allen, 341, 351.  
 Hancox, *ex parte*, 716.  
 Handcock (— v.) 833.  
 Handick v. Wilkes, 147.  
 Hands v. Hands, 701, 704.  
 Hankey v. Garret, 359, 361.  
 — v. Hammond, 273.  
 Hanman v. Riley, 485, 855.  
 Hanne v. Stevens, 849.  
 Hanson v. Beverley, 451, 523.  
 — v. Keatin, 26, 629.  
 Hanson, *ex parte*, 277.  
 Harbert's case, 646, 659.  
 Harcourt v. Seymour, 816, 824.  
 Harden v. Parsons, 304, 305, 310, 314,  
 332, 337, 776.  
 Hardy v. Hawkshaw, 807.  
 Harding v. Glyn, 167, 696, 701, 703,  
 704, 706.  
 — v. Hardrett, 284, 725.  
 Hardman, *ex parte*, 715.  
 — v. Johnson, 225.  
 Hardwick v. Mynd, 290, 422, 434, 447,  
 449, 471, 529, 533, 738.  
 Hardwicke (Lord) v. Vernon, 466, 469,  
 599.  
 Hardy v. Reeves, 728, 734.  
 Harford v. Purrier, 174.  
 Hargrave v. Tindall, 488.  
 Hargreaves v. Michell, 484, 729.  
 Hargthorpe v. Milforth, 310.  
 Harland v. Binks, 476, 483.  
 — v. Trigg, 168, 169.  
 Harley v. Harley, 627.  
 Harman v. Fisher, 480.  
 Harmood v. Oglander, 16, 735, 751, 756.  
 Harnard v. Webster, 766.  
 Harnett v. Macdougall, 130.  
 — v. Maitland, 514.  
 Harris' Trust, *in re*, 379.  
 — v. Booker, 665.  
 — v. Davison, 656.  
 — v. Horwell, 70.  
 — v. Mott, 633, 646.  
 — v. Poyner, 810.  
 — v. Pugh, 247, 665.  
 Harrison v. Borwell, 735.  
 — *in re*, 252.  
 — v. Cage, 428.  
 — v. Coppard, 227.  
 — v. Duignan, 746.  
 — v. Forth, 726.  
 — v. Graham, 235, 241, 290, 291,  
 305, 310.  
 — v. Harrison, 356.  
 — v. Hollins, 733.  
 — v. Naylor, 153, 156.  
 — v. Pryse, 372, 846.  
 — v. Stewardson, 843, 852.  
 Harrop v. Howard, 130.



- Hartnall, *in re*, 891, 905.  
 Harte v. French, 713.  
 — v. Middlehurst, 149.  
 Hart v. Tribe, 168.  
 Hartford, *in re*, 713.  
 Hartga v. The Bank of England, 32.  
 Hartley v. Hurle, 122.  
 Harton v. Harton, 247, 255.  
 Hartop v. Hoare, 275.  
 Hartshorn v. Slodden, 480.  
 Hartwell v. Chitters, 687.  
 Harvey v. Audland, 94.  
 — v. Harvey, 121, 386, 517, 694, 811, 851.  
 Harwood v. Wrayman, 685.  
 Hasell, *ex parte*, 730.  
 Hassell v. Simpson, 477.  
 Hathornthwaithe v. Russell, 871.  
 Havers v. Havers, 870, 871.  
 Hawker v. Hawker, 251, 256.  
 Hawkins v. Chappell, 318, 415.  
 — v. Gardner, 61.  
 — v. Kemp, 237, 449, 532.  
 — v. Lawse, 685.  
 — v. Luscombe, 255.  
 — v. Obeen, 832.  
 Hay v. Bowen, 368.  
 Hayes v. Kingdome, 177, 201, 210.  
 Hayford v. Benlows, 189.  
 Hays, *ex parte*, 517.  
 Hayton v. Wolf, 234.  
 Haytor v. Rod, 805.  
 Haywood v. Ovey, 848.  
 Head v. Lord Teynham, 596, 848.  
 Heap v. Tonge, 94.  
 Heardson v. Williamson, 256.  
 Hearle v. Greenbank, 34, 35, 36, 526, 623, 624.  
 Hazeldine, *in re*, 895.  
 Heath, *in the matter of*, 714.  
 — v. Henley, 729.  
 — v. Percival, 847.  
 Heathcote v. Hulme, 359, 361, 363.  
 Heatley v. Thomas, 633, 634, 640.  
 Heaton, *ex parte*, 772.  
 — v. Marriott, 304.  
 Heenan v. Berry, 745.  
 Heighington v. Grant, 363, 876.  
 Hemming, *ex parte*, 380.  
 Henchman v. Attorney-General, 194, 198, 325, 795.  
 Henderson v. M'Iver, 557.  
 Henley v. Stone, 842.  
 — v. Philips, 877.  
 — v. Webb, 817, 821, 823.  
 Hennessey, *ex parte*, 609, 610, 612, 613.  
 Herbert, *ex parte*, 277.  
 Hercy v. Ballard, 751, 756.  
 — v. Dinwoody, 471, 738, 739.  
 Hereford v. Ravenhill, 189, 806.  
 Heron v. Heron, 204, 206.  
 Hertford (Borough of) v. Poor of same Borough, 878.  
 — (Marquis of) *in re*, 860, 864.  
 Hethersell v. Hales, 559.  
 Hewett v. Hewett, 529, 696.  
 — v. Foster, 315, 316, 876.  
 Hewitt v. Wright, 184.  
 — v. Morris, 814.  
 Hey's Will, *in re*, 893.  
 Hibbard v. Lambe, 22, 531, 533, 536, 710, 712.  
 Hibbert v. Cooke, 514.  
 — v. Hibbert, 101.  
 Hichens v. Congreve, 225, 851.  
 Hichens v. Kelly, 842.  
 Hickling v. Boyer, 426.  
 Hicks v. Hicks, 359, 361, 777.  
 — v. Sallitt, 753, 754.  
 Hickson v. Fitzgerald, 234, 874.  
 Hide v. Heywood, 557, 875.  
 Higginson v. Barneby, 165.  
 — v. Kelly, 136.  
 Highway v. Banner, 148, 604.  
 Higinbotham v. Holme, 136.  
 Hilchins v. Hilchins, 251.  
 Hill, *ex parte*, 136.  
 — v. Buckley, 415.  
 — v. Cock, 183.  
 — v. Edmonds, 630.  
 — v. Gomme, 765.  
 — v. Hill, 164, 165.  
 — v. Bishop of London, 172, 180, 269, 318.  
 — v. Magan, 560, 872.  
 — v. Simpson, 455, 456, 457, 459.  
 Hillary v. Waller, 736, 738.  
 Hilliard, *in re*, 359, 361.  
 Hinckley v. Maclarens, 707.  
 Hind v. Poole, 420, 530.  
 Hindle v. Taylor, 167.  
 Hinde v. Blake, 867, 869.  
 Hindmarsh v. Southgate, 39.  
 Hinton, *ex parte*, 135.  
 — v. Hinton, 260, 276, 279.  
 Hinves v. Hinves, 811.  
 Hitch v. Leworthy, 296.  
 Hixon v. Wytham, 487.  
 Hoare v. Parker, 594.  
 — v. Peck, 734, 735.  
 Hobart v. Countess of Suffolk, 179.  
 Hobby v. Collins, 818.  
 Hobson v. Bell, 423, 612.  
 — v. Trevor, 751.  
 — v. Staneer, 842.  
 Hockley v. Bantock, 341, 356.  
 — v. Mawbey, 700.  
 Hodge v. Attorney-General, 30.  
 — v. Churchwood, 746.  
 Hodges, *in re*, 378.  
 — v. Blagrove, 425.  
 Hodgeson v. Bussey, 149.  
 Hodgkinson v. Cooper, 224.  
 Hodgson, *ex parte*, 136.  
 Hodgson, *in re*, 380.  
 — v. Hodgson, 605.  
 Hodle v. Healey, 734.  
 Hodsdon v. Lloyd, 261.



- Hodson's settlement, 895.  
 Holder v. Durbin, 713.  
 Holderness v. Carmarthen, 820, 821.  
 Holford v. Phipps, 595.  
 Holgate v. Haworth, 359, 879.  
 Holland's case, 19, 20, 30, 629, 677, 678.  
 — v. Baker, 843, 844, 851.  
 — v. Hughes, 351, 353, 355, 792.  
 Holliday v. Overton, 141.  
 Hollingsworth v. Shakeshaft, 359.  
 Hollis's case (Lord,) 729.  
 Holloway's case, 28, 287.  
 Holloway v. Headington, 94, 99.  
 — v. Radcliffe, 819.  
 Holmes v. Bell, 849.  
 — v. Coghill, 97.  
 — v. Dring, 337, 338.  
 — v. Moore, 338.  
 Holt, *ex parte*, 772.  
 — v. Holt, 217, 222.  
 Homan v. Hague, 857.  
 Honner v. Morton, 627.  
 Honnor's Trust, 504.  
 Honor v. Honor, 148.  
 Hood v. Clapham, 810.  
 — v. Hall, 836.  
 Hooke v. Kinnear, 844.  
 Hooper v. Eyles, 204.  
 — v. Goodwin, 183.  
 — v. Smith, 477, 480.  
 Hope v. Corporation of Gloucester, 742.  
 — v. Liddell, 263, 451, 765, 775.  
 Hopkins v. Hopkins, 8, 104, 144, 156,  
 181, 247, 619.  
 — v. Myall, 596.  
 Hopkinson v. Roe, 557.  
 Horde v. Earl of Suffolk, 542.  
 Hore v. Beecher, 631.  
 Horn v. Horn, 435, 436, 648.  
 Horne v. Barton, 156, 165, 166, 167.  
 Horner v. Wheelwright, 590.  
 Horrocks v. Ledsam, 848, 872.  
 Horsfall, *in re*, 264.  
 Horsley v. Chaloner, 332.  
 — v. Fawcett, 851.  
 Horwood, *ex parte*, 277, 278.  
 — v. West, 168, 171.  
 Hoskins v. Nicholls, 857.  
 Houell v. Barnes, 530.  
 Hough's will, *in re*, 250.  
 Hougham v. Sandys, 681.  
 Houghton, *ex parte*, 199, 200, 203.  
 — v. Koenig, 274.  
 House v. Way, 808.  
 Hovenden v. Lord Annesley, 30, 719,  
 730, 732, 734, 735, 739.  
 Hovey v. Blakeman, 124, 312, 314, 315.  
 How v. Godfrey, 545, 546, 557.  
 — v. Kennett, 474.  
 — v. Whitfield, 529.  
 Howard's Estate, *in re*, 884.  
 — v. Digby, 643, 644.  
 — v. Ducane, 462.  
 — v. Hooker, 631.  
 Howard v. Jemmet, 274, 758.  
 — v. Papera, 870, 871.  
 — v. Rhodes, 583.  
 Howe v. Earl of Dartmouth, 330, 342,  
 351, 353, 355, 768, 808, 809.  
 — v. Howe, 199, 202.  
 Howel v. Howel, 148, 149.  
 Howell v. Howell, 752.  
 Howse v. Chapman, 183.  
 Hoy v. Master, 170, 172.  
 Huddleston v. Whelpdale, 402.  
 Hudson v. Hudson, 300, 316.  
 Huet v. Fletcher, 739.  
 Hughes, *ex parte*, 462, 464, 465, 466,  
 468, 469, 473.  
 — v. Evans, 180.  
 — v. Kelly, 746.  
 — v. Key, 851, 857.  
 — v. Lumley, 672.  
 — v. Stubbs, 83, 100.  
 — v. Wells, 640, 775.  
 — v. Wynne, 484, 491.  
 Hughson v. Cookson, 850.  
 Hulkes v. Barrow, 384.  
 — v. Day, 670.  
 Hulme v. Huime, 574.  
 — v. Tenant, 123, 632, 634, 641.  
 Humberstone v. Chase, 32, 845.  
 Humble v. Bill, 435, 454, 455, 459.  
 Hume v. Edwards, 797.  
 Humphreston's case, 36, 37.  
 Humphry's estate, *in re*, 895.  
 Humphrey v. Morse, 873.  
 Humphrey v. Richards, 642.  
 Humphreys v. Hollis, 844.  
 Hungate v. Hungate, 200.  
 Hungerford v. Earle, 476.  
 Hunt v. Baker, 131.  
 — v. Bateman, 747.  
 — v. Coles, 665.  
 Huntingdon (Earl of) v. The Countess,  
 721.  
 Hunton v. Davies, 739.  
 Hurly, *ex parte*, 422.  
 Husband v. Pollard, 94.  
 Huskisson v. Bridge, 171.  
 Hussey v. Grills, 615, 617.  
 — v. Markham, 233.  
 Hutcheon v. Mannington, 816.  
 Hutcheson v. Hammond, 182, 195, 196,  
 513, 517.  
 Hutchins v. Lee, 61, 177, 178.  
 Hutchinson v. Hutchinson, 526, 704.  
 — v. Massareene, 428.  
 — v. Morritt, 318.  
 — v. Stephens, 838, 888.  
 — v. Townsend, 850.  
 Hutton v. Sandys, 605.  
 — v. Simpson, 754.  
 Hylton v. Hylton, 777.  
 Hyne v. Redington, 341, 342.  
 Hynshaw v. Morpeth Corporation, 198.  
 Ibbetson v. Ibbetson, 161.

Inchiquin v. French, 77.  
 Incledon v. Northcote, 629, 631.  
 Incorporated Soc'y v. Richards, 749, 786.  
 Inge, *ex parte*, 494, 495.  
 Inglefield v. Coghlan, 122.  
 Ingliss v. Grant, 474, 479.  
 Ingram, *in re*, 381.  
 Inkersole, *ex parte*, 715.  
 Inwood v. Twyne, 513, 823, 829.  
 Irwin v. Rogers, 878.  
 Isaac v. Defriez, 706.  
 Isaacs v. Weatherstone, 869.  
 Isald v. Fitzgerald, 224.  
 Ithell v. Beane, 435.

Jackson's case, 725.  
 Jackson v. Garnett, 476.  
 — v. Haworth, 633.  
 — v. Hobhouse, 123.  
 — v. Hurlock, 190, 194.  
 — v. Jackson, 202, 351.  
 — v. Kelly, 197.  
 — v. Milfield, 839.  
 — v. Welsh, 218, 224.  
 — v. Woolley, 524.  
 Jacob v. Lucas, 301, 326, 768.  
 — v. Shepperd, 480.  
 Jacobs v. Amyatt, 122.  
 Jacomb v. Harwood, 316.  
 James, *ex parte*, 460, 461, 462, 464, 465,  
 466, 467, 468, 469, 470, 560.  
 — v. Dean, 218, 219, 220, 222, 224.  
 — v. Frearson, 237, 241, 243, 244.  
 Janaway, *in re*, 832.  
 Jarman v. Woolton, 277.  
 Jebb v. Abbott, 435.  
 Jeffereys v. Small, 202.  
 Jefferies v. Harrison, 873.  
 Jefferys v. Jefferys, 94, 99.  
 Jenkins v. Hiles, 441.  
 — v. Jenkins, 250.  
 — v. Milford, 588, 591.  
 — v. Perry, 489, 490.  
 Jenkyn v. Vaughan, 93.  
 Jenner v. Tracy, 734.  
 Jennings v. Selleck, 177, 216.  
 Jerdon v. Foster, 832.  
 Jervoise, *in re*, 377.  
 — v. The Duke of Northumberland,  
 141, 142, 144, 145, 154, 158.  
 Jesse v. Bennett, 854.  
 Jessopp v. Watson, 183, 184.  
 Jesus College v. Bloome, 753.  
 Jevon v. Bush, 20, 521.  
 Jewson v. Moulson, 629.  
 Johnes v. Lockhart, 122.  
 Johnson, *ex parte*, 343, 835.  
 — v. Arnold, 806, 807.  
 — v. Ball, 68.  
 — v. Freeth, 128.  
 — v. Holdsworth, 52, 672.  
 — v. Johnson, 184, 808.  
 — v. Kennett, 434, 435, 436, 437, 439,  
 444.

JANUARY, 1858.—5

Johnson v. Legard, 93.  
 — v. Smith, 731.  
 — v. Telford, 558.  
 Johnston v. Lloyd, 351.  
 — v. Newton, 336.  
 — v. Rowlands, 172.  
 Johnstone v. Baber, 419.  
 — v. Lumb, 642.  
 Joliffe, *ex parte*, 372.  
 Jolland (— v.) 319.  
 Jolly v. Norton, 486.  
 Jones, *in re*, 834, 883.  
 — v. Ashurst, 29.  
 — v. Croucher, 93.  
 — v. Del Rio, 852.  
 — v. Foxall, 357, 362, 364.  
 — v. Gibbons, 631.  
 — v. Goodchild, 324.  
 — v. Habbs, 77.  
 — v. Harris, 639, 641.  
 — v. How, 853.  
 — v. James, 854.  
 — v. Jones, 387, 388, 391, 399, 403,  
 607, 845.  
 — v. Kearney, 218, 223, 775.  
 — v. Langton, 147.  
 — v. Lewis, 296, 332, 345, 595, 875.  
 — v. Maggs, 118, 119.  
 — v. Matthie, 423.  
 — v. Mitchell, 182, 183, 195, 196, 197.  
 — v. Morgan, 142, 256.  
 — v. Morley, 95.  
 — v. Powell, 524.  
 — v. Powles, 725.  
 — v. Price, 435, 528.  
 — v. Reasbie, 680.  
 — v. Salter, 124, 130.  
 — v. Lord Say and Seal, 247, 248,  
 254.  
 — v. Scott, 484, 485.  
 — v. Torin, 700.  
 — v. Turberville, 139, 277, 736.  
 — v. Williams, 667.  
 Joseph's Will, *in re*, 377.  
 Josling v. Karr, 849.  
 Josselyn v. Josselyn, 597.  
 Joy v. Campbell, 139, 277, 293, 305,  
 311, 313, 725, 758, 773.  
 Joyce v. Joyce, 713.  
 Juxon v. Brian, 428.  
 Kempf v. Jones, 858.  
 Kator v. Pembroke, 725.  
 Kaye v. Powell, 585.  
 Keane v. Robarts, 226, 292, 428, 454,  
 455, 456, 458, 459, 561.  
 Kearnan v. Fitzsimon, 238.  
 Kearsley v. Woodcock, 135.  
 Keating v. Keating, 416.  
 Keble v. Thompson, 337, 771, 773.  
 Keech v. Sandford, 220, 223, 224.  
 Keeling v. Child, 723.  
 Kekewich v. Manning, 88, 91, 94.  
 — v. Marker, 538.

- Kellaway v. Johnson, 353, 766, 775, 853.  
 Kellett v. Kellett, 181.  
 Kemp v. Kemp, 10.  
 Kempton v. Packman, 218, 222.  
 Kendall v. Granger, 182.  
 — v. Micfield, 17.  
 Kenge v. Delavall, 640.  
 Kennedy v. Daly, 174, 280, 325, 721, 725, 726.  
 — v. Turnley, 544, 582.  
 Kennell v. Abbott, 193, 197.  
 Kenney v. Browne, 467.  
 Kenrick v. Lord Beauclerk, 247, 248.  
 Kensey v. Langham, 269.  
 Kensington Hastings' case, 198.  
 — v. Dollond, 121, 122, 123.  
 Kent, *in re*, 835.  
 — v. Jackson, 737, 775.  
 Kentish v. Newman, 153.  
 Keogh v. Cathcart, 633.  
 Keon v. Magawly, 844.  
 Kettle v. Hammond, 477.  
 Kettleby v. Atwood, 798.  
 Kidney v. Koussmaker, 196, 471, 488, 738, 752.  
 Kilbee v. Sneyd, 290, 292, 294, 314, 316, 336, 461, 463, 465, 777.  
 Kildare (Earl of) v. Eustace, 10, 30, 678.  
 Killett v. Killett, 179.  
 Killick, *ex parte*, 121.  
 — v. Flexney, 217, 220, 460, 465.  
 Kilpin v. Kilpin, 56, 61.  
 Kilvington v. Gray, 813.  
 Kincaid, *in re*, 370.  
 Kinder v. Miller, 204, 206.  
 Kinderley v. Jervis, 285.  
 King v. Ayloff, 28, 287.  
 —, *ex parte*, 771, 773.  
 — v. Ballett, 689.  
 — v. Boston, 205.  
 — v. Archbishop of Canterbury, 543.  
 — v. Denison, 39, 179, 180, 181.  
 — v. Leach, 836, 837, 839.  
 — v. Marissal, 649.  
 — v. Mildmay, 260.  
 — v. Mullins, 374.  
 — v. Turner, 834.  
 King's Mortgage, *in re*, 264.  
 King (The) v. St. Catharine's Hall, 495.  
 — v. Coggan, 324.  
 — v. Dacombe, 675, 677.  
 — v. De la Motte, 649, 650, 674.  
 — (The) v. Egginton, 758.  
 — v. Holland, 11, 12, 43, 132.  
 — v. Jenkins, 19.  
 — v. Lambe, 673.  
 — v. Portington, 62, 71.  
 — v. Smith, 673.  
 — v. Trussel, 136.  
 — v. Wilson, 324.  
 — v. Winstanley, 424.  
 Kingdome v. Bridges, 210, 216.  
 Kingsman v. Kingsman, 70, 74.  
 Kingston v. Lorton, 168, 731.  
 — (Earl of) v. Lady Pierepoint, 311.  
 Kirby v. Mash, 718, 875.  
 Kiricke v. Bransbey, 179.  
 Kirk v. Clark, 844, 848.  
 — v. Paulin, 122.  
 — v. Webb, 204, 206.  
 Kirkby v. Dillon, 648, 650.  
 Kirkman v. Miles, 800, 823.  
 Kirkpatrick's Trust, 348.  
 Kirwan v. Daniel, 476, 482, 483.  
 Kitchen v. Calvert, 136.  
 Knatchbull v. Fearnhead, 375, 765, 768.  
 Knight v. Boughton, 169.  
 — v. Knight, 130, 168, 169, 170, 171, 172, 173, 631.  
 — v. Majoribanks, 460, 465.  
 — v. Martin, 367.  
 — v. Pechey, 204.  
 — v. Earl of Plymouth, 343, 351.  
 — v. Selby, 141.  
 Knights v. Atkyns, 797.  
 Knott v. Cotte, 102, 172, 364, 877.  
 Knowles v. Spence, 731.  
 Knox v. Kelly, 746.  
 Knye v. Moore, 846, 848.  
 Lacey, *ex parte*, 318, 460, 461, 462, 463, 464, 465, 466, 468, 469, 473.  
 Lachton v. Adams, 372.  
 Lacon v. Lacon, 734.  
 Lad v. London City, 198.  
 Ladbroke, *ex parte*, 422.  
 Ladbroke v. Bleaden, 234.  
 Lade v. Halford, 590.  
 — v. Lade, 200.  
 Laffan, *in re*, 714.  
 Lake v. Craddock, 202.  
 — v. De Lambert, 34, 711.  
 — v. Gibson, 201, 202.  
 Lamas v. Bayly, 205.  
 Lamplugh v. Lamplugh, 39, 207, 209, 210, 212, 215.  
 Lanauze v. Malone, 357.  
 Lancashire v. Lancashire, 530, 581.  
 Lancy v. Fairechild, 798.  
 Landen v. Green, 873.  
 Lander v. Weston, 349, 357, 451.  
 Lane v. Debenham, 301, 419, 530, 536, 538.  
 — v. Dighton, 204, 206, 756, 759, 762, 763.  
 — v. Wroth, 291.  
 Langford v. Auger, 263.  
 — v. Gascoyne, 290, 293, 311, 774.  
 — v. Mahony, 561.  
 Langham v. Sandford, 59, 69, 182.  
 Langhorn v. Langhorn, 895.  
 Langley v. Fisher, 325, 721.  
 — v. Hawk, 870.  
 — v. Sneyd, 680.  
 Langstaffe v. Fenwick, 546.  
 Langston v. Ollivant, 339.

- Langton v. Astrey, 724, 726.  
 — v. Horton, 279.  
 — v. Tracy, 482.  
 Landsdowne v. Landsdowne, 753.  
 L'Apostre v. Le Plaistrier, 274, 275, 278.  
 La Terriere v. Bulmer, 814.  
 La Touche v. Dunsany, 845.  
 Lavender v. Stanton, 432.  
 Law, *in re*, 568, 837, 839.  
 — v. Bagwell, 748.  
 — v. Skinner, 476, 477.  
 Lawes v. Bennett, 808.  
 Lawless v. Shaw, 173.  
 Lawrence v. Beverley, 796.  
 — v. Bowle, 767.  
 — v. Maggs, 222, 385, 386, 396.  
 Lea v. Grunby, 643.  
 Leach v. Dean, 93.  
 — v. Leach, 168.  
 Leahy v. Dancer, 660, 661.  
 Lear v. Leggett, 135.  
 Lechmere v. Earl of Carlisle, 719, 792, 793, 798, 801, 807, 825.  
 — v. Lavie, 168, 169, 171.  
 — v. Lechmere, 797, 798, 799, 802, 805.  
 Ledwich, *in re*, 710.  
 Lee v. Alston, 753.  
 — v. Brown, 513, 517, 519.  
 — v. Delane, 368.  
 — v. Howlett, 608.  
 — v. Lee, 361.  
 — v. Prieaux, 122.  
 — v. Young, 538, 542, 543, 712.  
 Leech v. Leech, 97.  
 Leeds (Duke of) v. Amherst, 737, 743.  
 — v. Munday, 263.  
 Lees v. Sanderson, 314.  
 Lefroy v. Flood, 172, 173.  
 Legard v. Hodges, 174.  
 Legate v. Sewell, 154, 603.  
 Legg v. Goldwire, 148.  
 Leigh v. Barry, 302, 305, 310, 476.  
 Leister v. Foxcroft, 70.  
 Leith v. Irvine, 547, 556.  
 Lemaitre v. Bannister, 169, 170.  
 Leman v. Whitley, 178.  
 Lenaghan v. Smith, 850.  
 Lench v. Lench, 204, 205, 206, 756, 762, 774.  
 Le Neve v. Norris,  
 Lennard v. Curzon, 845.  
 Leonard v. Baker, 474, 475.  
 — v. Lord Sussex, 154.  
 Lesley's case, 225.  
 Leslie v. Baillie, 367.  
 — v. Birnie, 498.  
 — v. Duke of Devonshire, 182, 188, 189.  
 — v. Guthrie, 276.  
 Lethieullier v. Tracy, 251, 255, 678.  
 Lever v. Andrews, 200.  
 Levet v. Needham, 177, 179.  
 Levett's Trust, *in re*, 378.  
 Lewellin v. Cobbold, 865.  
 — v. Mackworth, 719, 729.  
 Lewes v. Lewes, 135.  
 —, *in re*, 883.  
 Lewin v. Okeley, 489.  
 Lewis, *ex parte*, 423.  
 — (Otto,) *ex parte*, 833.  
 — v. Hillman, 378.  
 — v. Lane, 46, 616.  
 — v. Lewis, 56.  
 — v. Madocks, 174, 759, 762, 763.  
 — v. Lord Zouche, 651.  
 Litchfield v. Baker, 810.  
 Liley v. Hay, 169, 698.  
 Lillia v. Airey, 633.  
 Limbrey v. Gurr, 132.  
 Limbroso v. Francia, 395.  
 Linch v. Cappy, 360.  
 Lincoln Primitive Methodist Chapel, *in re*, 718.  
 — (Countess of) v. Duke of Newcastle, 146, 152, 159, 161, 163.  
 — v. Allen, 359.  
 — v. Windsor, 320, 550.  
 — v. Wright, 306, 316, 768, 771, 775.  
 Lindon v. Sharp, 477.  
 Lindow v. Fleetwood, 164, 166.  
 Lindsell v. Thacker, 121, 264.  
 Lingard v. Bromley, 768, 846.  
 Lingen v. Sowray, 796, 818, 824.  
 Linton v. Bartlett, 480.  
 Lismore (Lord,) *in re*, 795.  
 Lister's Hospital, *in re*, 378, 785.  
 Lister v. Lister, 461, 462, 468, 471, 738.  
 Little, *ex parte*, 427, 591.  
 Littlehales v. Gascoyne, 359, 875.  
 Livesey v. Harding, 538, 542.  
 — v. Livesey, 373.  
 Lloyd v. Baldwin, 435, 436.  
 — v. Loaring, 851.  
 — v. Smith, 853.  
 — v. Spillet, 15, 57, 61, 177, 178, 179, 180, 181, 229, 878.  
 — v. Wentworth, 180.  
 — v. Williams, 369, 488, 489.  
 Lloyd v. Gregory, 36, 37.  
 Loader v. Clarke, 776.  
 Lock v. Lock, 384, 395, 402.  
 Locke v. Lomas, 434, 523.  
 Lockey v. Lockey, 730, 754, 755.  
 Lockwood v. Abdy, 226, 561.  
 Lockyer v. Savage, 135.  
 Locton v. Locton, 173.  
 Loddington v. Kime, 484.  
 Lodge v. Lyseley, 650, 655, 656.  
 Lofts, *ex parte*, 479.  
 Lomax v. Ripley, 71, 73.  
 London Bridge Act, *in re*, 427.  
 London, Brighton, &c., Railway Company, *in re*, 718, 785.  
 London Gas Light Company v. Spottiswoode, 768, 849, 854.  
 London (City of) v. Garway, 182, 183.



- London v. Richmond, 851.  
 Long v. Yonge, 852.  
 Longdon v. Simson, 114.  
 Longmore v. Broom, 359, 703.  
 Longuet v. Hockley, 273.  
 Lonsdale (Earl of) v. Beckett, 577.  
 Lord v. Bunn, 135, 450, 712.  
 — v. Godfrey, 354, 811.  
 Lorimer, *in re*, 380, 381.  
 Louch, *ex parte*, 478, 479.  
 Love v. Eade, 751, 786.  
 Love v. Gaze, 59.  
 Lovegrove, *ex parte*, 557.  
 — v. Cooper, 688.  
 Loveridge v. Cooper, 605, 607.  
 Lovett's Exhibition, *in re*, 713.  
 Low, *ex parte*, 479.  
 — v. Carter, 765.  
 Lowe v. Morgan, 842.  
 Lowes v. Hackward, 196.  
 Lowry v. Fulton, 232, 235, 241, 242,  
 243, 289.  
 Lowson v. Copeland, 328, 365, 878.  
 Lowther v. Carlton, 726.  
 Loyd v. Griffith, 427.  
 — v. Read, 200, 211, 212, 214, 216.  
 Lucas, *ex parte*, 380.  
 Luckin v. Rushworth, 217, 224.  
 Ludlow, *ex parte*, 828.  
 — (Corporation of) v. Greenhouse,  
 723, 777, 779, 780, 781, 782, 783.  
 Lumb v. Milnes, 122.  
 Lunn's Charity, *in re*, 838.  
 Lupton v. White, 337.  
 Lushington, *ex parte*, 505.  
 Lush's Estate, *in re*, 885.  
 Lydiatt v. Foach, 503, 507.  
 Lyne, *ex parte*, 299.  
 — v. —, 122.  
 Lyon v. Baker, 320, 550.  
 Lyse v. Kingdon, 343, 767, 875.  
 Lyster v. Burroughs, 174.  
 — v. Dolland, 202, 665.  
 Maberly v. Turton, 517, 697.  
 M'Carthy v. Daunt, 747.  
 — v. Decaix, 778.  
 Macartney v. Blackwood, 466, 752.  
 Macauley v. Philips, 629.  
 M'Donald v. Bryce, 116, 118.  
 — v. Hanson, 421.  
 M'Donel v. Hesilrige, 93.  
 Macdonald v. Walker, 265.  
 Macdonnell v. Harding, 333, 775.  
 Mace v. Cadell, 278.  
 Macey v. Shurmer, 168.  
 Mackenzie v. Makenzie, 476, 891, 905.  
 Mackie v. Mackie, 815.  
 M'Key, *ex parte*, 518.  
 Mackinnon v. Stewart, 476, 481, 666.  
 Mackreth v. Symmons, 725.  
 M'Clelland v. Shaw, 183, 196.  
 M'Gachen v. Dew, 326, 771, 849.  
 M'Hardy v. Hitchcock, 864, 866.  
 Macleod v. Annesley, 345, 349.  
 M'Leod v. Drummond, 454, 455, 456,  
 457, 458, 459.  
 Macnab v. Whitbread, 168, 170.  
 Macnamara v. Jones, 556.  
 Macpherson v. Macpherson, 814.  
 Maddison v. Andrew, 543.  
 Madoc v. Jackson, 700.  
 Madox v. Jackson, 848.  
 Madge v. Riley, 839.  
 Magawley's Trust, *in re*, 93.  
 Maggeridge v. Grey, 710.  
 Maguire v. Scully, 147, 149.  
 Mahon v. Savage, 542, 699, 706.  
 — (Lord) v. Earl Stanhope, 418.  
 Maire, *ex parte*, 835.  
 Maitland v. Bateman, 329.  
 Major v. Lansley, 645, 694.  
 Malcolm v. O'Callaghan, 557.  
 Malim v. Barker, 168.  
 — v. Keighley, 168, 169, 171.  
 Mallabar v. Mallabar, 181, 196, 197.  
 Malone v. Geraghty, 718, 848.  
 — v. O'Conner, 168, 170.  
 Malzy v. Edge, 240, 244.  
 Manchester (Mayor of) v. Manchester  
 (Overseers of), 272.  
 Manchester New College, *in re*, 781, 782,  
 783.  
 Mangles v. Dixon, 729.  
 Manifold, *in re*, 837.  
 Manners v. Furze, 869.  
 Manning v. Thesiger, 849, 851.  
 Manning's Trust, 895.  
 Mansell v. Mansell, 405, 406, 724, 725,  
 764.  
 — v. Vaughan, 299, 528, 536.  
 Mansfield (Earl of) v. Ogle, 749.  
 — v. Shaw, 870.  
 Mant v. Leith, 345.  
 Maplett v. Pocock, 873.  
 Mapp v. Elcock, 179.  
 Mara v. Manning, 640, 777.  
 March v. Russell, 765, 777.  
 Margetts v. Barringer, 122.  
 Marker v. Marker, 778.  
 Markwell's Legacy, *in re*, 378, 785.  
 Marlborough (Duke of) v. Lord Godol-  
 phin, 701, 703.  
 — v. St. John, 514.  
 Marlow v. Pitfield, 37, 485.  
 — v. Smith, 262, 279.  
 Marriot v. Marriot, 70.  
 Marriott v. Kinnersley, 306, 764.  
 — v. Turner, 183.  
 Marryat v. Marryat, 865.  
 — v. Townley, 144, 149, 152, 153,  
 156, 164.  
 — v. The Bank, 33.  
 Marsh (— v.) 823.  
 —, *ex parte*, 277.  
 — v. Hunter, 341, 356.  
 Marshall, *ex parte*, 263, 715.  
 — v. Blew, 594.



- Marshall v. Bousfield, 153, 154.  
 — v. Bremner, 810.  
 — v. Holloway, 111, 191, 549, 554.  
 — v. Sladden, 418.  
 Martin, *ex parte*, 277.  
 — v. Hooper, 487.  
 — v. Margham, 136.  
 — v. Martin, 51, 53, 153, 318.  
 — v. Persse, 235, 874.  
 — v. Sedgwick, 613.  
 Marwood v. Turner, 604.  
 Mary England, *in re*, 517.  
 Masham v. Harding, 489.  
 Mason v. Bogg, 485.  
 — v. Day, 831.  
 — v. Limbury, 167.  
 — v. Mason,  
 Massam v. Harding, 690.  
 Masselin's Will, *in re*, 378.  
 Massey, *ex parte*, 277.  
 — v. Banner, 296, 332, 333.  
 — v. Parker, 121, 122, 124.  
 Master v. De Croismar, 43, 153.  
 — v. Fuller, 635.  
 Mather v. Norton, 439.  
 — v. Priestman, 422.  
 — v. Thomas, 265.  
 Mathison v. Clarke, 319, 320, 546.  
 Matson v. Swift, 807.  
 Matthew v. Hanbury, 138.  
 Matthews v. Bagshaw, 547.  
 Matthew v. Brise, 333, 342, 352, 753.  
 — v. Gabb, 613, 614.  
 Matthe v. Edwards, 414, 423.  
 Maugham v. Mason, 183, 195, 196.  
 Maundrell v. Maundrell, 191.  
 Mavor v. Davenport, 238.  
 Maxwell v. Ashe, 223.  
 — v. Wettenhall, 489, 490.  
 May v. Selby, 851.  
 — v. Taylor, 249, 269.  
 Maynard's Settlement, *in re*, 890.  
 Maynwaring v. Maynwaring, 822, 823.  
 Mead v. Lord Orrery, 454, 455, 456, 459,  
 460, 725.  
 Meader v. McCreedy, 362.  
 Meaghan, *in re*, 136.  
 Medley v. Horton, 130.  
 — v. Martin, 279.  
 Medlicott v. O'Donel, 732, 734.  
 Meek v. Kettlewell, 81, 83, 84, 88, 91,  
 92, 93, 94.  
 Meggison v. Moore, 168, 172.  
 Meggott v. Meggott, 755.  
 Megod's case, 8, 20.  
 Mehrtens v. Andrews, 353, 743.  
 Meinertzhagen v. Davis, 40, 576, 577.  
 Melland v. Gray, 363.  
 Melling v. Leak, 586, 590, 748.  
 Mennard v. Welford, 574.  
 McHardy v. Hitchcock, 864, 866.  
 Meredith v. Heneage, 167, 168, 169, 170,  
 171, 172.  
 Merest v. James, 16.  
 Merry, *ex parte*, 836.  
 Mertins v. Jolliffe, 726.  
 Mestaer v. Gillespie, 277.  
 Metcalf v. Scholey, 665.  
 Metham v. Devon, 67, 77.  
 Meure v. Meure, 153, 156.  
 Meux v. Bell, 608, 610, 611, 612.  
 — v. Howell, 474, 475.  
 — v. Maltby, 851.  
 Meyer v. Simonsen, 816.  
 — v. Montrieu, 867.  
 Meyrick's Trust, *in re*, 888.  
 McFadden v. Jenkyns, 61, 91.  
 Middleton v. Dodswell, 522, 870, 871.  
 — v. Losh, 120.  
 — v. Reay, 544, 582.  
 — v. Spicer, 42, 198, 318, 324.  
 Milbank v. Collier, 851.  
 Miles v. Durnford, 138, 454, 456.  
 Millfield, *in re*, 834, 837, 839.  
 Millard's case, 725.  
 — v. Eyre, 711.  
 Miller's case, 19.  
 — v. Huddleston, 853.  
 — v. Knight, 839.  
 — v. Priddon, 578, 581.  
 — v. Race, 274, 275, 757, 758.  
 Milles v. Milles, 387, 392.  
 Milligan v. Mitchell, 497, 723.  
 Mills v. Mills, 341, 353, 811.  
 — v. Osborne, 338.  
 Milnes v. Cowley, 763.  
 Milsington v. Mulgrave, 386.  
 Milsintown v. Earl of Portmore, 387.  
 Miltown v. Trimbleston, 901.  
 Minchin v. Nance, 174.  
 Mitchell v. Nixon, 572.  
 Mitchelson v. Piper, 524.  
 Mitford, *ex parte*, 771.  
 — v. Mitford, 276, 629, 631.  
 Mogg v. Baker, 475.  
 — v. Hodges, 183, 189.  
 Moggridge v. Thackwell, 693.  
 Mohun v. Mohun, 872, 874.  
 Molony, *in re*, 838.  
 — v. Kennedy, 642.  
 — v. L'Estrange, 472.  
 Molton v. Camroux, 27.  
 Money, *in re*, 378.  
 Montefiore, *in re*, 772.  
 Montford (Lord) v. Lord Cadogan, 238,  
 241, 385, 387, 392, 402, 766, 768, 769,  
 770, 774.  
 Montgomerie v. Bath (Marquis of) 842.  
 Montgomery v. Johnson, 235, 243.  
 Montmorency v. Devereux, 472.  
 Monypenny v. Bristow, 751, 753, 754,  
 756.  
 Moody, *ex parte*, 772.  
 — v. *in re*, 834.  
 — v. Matthews, 223.  
 — v. Walter, 405, 408, 409, 910.  
 Moon v. Blake, 847.  
 Moons v. De Bernales, 361, 766, 771, 772.

- Moor v. Black, 755.  
 Moorcroft v. Dowding, 63, 290.  
 Moore, *ex parte*, 277.  
 — v. Cleghorn, 141.  
 — v. Frowd, 320, 549, 553, 874.  
 — v. Hussey, 34.  
 — v. Moore, 130, 643.  
 — v. Scarborough (Earl of), 643.  
 — v. Vinten, 837, 847.  
 Morden College case, 502.  
 Morgan, *ex parte*, 263, 465, 737.  
 Morgan v. Horseman, 480.  
 — v. Morgan, 116, 119, 623, 624, 753.  
 — v. Sherrard, 686.  
 Moriarty v. Martin, 167.  
 Morice v. Bishop of Durham, 169, 181.  
 Morison v. Morison, 319, 553.  
 Morley's Trust, *in re*, 263, 264.  
 Morley v. Bird, 201.  
 — v. Lord Hawke, 774.  
 — v. Morley, 332.  
 Mornington, *ex parte*, 894.  
 Morony v. Vincent, 873.  
 Morret v. Paske, 318.  
 Morrice v. Bank of England, 689.  
 Morrill v. Lawson, 847, 849.  
 Morris v. Preston, 573.  
 — v. Lavie, 771.  
 Morse v. Faulkner, 52.  
 — v. Langham, 484.  
 — v. Royal, 461, 463, 464, 470, 471, 472, 473, 734.  
 Mortimer v. Davies, 200.  
 — v. Ireland, 266.  
 — v. Watts, 386, 543.  
 Mortlock v. Buller, 415, 418.  
 Morton v. Tewart, 63, 64.  
 Moseley v. Moseley, 696, 707.  
 Moses v. Levi, 314, 315.  
 Mosley v. Ward, 357, 361, 875, 878, 879.  
 Mott v. Buxton, 247, 269.  
 Mount, *in re*, 835.  
 Mousley v. Carr, 362, 363, 876.  
 Moyle v. Moyle, 232, 317, 336, 351.  
 Moyle v. Gyles, 201.  
 M'Queen v. Farquhar, 726.  
 Muckleston v. Brown, 67, 68, 71, 72, 73, 138, 178, 182, 773.  
 Mucklow v. Fuller, 240, 318.  
 Mulcahy v. Kennedy, 734.  
 Mulvany v. Dillon, 217, 220, 224, 461, 465.  
 Mumma v. Mumma, 39, 209, 212.  
 Munch v. Cockerell, 293, 362, 766, 778, 845, 848.  
 Mundy v. Mundy, 755.  
 Murless v. Franklin, 200, 207, 209, 214, 215.  
 Murphy, *in re*, 136.  
 Murray v. Barlee, 634, 635, 636, 641.  
 — v. Palmer, 472.  
 — v. Pinkett, 756.  
 Murrell v. Cox, 310, 315.  
 Myler v. Fitzpatrick, 226, 561, 562.  
 Nab v. Nab, 61, 63, 64, 71.  
 Nail v. Punter, 774.  
 Nairn v. Majoribanks, 514.  
 Nantes v. Corrock, 629, 641, 642.  
 Napier v. Napier, 369.  
 Nash v. Coates, 253, 254.  
 — v. Dillon, 873.  
 — v. Preston, 9, 260.  
 — v. Smith, 179.  
 Naylor v. Arnitt, 522.  
 — v. Winch, 460, 465.  
 Neale v. Davies, 325.  
 Neate v. Duke of Marlborough, 650, 652, 658, 662, 663.  
 Needham, *in re*, 233, 237.  
 Needler's case, 774.  
 — v. Bishop of Winchester, 34.  
 Neeves v. Burrage, 524.  
 Nelson v. Bridport, 54, 55.  
 Nesbitt v. Tredennick, 217, 218, 222.  
 Nettleton v. Stephenson, 118.  
 Nevarre v. Rutton, 729.  
 Nevil v. Saunders, 247.  
 New v. Jones, 320, 546, 549, 550, 557.  
 Newburgh v. Bickerstaffe, 753, 755.  
 — v. Newburgh, 71, 75.  
 Newcastle (Duke of) v. Countess of Lincoln, 146, 150.  
 Newcomen v. Hassard, 639, 645, 646.  
 Newlands v. Paynter, 44, 121, 125, 131.  
 Newman v. Jones, 774.  
 — v. Warner, 533, 712.  
 Newport's case, 828.  
 Newton v. Askew, 92, 94, 599.  
 — v. Bennet, 359, 360, 488, 489, 876, 877.  
 — v. Chantler, 477, 480.  
 — v. Earl of Egmont, 852.  
 — v. Pelham, 74.  
 — v. Preston, 204.  
 — Charity, *in re*, 782.  
 Nicholls, *in re*, 713.  
 — v. Crisp, 183.  
 Nicholson v. Falkiner, 857, 858.  
 — v. Tutin, 483.  
 Nickolson v. Knowles, 226.  
 Nicloson v. Wordsworth, 233, 236, 237.  
 Niel v. Morley, 27.  
 Nightingale's Charity, 718.  
 — v. Earl Ferrers, 37.  
 — v. Lawson, 383, 384, 396.  
 Noad v. Backhouse, 870.  
 Noble v. Fry, 626.  
 — v. Meymott, 233, 567, 572, 851.  
 Noel v. Lord Henley, 190, 813.  
 — v. Jevon, 11, 260, 279.  
 Nokes v. Seppings, 867.  
 Norbury v. Calbeck, 878.  
 — v. Norbury, 343.  
 Norcliff v. Worsley, 603.  
 Norden v. James, 479, 497.  
 Norfolk's case (Duke of), 104, 131, 132, 681, 751.  
 Norfolk (Duke of) v. Browne, 177.

- Norris v. Le Neve, 224, 225.  
 — v. Norris, 349, 873, 874.  
 — v. Wright, 340, 345, 350, 356, 357,  
 853, 858.  
 North v. Champernoon, 602, 603.  
 — v. Crompton, 181.  
 — v. Williams, 602, 603, 604.  
 Norton v. Frecker, 754.  
 — v. Pritchard, 580.  
 — v. Turvill, 37, 633, 642, 729.  
 Norway v. Norway, 234, 874.  
 Nowlan v. Nelligan, 168.  
 Nugent v. Gifford, 454, 455, 456, 457,  
 459.  
 Nunn v. Wilsmore, 474, 475, 477, 487.  
 Nurton v. Nurton, 454, 455.  
  
 Oakes v. Strachey, 808, 811.  
 Oakley v. Young, 252.  
 Oates v. Cooke, 250.  
 O'Brien v. O'Brien, 356, 357.  
 O'Callaghan v. Cooper, 876.  
 O'Connor v. Spaight, 753.  
 Odell, *in re*, 568.  
 O'Dowda v. O'Dowda, 659.  
 O'Fallon v. Dillon, 658, 659.  
 O'Ferrall v. O'Ferrall, 384.  
 Oglander v. Oglander, 713.  
 Ogle v. Cook, 183.  
 O'Gorman v. Comyn, 658, 659, 660.  
 O'Hara v. O'Neil, 63.  
 O'Herlihy v. Hedges, 318.  
 Oke v. Heath, 195, 197.  
 O'Keefe v. Calthorpe, 712.  
 O'Kelly v. Glenny, 734, 739.  
 Oldham v. Hughes, 798, 816, 817.  
 — v. Litchford, 71.  
 Oliver v. Court, 317, 415, 421, 424, 467,  
 470, 471.  
 Omerod v. Hardman, 428.  
 Ommaney, *ex parte*, 835, 901.  
 O'Neill v. Lucas, 118.  
 Onslow's (Speaker) case, 820.  
 Onslow v. Lord Londesborough, 425.  
 — v. Wallis, 322, 323, 596.  
 O'Reilly v. Alderson, 574, 710.  
 Ord v. Noel, 414, 415, 422, 423, 424.  
 — v. White, 729.  
 Orgill, *ex parte*, 715.  
 Ormonde (Marquis of) v. Kynersley, 225.  
 Ormsby, *in re*, 545, 546, 557.  
 Orr v. Newton, 241, 330.  
 Orrett v. Corser, 773.  
 Orrok v. Binney, 458.  
 Osborne (— v.) 373, 583.  
 — v. Fallows, 842.  
 — v. Foreman, 853.  
 Osmond v. Fitzroy, 777.  
 Oswald v. Thompson, 478.  
 Ottley v. Browne, 139, 773.  
 — v. Gilby, 599, 873.  
 Otway v. Hudson, 795.  
 — v. Wing, 633.  
 Ousley v. Anstruther, 356.  
  
 Overton v. Bannister, 39, 373.  
 Owen v. Aprice, 755.  
 — v. Body, 476.  
 — v. Foulkes, 461.  
 — v. Williams, 217, 218, 220, 224.  
 Owens v. Dickenson, 635, 638, 642.  
 Oxenden v. Lord Compton, 798, 825,  
 826, 827, 828, 829, 830.  
 Oxford (University of) v. Richardson,  
 753.  
 Oxley, *ex parte*, 135.  
  
 Packer v. Wyndham, 629, 631.  
 Padbury v. Clark, 816, 823.  
 Paddington Charities, *in re*, 106.  
 Page, *ex parte*, 716.  
 — v. Adam, 435, 437, 440, 444.  
 — v. Broom, 425.  
 — v. Cooper, 416, 417.  
 — v. Leapingwell, 182, 183, 195.  
 — v. Way, 134.  
 Paine v. Meller, 174, 175.  
 Painter, *ex parte*, 715, 716.  
 Palmer, *ex parte*, 715.  
 — v. Carlisle, (— ord)  
 — v. Jones, 766.  
 — v. Mitchell,  
 — v. Simmonds, 168, 171.  
 — v. Young, 218.  
 Palmes v. Danby, 830.  
 Pannell v. Hurley, 226, 227, 459, 562.  
 Pantan v. Pantan, 337.  
 Papillon v. Voice, 144, 154, 562.  
 Parke's Charity, 503, 781, 782.  
 Parker v. Bloxam, 319.  
 — v. Brooke, 121, 643, 694, 727, 728.  
 — v. Carter, 586, 617, 622, 623.  
 Parkes v. White, 120, 123, 124, 406,  
 460, 462, 470, 640, 643, 774.  
 Parkinson's Trust, *in re*, 169.  
 Parnham v. Hurst, 276.  
 Parr v. Attorney-General, 31.  
 Parrot v. Treby, 877.  
 Parrott v. Palmer, 753.  
 Parry's Trust, *in re*, 381.  
 Parry, *in re*, 377.  
 — v. Warrington, 813.  
 Parsons v. Baker, 168.  
 — v. Potter, 235.  
 Partridge v. Pawlet, 201.  
 Passingham v. Selby, 489.  
 — v. Sherborne, 505, 579.  
 Pattinson, *in re*, 883, 906.  
 Pattison v. Hawkesworth, 735.  
 Paul v. Birch, 274.  
 — v. Compton, 167, 168, 172.  
 Pawlett, *ex parte*, 348.  
 — v. Attorney-General, 11, 30, 103,  
 260, 279, 280, 284, 285, 677, 725.  
 Payne, *ex parte*, 168, 169, 836.  
 — v. Barker, 595.  
 — v. Compton, 725.  
 Peacham v. Daw, 867.  
 Peachy v. Duke of Somerset, 283.

- Peacock v. Monk, 633, 643, 645.  
 Peake v. Ledger, 851.  
 — v. Penlington, 164.  
 Pearce v. Gardner, 416, 527.  
 — v. Newlyn, 725.  
 — v. Slocombe, 489, 490.  
 Pearce v. Baron, 165.  
 — v. Green, 599.  
 Pearson v. Belchier, 739.  
 — v. The Bank of England, 33.  
 — v. Lane, 598, 821.  
 — v. Pulley, 731, 734.  
 Peart, *ex parte*, 381.  
 Pease, *ex parte*, 278.  
 Peat v. Crane, 351.  
 Peatfield v. Benn, 582.  
 Pechel v. Fowler, 415, 422, 723.  
 Peers v. Ceeley, 366, 558.  
 Pelly v. Maddin, 200.  
 Penfold v. Bouch, 181, 595, 875.  
 Penn v. Lord Baltimore, 10, 30, 31, 47, 50.  
 Penne v. Peacock, 526.  
 Pennell v. Deffell, 333, 760.  
 — v. Home, 742.  
 Pennefather, *in re*, 713.  
 Penny v. Pretor, 835.  
 — v. Turner, 703, 704.  
 Pentland v. Stokes, 720.  
 Pepper v. Tuckey, 712, 838.  
 Peppercorn v. Wayman, 237.  
 Perkins v. Baynton, 359, 361.  
 — v. Bradley, 28.  
 Perrott v. Perrott, 408.  
 Perry (in the goods of) 234.  
 — v. Knott, 10, 16, 17, 768, 845, 846, 850, 853, 854.  
 — v. Phelps, 762.  
 Persse v. Persse, 94.  
 Petit v. Smith, 20.  
 Petre v. Bruin, 488.  
 — v. Petre, 745, 746.  
 Petteward v. Prescott, 752.  
 Petty v. Styward, 201.  
 Peyton v. Bury, 299, 536.  
 — v. M'Dermott, 835.  
 Phayre v. Peree, 725.  
 Phelps, *ex parte*, 711.  
 Phene v. Gillan, 563.  
 Philips v. Brydges, 10, 16, 17, 600, 604, 615, 792.  
 — v. Bury, 492.  
 — v. Everard, 425.  
 — v. Phillips, 373.  
 Phillipott's Charity, 781.  
 Phillippo v. Munnings, 243, 356, 729, 763, 867.  
 Phillips's Charity, *in re*, 781.  
 — v. Buckingham, (Duke of) 850.  
 — *ex parte*, 825, 826, 827, 829, 830.  
 — v. Brydges, 142.  
 — v. Eastwood, 516.  
 — v. Garth, 701, 707.  
 — v. Phillips, 181, 183, 197.  
 Phillipson v. Gatty, 345, 356, 357, 737, 849.  
 Phillpotts v. Phillpotts, 138.  
 Philpot, *ex parte*, 479.  
 Phipps v. Lord Ennismore, 136.  
 — v. Kelynge, 111.  
 Pickering v. Pickering, 353, 354, 811, 812.  
 — v. Lord Stamford, 734, 737, 739.  
 — v. Vowles, 217, 218, 222, 263, 386.  
 Pickett v. Loggon, 752.  
 Pickstock v. Lyster, 474, 475, 476.  
 Pickup v. Atkinson, 810.  
 Pierce v. Scott, 429, 458.  
 Piercy v. Roberts, 133.  
 Pierson v. Garnet, 167, 168, 169, 170, 696.  
 — v. Shore, 217, 831.  
 Piety v. Stace, 357, 359, 361, 875.  
 Pike v. White, 45.  
 Pilkington v. Bayley, 57.  
 — v. Boughey, 168, 182.  
 Pimm v. Insall, 285.  
 Pink v. De Thuisey, 538.  
 Pitt v. Bonner, 767, 768.  
 Pitt or Pit v. Hunt, 12, 631, 648.  
 — v. Pelham, 173, 694.  
 Pitts v. Edelf, 726.  
 Plasket v. Lord Dillon, 648, 650, 651.  
 Platel v. Craddock, 326.  
 Platt v. Sprigg, 407.  
 Playfair v. Cooper, 748.  
 Playters v. Abbott, 390, 397, 403.  
 Plenty v. West, 575.  
 Plucknett v. Kirke, 650, 684.  
 Plunket v. Penson, 488, 684, 685, 689, 690.  
 Plunkett, *ex parte*, 713.  
 Plyer's Trust, *in re*, 885, 896.  
 Plymouth v. Hickman, 64.  
 Pocock v. Reddington, 338, 343, 357, 875.  
 Podmore v. Gunning, 77.  
 Poland v. Glyn, 480.  
 Pole v. Pole, 207, 210, 211, 215.  
 Pollard, *ex parte*, 48.  
 — v. Downes, 562.  
 Pollexfen v. Moore, 234.  
 Polley v. Seymour, 806, 808.  
 Pomfret (Earl of) v. Lord Windsor, 325, 729, 735, 739.  
 Pool Bathurst's Estate, *in re*, 577.  
 Poole v. Pass, 595, 596.  
 — v. Franks, 871.  
 Pooley v. Ray, 740.  
 Poor v. Mial, 193.  
 Pope v. Gwyn, 488.  
 — v. Pope, 170, 171.  
 — v. Whitcombe, 701, 704, 706, 707.  
 Porey v. Juxon, 8.  
 Porter's Trust, *in re*, 895.  
 — v. Watts, 583.  
 — v. Walker, 477.  
 Portington's (Lady) case, 53.



- Portlock v. Gardner, 226, 319, 562, 730.  
 Portsmouth (Earl of) v. Fellows, 711.  
 Potter v. Chapman, 22, 536, 538, 543.  
 Poulson, *ex parte*, 772, 773.  
 Poulton, *in re*, 834.  
 Povey v. Juxon, 59.  
 Powdrell v. Jones, 627.  
 Powel v. Price, 149, 725.  
 Powell's case, 487.  
 Powell v. Cleaver, 353, 808.  
 — v. Evans, 328, 351.  
 — v. Hankey, 643.  
 — v. Matthews, 882, 885.  
 — v. Merrett, 325.  
 — v. Wright, 851.  
 Powerscourt v. Powerscourt, 542.  
 Powles v. Page, 613.  
 Powlett (Earl) v. Herbert, 317, 875.  
 Powys v. Blagrave, 514.  
 — v. Mansfield, 216.  
 Pranker v. Pranker, 199, 214.  
 Pratt v. Colt, 12, 650, 682.  
 — v. Sladden, 181.  
 Prendergast v. Eyre, 835, 836, 839.  
 Prentice v. Prentice, 856.  
 Preston v. Grand Collier Dock Company, 851.  
 Prevost v. Clarke, 167.  
 Price v. Berrington, 27.  
 — v. Blakemore, 759, 762, 763.  
 — v. Byrn, 460, 470.  
 — v. Dewhurst, 835.  
 — v. Loaden, 562.  
 — v. Oneby, 832.  
 — v. Price, 81, 84.  
 Prichard v. Ames, 121, 122, 694.  
 Priddy v. Rose, 771.  
 Pride v. Fooks, 118, 318, 344, 764, 876.  
 Prideaux, *in re*, 835.  
 Primrose v. Bromley, 238.  
 Prince v. Heylin, 735.  
 Pring, *ex parte*, 183.  
 — v. Pring, 74, 76.  
 Prior's (Lady) Charity, *in re*, 505.  
 — v. Horniblow, 744.  
 — v. Penpraze, 279.  
 Pritchard v. Langher, 330.  
 Propert's purchase, *in re*, 882.  
 Projected Railway, *ex parte*, 352.  
 Prosser, *ex parte*, 835.  
 Proudfoot v. Hume, 866, 867.  
 Prowse v. Abingdon, 489.  
 Prytharch v. Havard, 839.  
 Pugh, *ex parte*, 370.  
 — *in re*, 634.  
 — v. Vaughan, 589.  
 Puleston v. Puleston, 67.  
 Pullen v. Middleton, 46.  
 Pulling v. Tucker, 480.  
 Pulteney v. Darlington, 758, 792, 796, 800, 802, 803, 805, 807, 821, 823, 824, 825.  
 — v. Warren, 751, 753, 754, 755.  
 Pulvertoft v. Pulvertoft, 81, 84, 93, 94, 98.  
 Purdew v. Jackson, 627, 629, 630.  
 Purefoy v. Purefoy, 484.  
 Pushman v. Filliter, 167, 168, 169, 171.  
 Pybus v. Smith, 123, 766.  
 Pye, *ex parte*, 65, 82.  
 — v. Gorge, 405, 406, 724.  
 Pyncent v. Pyncent, 849.  
 Pym v. Lockyer, 136.  
 Quarrell v. Beckford, 559.  
 The Queen v. Abrahams, 19.  
 — v. Harrogate Commissioners, 272.  
 — v. Norfolk Commissioners of Sewers, 516.  
 — v. Pitt, 836.  
 — v. Sterry, 271.  
 — v. Trustees of Orton Vicarage, 19.  
 Queen's College, Cambridge, *in re*, 495.  
 Quick v. Staines, 278.  
 Raby v. Ridehalgh, 340, 344, 771.  
 Rachfield v. Careless, 59, 69, 182, 262.  
 Rackham v. Siddall, 245, 247, 258, 263, 765.  
 Radcliffe v. Eccles, 835.  
 Radnor (Lady) v. Rotherham, 621.  
 Raffety v. King, 733.  
 Ramsden v. Langley, 558.  
 Randal v. Hearle, 168.  
 — v. Randal, 94.  
 Randall's Will, *in re*, 890.  
 — v. Bookey, 181, 183.  
 — v. Errington, 460, 461, 463, 469, 470, 471, 737, 778.  
 — v. Russell, 225.  
 Raphael v. Bank of England, 758.  
 — v. Boehm, 356, 359, 364, 766, 877.  
 Rashley v. Masters, 796, 872, 873.  
 Rastel v. Hutchinson, 205.  
 Ratcliff v. Graves, 360.  
 Ratcliffe v. Winch, 521.  
 Ravenscroft v. Frisby, 745.  
 Ravenshaw v. Hollier, 174.  
 Rawe v. Chichester, 218, 219, 220, 222, 224.  
 Rawleigh's case, 214.  
 Raworth v. Parker, 486, 487.  
 Ray, *ex parte*, 121, 122.  
 — v. Adams, 168, 696.  
 Raymond v. Webb, 414.  
 Rayner v. Mowbray, 701, 707.  
 Rea v. Williams, 201.  
 Reach v. Kennegall, 71, 877.  
 Read v. Prest, 856.  
 — v. Snell, 144, 149, 155.  
 — v. Truelove, 290.  
 Reade v. Reade, 751, 755, 756.  
 — v. Sparkes, 591, 857, 858.  
 Reading Dispensary, *in re*, 782.  
 Redington v. Redington, 200, 203, 207, 211, 212, 214, 215, 216.  
 Reece v. Trye, 325, 721.



- Reech v. Kennegal, 71, 877.  
 Reed v. O'Brien, 89, 848.  
 Rees, *ex parte*, 781.  
 — v. Keith, 631.  
 — v. Williams, 341, 356.  
 Reeve v. Attorney-General, 30, 31, 677.  
 — v. Parkins, 723.  
 Reeves v. Creswick, 387, 393, 400.  
 Regina v. Shee, 272.  
 Reid v. Thompson, 596.  
 Remington, *in re*, 715.  
 Rendlesham v. Meux, 417.  
 Renvoize v. Cooper, 265.  
 Retford, West (Church lands) *in re*, 781.  
 Revell v. Hussey, 175.  
 Rex v. Blunt, 673.  
 — v. Bulkeley, 673.  
 — v. Flockwood, 301.  
 — v. Lexdale, 575.  
 — v. Tippin, 287.  
 Reynolds, *ex parte*, 465, 468, 469, 711.  
 — v. Jones, 288, 756.  
 — v. Messing, 621.  
 Rice v. Rice, 606, 729.  
 Rich v. Cockell, 694.  
 Richard's Trust, 897.  
 — v. Perkins, 870.  
 Richardson, *ex parte*, 278.  
 — v. Bank of England, 865, 866, 867, 868.  
 — v. Chapman, 168, 543, 708.  
 — v. Horton, 285.  
 — v. Hulbert, 234, 847.  
 — v. Jenkins, 239, 692, 767.  
 — v. Larpent, 852.  
 — v. Moore, 392.  
 Riddle v. Emerson, 61.  
 Rider v. Kidder, 33, 199, 200, 205, 207, 216.  
 — v. Rider, 207, 649.  
 Ridgeway, *ex parte*, 343.  
 Ridgway v. Woodhouse, 193.  
 Ridout v. Lewis, 643.  
 Rigby, *ex parte*, 297.  
 Rigden v. Vallier, 152, 201, 202.  
 Riggs v. Sikes, 202, 833.  
 Right v. Smith, 248.  
 Ripley v. Waterworth, 33, 189.  
 Rippon v. Norton, 134.  
 Rivet's case, 272.  
 Roberts (— v.) 544, 583.  
 Roberdeau v. Rous, 47, 48, 753.  
 Roberts v. Dixwell, 142, 144, 155, 157, 251, 623, 681.  
 — v. Kingsley, 148.  
 — v. Lloyd, 87, 605.  
 — v. Spicer, 122, 694.  
 — v. Tunstall, 470, 471, 473, 737, 742.  
 Robertson v. Skelton, 174.  
 Robinson v. Comyns or Cuming, 16, 247, 604.  
 — v. Grey, 246, 247, 254.  
 — v. Hedger, 657.  
 Robinson v. Knight, 187, 805.  
 — v. Lowater, 435, 441, 445, 446, 447.  
 — v. Pett, 232, 318, 319, 545, 551, 553.  
 — v. Ridley, 466, 468.  
 — v. Robinson, 341, 346, 350, 355, 356, 361, 363.  
 — v. Smith, 168.  
 — v. Taylor, 179, 180, 183.  
 — v. Wheelwright, 121.  
 — v. Wood, 837.  
 Rochard v. Fulton, 608.  
 Rochdale Canal Co. v. King, 743.  
 Roche, *in re*, 572, 573, 574, 711, 713.  
 — v. O'Brien, 471, 472, 473, 734, 737, 738, 778.  
 — v. Hart, 873.  
 Rochford v. Fitzmaurice, 147, 148, 149, 154, 156, 157, 164, 253.  
 — v. Hackman, 135, 873.  
 Rocke v. Hart, 359, 361, 363.  
 — v. Rocke, 597.  
 Rodgers v. Marshall, 97, 99.  
 Roe v. Fludd, 195.  
 — v. Reade, 263, 591.  
 Rogers v. Linton, 849.  
 — v. Rogers, 180, 181, 183, 184, 865.  
 — v. Skillicorne, 434, 435, 436.  
 Rolle's Charity, *in re*, 718.  
 Rolleston v. Morton, 662.  
 Rollfe v. Budder, 121, 694.  
 Rome v. Young, 485.  
 Rook v. Worth, 823, 829, 830, 838.  
 Roper v. Holland, 19.  
 — v. Radcliffe, 179.  
 Rose, *ex parte*, 613.  
 — v. Cunningham, 69.  
 — v. Haycock, 478.  
 Ross's Trust, *in re*, 123, 124, 632.  
 —, *in re*, 381.  
 — v. Ross, 865.  
 Rothwell v. Rothwell, 867.  
 Round v. Hyde, 480.  
 Roupe v. Atkinson, 629.  
 Routh v. Howell, 295.  
 — v. Kinder, 847.  
 Rowe v. Almsmen of Tavistock, 506, 507, 508.  
 — v. Bant, 659.  
 Rowel v. Walley, 395.  
 Rowland v. Morgan, 163, 368.  
 — v. Witherden, 306, 351, 357.  
 Rowley v. Adams, 882, 888, 896, 903, 904.  
 — v. Unwin, 642, 778.  
 Rowth v. Howell, 332.  
 Roy v. Gibbon, 867, 869.  
 Royds v. Royds, 876.  
 Royston Free Grammar School, *in re*, 782, 783.  
 Rumball v. Munt, 107.  
 Rumboll v. Rumboll, 303, 209, 210.  
 Rumford Market case, 217.  
 Rundle v. Rundle, 202, 207.

- Rushworth's case, 218.  
 Russell's case, 36, 39.  
 —, *ex parte*, 891.  
 — v. Clowes, 325.  
 — v. Dickson, 125.  
 — v. Jackson, 71, 74, 169.  
 — v. McCulloch, 657.  
 — v. Plaice, 454.  
 Rust v. Cooper, 47, 480.  
 Rutherford v. Maule, 324.  
 Ryall v. Rolle, 274, 275, 276, 650, 754, 758.  
 — v. Ryall, 63, 204, 206, 756, 762.  
 Rycroft v. Christy, 91, 92, 122.  
 Ryder v. Bickerton, 337, 338, 774.  
 Ryland v. Smith, 369.  
  
 Sadler v. Hobbs, 304, 305, 311, 312, 313, 314, 318.  
 — v. Lee, 594.  
 Saint John's Col., Cambridge, v. Todington, 492.  
 Saint John (Lord) v. Boughton, 485, 745.  
 — v. Turner, 739.  
 Saint Wenn's Charity, *in re*, 781.  
 Sale v. Kitson, 855.  
 — v. Moore, 168, 169, 170, 173.  
 Saloway v. Strawbridge, 420, 530.  
 Salisbury v. Baggott, 721, 726.  
 Salt v. Chattaway, 183, 197.  
 Salter v. Cavanagh, 181, 731, 745.  
 Saltoun v. Houston, 239.  
 Salvin v. Thornton, 604.  
 Salway v. Salway, 334, 357.  
 Sammes v. Rickman, 873.  
 Sampayo v. Gould, 164, 352.  
 Sanders v. Page, 629, 631.  
 — v. Richards, 454.  
 Sanderson v. Walker, 463, 470, 876.  
 Sandford, *in re*, 835.  
 — v. Keech, 217.  
 Sandon v. Hooper, 559.  
 Sands v. Nugee, 533.  
 Sandys v. Watson, 873, 878.  
 Sanford v. Irby, 256.  
 Saunders, *ex parte*, 715, 716.  
 — v. Dehew, 93, 724, 726.  
 — v. Neville, 595.  
 — v. Vautier, 597.  
 Savage v. Carroll, 763.  
 — v. Foster, 39, 774.  
 — v. Taylor, 511.  
 Saville v. Tancred, 226, 459.  
 Savory v. Barber, 852.  
 Sawley v. Gower, 684.  
 Sawyer v. Birchmore, 375.  
 Say v. Creed, 368.  
 Sayers, *ex parte*, 276, 754, 758, 759.  
 Scales v. Maude, 81, 88.  
 Scammell v. Wilkinson, 261.  
 Scarborough v. Borman, 125.  
 — (Earl of) v. Parker, 875.  
 Scarisbrick v. Skelmersdale, 111.  
  
 Scattergood v. Harrison, 319, 546.  
 Scawen v. Scawen, 214, 215.  
 Schroder v. Schroder, 752.  
 Score v. Ford, 865, 869.  
 Scott v. Becher, 867, 870.  
 — v. Davis, 124, 472, 473, 632.  
 — v. Nesbitt, 47, 471.  
 — v. Nicoll, 842.  
 — v. Scholey, 648, 665.  
 — v. Spashett, 370.  
 — v. Surman, 274, 276.  
 — v. Tyler, 453, 454, 455, 456, 458, 459.  
 Scounden v. Hawley, 31, 260.  
 Scroope v. Scroope, 210.  
 Scudamore, *ex parte*, 480.  
 — v. Scudamore, 793, 797, 805.  
 Scully v. Delaney, 239, 316.  
 — v. Scully, 848.  
 Sculthorp v. Burgess, 177.  
 Scurfield v. Howes, 305, 311, 312, 315, 316, 766.  
 Seale v. Seale, 153.  
 Sear v. Ashwell, 97.  
 Searle v. Law, 82, 84.  
 Seddon v. Connell, 846, 848.  
 Seeley v. Jago, 98, 816, 819.  
 Seers v. Hind, 359, 875, 878.  
 Segrave v. Kirwan, 226.  
 Selby v. Alston, 16, 792.  
 Sellack v. Harris, 70.  
 Selyard v. Harris, 847.  
 Senhouse v. Earle, 727.  
 Sergeson v. Sealey, 827, 828, 829.  
 Sergison, *ex parte*, 263, 833.  
 Sewell v. Denny, 118, 177.  
 — v. Musson, 476.  
 Seys v. Price, 830.  
 Shadbolt v. Thornton, 808.  
 — v. Woodfall, 426.  
 Shaftesbury v. Duke of Marlborough, 387, 389, 391, 393, 395, 397, 398.  
 Shakeshaft, *ex parte*, 356, 357, 767, 768, 771, 772, 773.  
 Shales v. Shales, 214.  
 Shallcross v. Wright, 184.  
 Shanley v. Baker, 197.  
 Shannon v. Bradstreet, 591.  
 Shapland v. Smith, 247.  
 Sharp v. Cossent, 135.  
 — v. Sharp, 233, 264, 570.  
 Sharpe v. Earl of Scarborough, 650, 661, 688, 691.  
 Sharpe's Trust, *in re*, 377, 380.  
 Shaw, *ex parte*, 264, 479.  
 — v. Borrer, 414, 428, 429, 440, 441, 513.  
 — v. Bran, 29.  
 — v. Lawless, 102, 167.  
 — v. Rhodes, 114, 117, 119.  
 — v. Weigh, 250.  
 Shee v. Hale, 135, 136.  
 Sheldon v. Weldman, 729.  
 Shelly's case, 827.

- Shepherd v. Moulis, 341, 355, 356.  
 — v. Shepherd, 621.  
 Sheppard v. Smith, 875, 877.  
 — v. Woodford, 272.  
 Sheridan v. Joyce, 366, 756.  
 Sheriff v. Axe, 320, 546.  
 Sherrard v. Lord Harborough, 179, 318.  
 Sherratt v. Bentley, 234, 874.  
 Sherwood, *in re*, 320, 549.  
 Shewell v. Shewell, 368.  
 Shewen v. Vanderhorst, 524.  
 Shields v. Atkins, 325.  
 Shine v. Gough, 511, 591.  
 Shipbrook (Ltd.) v. Lord Hinchinbrook,  
 305, 311, 312, 315, 316.  
 Shiphard v. Lutwidge, 488.  
 Shippardson v. Tower, 808.  
 Shipton v. Rawlins, 845, 854.  
 Shirley v. Ferrers, 489.  
 — v. Watts, 648, 649.  
 Shore v. Collett, 227.  
 Shorrocks, *in re*, 835.  
 Short v. Wood, 820.  
 Shrewsbury School, *in re*, 269, 318, 782.  
 Sidebotham v. Barrington, 422.  
 Sidmouth v. Sidmouth, 200, 207, 211,  
 214, 215, 216.  
 Sidney v. Shelley, 182, 191.  
 Siebert v. Spooner, 477.  
 Sikes v. Lister, 832.  
 Silk v. Prime, 489.  
 Sillibourne v. Newport, 538.  
 Simmonds v. Palles, 482, 483.  
 Simes v. Eyre, 849.  
 — v. Naylor, 834.  
 Simpson v. Morley, 668.  
 — v. Sikes, 477, 478, 479.  
 — v. Taylor, 648.  
 Sims v. Marryatt, 249.  
 Sish v. Hopkins, 660.  
 Sisson v. Shaw, 517.  
 Sitwell v. Bernard, 813.  
 Skarff v. Soulbys, 93.  
 Skeats v. Skeats, 209, 211, 215.  
 Skeetes, *in re*, 785.  
 Skett v. Whitmore, 61, 204.  
 Skinner, *ex parte*, 505, 507, 781, 782,  
 783.  
 Slade v. Rigg, 848.  
 Slater v. Wheeler, 300, 847.  
 Slewing's Charity, *in re*, 781, 783.  
 Sloane v. Cadogan, 81, 89, 93.  
 Sloman v. Bank of England, 372.  
 Sloper, *in re*, 897.  
 Small v. Attwood, 774, 777, 844.  
 — v. Marwood, 237.  
 — v. Oudley, 480.  
 Smart v. Bradstock, 852.  
 Smee v. Martin, 518.  
 Smith, *ex parte*, 298, 471, 771, 835.  
 — v. Adams, 621.  
 — v. Adkins, 106.  
 — v. Attersoll, 77.  
 — v. Baker, 199.  
 Smith v. Boucher, 894.  
 — v. Camelford, 200, 643.  
 — v. Clay, 732.  
 — v. Claxton, 184, 185, 818.  
 — v. French, 774, 777.  
 — v. Garland, 93.  
 — v. Guyon, 435.  
 — v. Hibbard, 832.  
 — v. Hurst, 662, 663, 666.  
 — v. Jameson, 20.  
 — v. Keating, 481.  
 — v. King, 39, 180.  
 — v. Lyne, 99.  
 — v. Smith, 34, 605, 609, 612, 771,  
 870, 885, 896.  
 — v. Snow, 595, 850.  
 — v. Spencer, 626.  
 — v. Warde, 101.  
 — v. Wheeler, 236, 449, 585.  
 — v. Wilkinson, 63.  
 Smyth's Settlement, 896, 897, 905.  
 Snow v. Booth, 749.  
 — v. Hole, 875.  
 Snowdon v. Dales, 132, 133.  
 Sockett v. Wray, 35.  
 Sombre Dyce, *in re*, 835.  
 Somerset's case (Earl of), 676.  
 Sonley v. Clockmakers' Company, 693.  
 Southampton (Lord) v. Marquis of Hert-  
 ford, 111, 161, 191.  
 Southcomb v. Bishop of Exeter, 742.  
 South Eastern Railway Company, *ex*  
*parte*, 342.  
 Southouse v. Bate, 181.  
 South Sea Company v. Wymondsell,  
 734, 735.  
 Southwell v. Ward, 713.  
 Sowarsby v. Lacy, 432.  
 Sowerby's Charity, *in re*, 782.  
 Spackman v. Timbrell, 285.  
 Spalding v. Shalmer, 304, 429, 435.  
 Sparling v. Parker, 815.  
 Spink v. Lewis, 182, 183.  
 Spottiswoode v. Stockdale, 486.  
 Sprange v. Barnard, 169, 171.  
 Sprigg v. Sprigg, 190, 195.  
 Spring v. Biles, 706.  
 Spurgeon v. Collier, 284, 724.  
 Spunner v. Walsh, 836.  
 Spurrier v. Hancock, 175.  
 Squire v. Dean, 643.  
 — v. Ford, 486.  
 Stacey v. Elph, 233, 235, 242, 462.  
 Stackhouse v. Barnston, 737, 751, 756.  
 Stackpole v. Davoren, 751, 752.  
 Stacpoole v. Stacpoole, 359, 875.  
 Stahlshmidt v. Lett, 520.  
 Staines v. Morris, 425.  
 Stair v. Macgill, 813.  
 Stamford (Earl of) v. Sir John Hobart,  
 144, 156.  
 Stamp v. Cooke, 707.  
 Stamper v. Millar, 301.  
 Standford v. Marshall, 634, 641.

- Stanes v. Parker, 549, 550.  
 Stanley, *in re*, 836.  
 — v. Bond, 670.  
 — v. Darington, 291.  
 — v. Leigh, 150.  
 Stanley v. Lennard, 145, 247.  
 Stansfield v. Hobson, 855.  
 Stanton v. Hall, 121, 122, 135.  
 Staple's Trust, *in re*, 381.  
 Stapleton v. Stapleton, 82.  
 Starkey v. Brooks, 180, 181, 183.  
 Stead v. Nelson, 633, 635, 645.  
 — v. Newdigate, 792, 807, 818.  
 Steele v. Philips, 650.  
 Stent v. Bailis, 174.  
 Stephens v. James, 135.  
 — v. Trueman, 94.  
 Stevens v. Hotham, 425.  
 — v. South Devon Railway Com-  
 pany, 516.  
 Stermett v. Bainbridge, 468.  
 Stewart v. Hoare, 556.  
 — v. Noble, 489.  
 Stickland v. Aldridge, 67, 68, 70, 71.  
 Stickney v. Sewell, 338, 345.  
 Stiffe v. Everitt, 627.  
 Stikeman v. Dawson, 39.  
 Stile v. Tomson, 530.  
 Stiles v. Guy, 239, 316, 329, 338, 661,  
 737.  
 Stileman v. Ashdown, 210, 212, 650,  
 658, 659, 660.  
 Stocken v. Dawson, 549.  
 Stone v. Godfrey, 325, 737, 775, 778.  
 — v. Gratham, 476.  
 — v. Theed, 383, 384, 386, 388, 389,  
 395.  
 — v. Van Heythusen, 482, 490.  
 — v. Wythipole, 37.  
 Stones v. Rowton, 578.  
 Stonehewer v. Thompson, 660.  
 Stonehouse v. Evelyn, 183.  
 Stonor v. Curwen, 147, 155, 156.  
 Storry v. Walsh, 441, 445, 446, 448.  
 Story v. Tonge, 372.  
 Stott v. Hollingworth, 813.  
 Stow v. Drinkwater, 262.  
 Stafford v. Powel, 146, 163.  
 — v. Twynam, 465.  
 Streatfield v. Streatfield, 148.  
 Stretton v. Ashmall, 345.  
 Stright, *ex parte*, 612.  
 Strode v. Russel, 262.  
 — v. Winchester, 71.  
 Strong v. Strong, 853.  
 Stroughill v. Anstey, 416, 417, 434, 436,  
 437, 439, 458.  
 Stuart, *ex parte*, 425.  
 — v. Bruere, 813.  
 — v. Kirkwall, 634, 635, 639, 641.  
 — v. Stuart, 340, 348.  
 Stuckey v. Drewe, 475.  
 Stultz's Trust, *in re*, 136.  
 Stubbs, *ex parte*, 715.  
 Stubbs v. Roth, 218, 223.  
 — v. Sargon, 181.  
 Sturgis v. Champneys, 629, 630.  
 — v. Corp, 124.  
 Sturt v. Mellish, 19, 20.  
 Stutely, *ex parte*, 379, 772.  
 Styau, *in re*, 613.  
 Suir Island Female Charity School, *in*  
*re*, 503, 782.  
 Supple v. Lowson, 542, 705, 706, 782.  
 Sutcliffe v. Cole, 190.  
 Sutherland v. Cooke, 808, 810, 815.  
 Sutton v. Jones, 319, 460.  
 — v. Sharp, 359, 361.  
 Sutton Colefield case, 198, 726.  
 Swan v. Swan, 511.  
 Swayne v. Swayne, 613.  
 Sweet v. Southcote, 726.  
 Sweetapple v. Bindon, 153, 621, 622,  
 793.  
 Swift, *ex parte*, 517.  
 — v. Davis, 211, 214.  
 — v. Gregson, 701, 706.  
 — v. Nash, 69.  
 Swinnock v. Crisp, 518.  
 Sykes v. Hastings, 319.  
 Sylva v. Da Costa, 834.  
 Sylvester v. Jarman, 263.  
 — v. Wilson, 247.  
 Symance v. Tattam, 409.  
 Symons v. Rutter, 807.  
 Symson v. Turner, 247.  
 Syngue v. Hales, 141, 146, 164.  
 Tabor v. Grover, 18.  
 Taggart v. Taggart, 152, 153.  
 Tait v. Jenkins, 871.  
 — v. Northwick, 482, 491.  
 Talbot v. Earl of Radnor, 234, 367.  
 — v. Whitfield, 820.  
 Taner v. Ivie, 455.  
 Tanner v. Dancey, 873.  
 — v. Elworthy, 218.  
 Tappenden v. Burgess, 477, 478, 479.  
 — v. Walsh, 694.  
 Tarback v. Marbury, 476.  
 Tardiff v. Robinson, 392.  
 Targus v. Puget, 153.  
 Tarleton v. Hornby, 768, 845.  
 Tasker v. Small, 175, 844.  
 Taster v. Marriott, 218.  
 Tatam v. Williams, 742.  
 Taylor, *ex parte*, 477, 478.  
 Taylor's Trust, *in re*, 807.  
 — v. Allen, 870.  
 — v. Alston, 214, 215.  
 — v. Clark, 815.  
 — v. Crompton, 753.  
 — v. George, 167, 168.  
 — v. Glanville, 367, 873, 875.  
 — v. Hawkins, 456.  
 — v. Haygarth, 198, 321, 324, 679.  
 — v. Hibbert, 813.  
 — v. Jones, 93, 648.



- Taylor v. Plumer, 274, 275, 754, 757,  
     758, 763.  
 — v. Salmon, 851.  
 — v. Stibbert, 725.  
 — v. Tabrum, 424, 767, 876.  
 — v. Taylor, 39, 184, 207, 212, 215,  
     633.  
 — v. Wheeler, 276.  
 Tee v. Ferris, 71, 73.  
 Tebbs v. Carpenter, 328, 358, 359, 361,  
     362, 364, 365, 876, 879.  
 Tenant v. Brown, 173.  
 Tench v. Cheese, 116.  
 Terry v. Terry, 337, 513.  
 Theebridge v. Kilburne, 149.  
 Thetford School case, 198, 199.  
 Thicknesse v. Vernon, 201.  
 Thomas, *ex parte*, 277, 278.  
 — v. Bennett, 643.  
 — v. Burne, 223.  
 — v. Dering, 538, 540, 541.  
 — v. Dunning, 842, 843.  
 — v. Gwynne, 834.  
 — v. Hole, 707.  
 — v. Thomas, 751, 756.  
 Thomason v. Mackworth, 251.  
 Thompson, *in re*, 836.  
 — v. Blackstone, 415.  
 — v. Grant, 264.  
 — v. Harrison, 777.  
 — v. Jackson, 476.  
 — v. Leach, 36.  
 — v. Simpson, 722, 728, 745, 775.  
 Thompson v. Speirs, 613.  
 Thorby v. Yeats, 595, 858, 875.  
 Thornley v. Aspland, 137.  
 Thornton v. Ellis, 813.  
 — v. Hawley, 800, 806, 807, 816.  
 Thorp v. Thorp, 376, 377.  
 Thorpe v. Jackson, 848.  
 — v. Owen, 61, 82, 172, 681.  
 Thrupp v. Harman, 643, 644, 681.  
 Thrustout v. Coppin, 262.  
 Thruxton v. Attorney-General, 56.  
 Thynn v. Thynn, 71.  
 Tibbits v. Tibbits, 168, 169, 171.  
 Tickner v. Smith, 358.  
 Tidd v. Lister, 370, 587, 870.  
 Tierney v. Wood, 65.  
 Tiffin v. Longman, 705.  
 Tillstone's Trust, *in re*, 377.  
 Tilly v. Bridges, 755.  
 Timson v. Ramsbottom, 608, 610, 614.  
 Tipping v. Piggott, 405, 406.  
 — v. Power, 873.  
 Titley v. Wolstenholme, 265, 266.  
 Todd v. Wilson, 549, 550.  
 Toft v. Stephenson, 746.  
 Toller v. Attwood, 256.  
 — v. Carteret, 48.  
 Tooke v. Hollingsworth, 274.  
 Tournay, *in re*, 376.  
 Townley v. Bedwell, 392, 808.  
 — v. Bond, 244, 390, 392.  
 Townley v. Sherborne, 299, 302, 304.  
 Townsend, *ex parte*, 29, 295.  
 —, *in re*, 883.  
 — v. Ash, 756.  
 — v. Barber, 314.  
 — v. Lawton, 409.  
 — v. Westacott, 93.  
 — v. Wilson, 301, 528.  
 Townshend (Marquis of) v. Bishop of  
     Norwich, 179.  
 — v. Townshend, 729, 730, 731.  
 — v. Windham, 643.  
 Townson v. Tickell, 236, 237.  
 Trafford v. Boehm, 341, 351, 768, 792,  
     820, 821, 823.  
 — v. Trafford, 160.  
 Trash v. Wood, 45, 680.  
 Travell v. Danvers, 710.  
 Travers v. Townsend, 876.  
 Tregonwell v. Sydenham, 181, 182, 189,  
     190, 191.  
 Trench v. St. George, 384, 385.  
 — v. Harrison, 200, 206, 350, 756,  
     763.  
 Trent v. Hanning, 250.  
 Treves v. Townsend, 359, 361, 362.  
 Trevor v. Peryor, 682.  
 — v. Trevor, 147, 155, 156, 725.  
 Trickey v. Trickey, 117.  
 Trinity College v. Brown, 272.  
 Triquet v. Thornton, 806.  
 Trot v. Vernon, 167.  
 Trott v. Dawson, 560.  
 Trower v. Knightley, 531, 819.  
 Trutch v. Lamprell, 291.  
 Tryon, *in re*, 234.  
 Tucker v. Boswell, 813.  
 — v. Thurstan, 284.  
 Tudor v. Samyne, 631.  
 Tuer v. Turner, 818.  
 Tuffnell v. Page, 45, 616.  
 Tullet v. Tullet, 830.  
 Tullett v. Armstrong, 122, 128, 633,  
     634, 635.  
 Tulloch v. Hartley, 50.  
 Tunstall v. Trappes, 651, 661, 662, 672,  
     772.  
 Tunstall's Will, 895.  
 Turquand v. Knight, 875.  
 Turner, *ex parte*, 435, 441, 442, 772.  
 — (Sir Edward's) case, 631.  
 — v. Buck, 288, 719, 751.  
 — v. Corney, 290, 599.  
 — v. Frampton, 368.  
 — v. Gwinn, 603.  
 — v. Harvey, 415.  
 — v. Hill, 217.  
 — v. Hind, 853.  
 — v. Mauley, 356, 366, 574.  
 — v. Sargent, 146, 164.  
 — v. Turner, 358.  
 — v. Wardle, 238.  
 Turnley v. Kelly, 121.  
 Turpin, *ex parte*, 771.



- Tutin, *ex parte*, 833.  
 Twistleton v. Thelwel, 873.  
 Twopeny v. Peyton, 133.  
 Twyne's case, 476.  
 Tylden v. Hyde, 445.  
 Tylee v. Tylee, 869.  
 Tyler v. Lake, 122.  
 Tyler's Trust, *in re*, 895.  
 Tyrrell v. Hope, 122, 277.  
 Tyrrell's case (Lady,) 177.  
  
 Underwood v. Hatton, 375, 487, 522, 765.  
 — v. Stevens, 315, 316, 774.  
 Uniacke, *in re*, 233, 237.  
 University College, Oxford, *in re*, 495.  
 — of Oxford v. Richardson, 753.  
 Upton Warren, *in re*, 781.  
 Upfull's Trust, *in re*, 376.  
 Urch v. Walker, 233, 234, 240, 241, 366.  
 Uvedale v. Ettrick, 712.  
 — v. Uvedale, 873.  
  
 Van v. Barnett, 723, 806, 816, 823.  
 Van Sandau v. Moore, 857.  
 Vandebende v. Levingston, 752.  
 Vanderstegen v. Witham, 19.  
 Vaughan v. Buck, 369, 370, 810, 812.  
 — v. Burslem, 151, 162, 163.  
 — v. Farrer, 504.  
 — v. Vanderstegen, 639, 768.  
 Venables v. Morris, 253.  
 Verner, *ex parte*, 136.  
 Verney v. Carding, 725, 758.  
 — v. Verney, 384, 386, 395.  
 Vernon's case, 58.  
 Vernon, *ex parte*, 200, 832.  
 — v. Blackerley, 844.  
 — v. Vawdry, 238, 764.  
 — v. Vernon, 94, 167, 830.  
 Verulam (Earl of) v. Bathurst, 155.  
 Vez v. Emery, 367.  
 Vezev v. Jamson, 182.  
 Vick v. Edwards, 252.  
 Vickers v. Cowell, 201.  
 — v. Scott, 415, 813.  
 Vigor v. Harwood, 813.  
 Vigrass v. Binfield, 337, 867, 869.  
 Villers v. Beaumont, 97.  
 Villiers v. Villiers, 250.  
 Vincent v. Godson, 239.  
 — v. Newcombe, 345, 810.  
 Viner v. Cadell, 274, 278.  
 Voyle v. Hughes, 91.  
  
 Wackerbath, *ex parte*, 305.  
 — v. Powell, 294.  
 Wade v. Paget, 16.  
 Wadley v. Wadley, 392.  
 Wagstaff v. Smith, 122, 124, 248.  
 — v. Wagstaff, 45, 615, 616.  
 Wain v. Earl of Egmont, 487, 538, 541.  
 Wainwright v. Bagshaw, 107.  
 — v. Elwell, 15.  
  
 Wainwright v. Hardisty, 635, 645.  
 — v. Waterman, 696.  
 Waite v. Whorwood, 754, 757.  
 Waithman, *ex parte*, 612.  
 Wake v. Wake, 893, 903.  
 Wakeford, *in re*, 834, 883.  
 Wakeman v. Duchess of Rutland, 427, 844.  
 Walburn v. Ingilby, 846.  
 Walford (— v.) 596.  
 Waldo v. Caley, 542.  
 — v. Waldo, 515.  
 Walker (— v.) 345.  
 Walker, *in re*, 546, 818, 834, 883.  
 — v. Denne, 791, 795, 798, 805, 806, 819.  
 — v. Meager, 487, 643.  
 — v. Preswick, 725, 845.  
 — v. Shore, 415, 775, 816.  
 — v. Smalwood, 429, 434, 524.  
 — v. Symonds, 290, 304, 307, 311, 312, 317, 337, 338, 357, 599, 726, 767, 774, 775, 777, 778, 845.  
 — v. Walker, 538, 540.  
 — v. Wetherell, 518.  
 — v. Woodward, 363.  
 Wall v. Bright, 175, 263, 268.  
 Wallburn v. Ingilby, 846.  
 Walley v. Whalley, 217, 222, 224, 725, 847.  
 Wallgrave v. Tebbs, 73, 79.  
 Wallwyn v. Coutts, 101, 476, 481.  
 Walsh v. Dillon, 858.  
 — v. Gladstone, 572.  
 — v. Wallinger, 701, 703, 704.  
 Walter v. Maunde, 599, 707, 808.  
 — v. Saunders, 631.  
 Walton, *ex parte*, 715.  
 — v. Merry, 839.  
 — v. Walton, 59, 69, 180, 182.  
 Walworth v. Holt, 851.  
 Wankford v. Wankford, 234.  
 Warburton v. Hill, 608, 613, 614, 615.  
 — v. Sandys, 300, 301, 567, 581.  
 — v. Vaughan, 837, 839.  
 Ward v. Arch, 729, 747.  
 — v. Audland, 88.  
 — v. Bassett, 853.  
 — v. Burbury, 253, 254.  
 — v. Butler, 239, 240.  
 — v. Lant, 177.  
 Wardle v. Claxton, 122, 123.  
 Ware v. Polhill, 829.  
 Waring, *in re*, 376, 380.  
 — v. Coventry, 277.  
 — v. Waring, 326, 344, 345, 350, 358.  
 Warman v. Seaman, 177.  
 Warmstrey v. Tanfield, 12, 600.  
 Warrick v. Warrick, 148, 727.  
 Warter v. Hutchinson, 248, 251, 254, 257.  
 Warwick Charities, *in re*, 718.  
 — Countess of, v. Edwards, 643.  
 — v. Richardson, 37, 581.

- Washborn v. Downes, 602.  
 Waterhouse v. Stanfield, 49.  
 Waters v. Bailey, 218.  
 — v. Wood, 44.  
 Watkins, *ex parte*, 612.  
 — v. Cheek, 434, 435, 456, 458.  
 Watson, *ex parte*, 361, 772.  
 — v. Hayes, 183.  
 — v. Hinsworth Hospital, 507.  
 — v. Earl of Lincoln, 195.  
 — v. Marshall, 370.  
 — v. Pearson, 258, 300.  
 — v. Toone, 460, 465, 466, 471.  
 Watts's settlement, *in re*, 574, 885, 896.  
 — v. Ball, 621, 625.  
 — v. Bullas, 99.  
 — v. Cresswell, 39.  
 — v. Girdlestone, 338, 341, 356, 418.  
 — v. Hyde, 472.  
 — v. Jeffereyes, 671.  
 — v. Kancie, 454, 455.  
 — v. Porter, 280, 671.  
 — v. Turner, 595.  
 Waugh's Trust, *in re*, 883, 906.  
 Way v. East, 132.  
 Weale v. Olive, 84.  
 Weatherby v. St. Giorgio, 430.  
 Weaver v. Maule, 283, 284.  
 Webb v. Ledsam, 305.  
 — v. Lugar, 218.  
 — v. Rorke, 470.  
 — v. Earl of Shaftesbury, 142, 318,  
 544, 559, 582, 723.  
 — v. Webb, 118, 857.  
 — v. Wools, 168, 171.  
 Wedderburn v. Wedderburn, 319, 729,  
 730, 777, 778.  
 Wedgwood v. Adams, 424.  
 Weiss v. Dill, 557.  
 Weld v. Bonham, 851.  
 — v. Tew, 827.  
 Welford v. Liddle, 734.  
 Wellesley v. Wellesley, 174.  
 West v. Ayles, 834.  
 — v. Errissey, 148, 149, 727.  
 — v. Steward, 474.  
 Westby v. Westby, 670.  
 Westbrook, *in re*, 546, 556.  
 — v. Blythe, 668, 672.  
 Westcott v. Culliford, 368.  
 Western v. Cartwright, 734.  
 Westley v. Clarke, 304, 305, 310, 317.  
 Weston v. Filer, 893, 903.  
 Westover v. Chapman, 338, 363.  
 Wetherell v. Collins, 842.  
 — v. Hall, 593.  
 — v. Langston, 237.  
 — v. Wilson, 596.  
 West Ham Charities, *in re*, 782.  
 Whale v. Booth, 278, 455, 456, 457.  
 Whalley v. Whalley, 734.  
 Whateley v. Kemp, 148.  
 Wharton v. Toone, 460, 734.  
 Wheate v. Hall, 164.  
 Wheatley v. Purr, 81.  
 Wheeler, *in re*, 883.  
 Wheelwright v. Jackson, 480.  
 Wheldale v. Partridge, 793, 799, 804,  
 806, 824.  
 Whelpdale v. Cookson, 461, 464, 466,  
 473.  
 Whetstone (Lady) v. Bury, 678.  
 Whitchcote v. Lawrence, 461, 463, 469,  
 470, 471, 738.  
 Whinchcombe v. Pulleston, 136.  
 Whish, *ex parte*, 715.  
 Whistler v. Newman, 634, 640, 775, 875.  
 — v. Webb, 842.  
 Whiston v. Dean and Chapter of Ro-  
 chester, 493.  
 Whitacre, *ex parte*, 264.  
 Whitaker v. Wisby, 28.  
 Whitcomb v. Minchin, 462.  
 White v. Barton, 241, 868.  
 — v. Baylor, 283, 693.  
 — v. Briggs, 168, 169, 170, 171.  
 — v. Carter, 155.  
 — v. Cuddon, 415.  
 — v. Evans, 59, 69, 182.  
 — v. Ewer, 731.  
 — v. Foljambe, 421, 425.  
 — v. Lincoln, 337, 599.  
 — v. Nuts, 175.  
 — v. Parker, 247, 248.  
 — v. Tommy, 465.  
 — v. White, 383, 384, 395, 396, 397,  
 398, 399, 402, 706, 713, 774.  
 — v. Williams, 59.  
 Whitecomb v. Jacob, 756, 757.  
 Whitfield v. Brand, 278.  
 — v. Prickett, 135.  
 Whitley, *ex parte*, 713, 715, 716.  
 Whitmarsh v. Robertson, 865.  
 Whitmore v. Weld, 39.  
 Whittingham's case, 36, 37.  
 Whitem v. Sawyer, 369.  
 Whittle v. Halliday, 848.  
 — v. Henning, 372.  
 Whitton, *ex parte*, 836.  
 — v. Lloyd, 488.  
 Whitwich v. Jermin, 796.  
 Whitworth v. Gaugain, 280, 672.  
 Wichfield v. Baker, 808.  
 Widdowson v. Duck, 343, 524.  
 Widmore v. Woodroffe, 699.  
 Wigg v. Wigg, 173, 725.  
 Wightman v. Townroe, 272.  
 Wigglesworth v. Wigglesworth, 357, 867.  
 Wike's case, 30, 260, 280, 629, 677.  
 Willocks v. Hannington, 83.  
 Wild v. Wells, 755.  
 Wildes v. Davies, 119.  
 Wilding v. Bolder, 40, 579.  
 — v. Richards, 481, 482, 483.  
 Wiles v. Cooper, 858.  
 — v. Gresham, 326, 340, 521, 756.  
 Wilkes v. Steward, 337, 338.  
 Wilkins v. Fry, 423, 426.

- Wilkins v. Hunt, 873.  
 — v. Stevens, 205.  
 Wilkinson, *ex parte*, 243, 715.  
 — v. Brayfield, 178.  
 — v. Malin, 298, 299, 501.  
 — v. Parry, 565, 577, 774, 777, 847.  
 Wilks v. Groom, 885.  
 — v. Wilkinson, 131, 135, 139, 556, 559.  
 Willan v. Lancaster, 617.  
 Willand v. Fenn, 316.  
 Willats v. Busby, 93, 849, 850.  
 Willet v. Sandford, 8.  
 Willett v. Blandford, 319.  
 Williams' estate, *in re*, 881.  
 — *in re*, 836.  
 — v. Bird, 715.  
 — v. Carter, 167.  
 — v. Coade, 182, 183.  
 — v. Corbet, 101.  
 — v. Kershaw, 182.  
 — v. Lomas, 768.  
 — v. Lord Lonsdale, 324.  
 — v. Nixon, 240, 299, 310, 315, 316, 317, 318.  
 — v. Powell, 363, 364.  
 — v. Waters, 248.  
 — v. Williams, 169, 173.  
 Williamson v. Codrington, 93, 94.  
 — v. Curtis, 435.  
 — v. Park, 659.  
 — v. Williamson, 93.  
 Willis v. Childe, 543.  
 — v. Hiscox, 595, 878.  
 — v. Kibble, 551.  
 — v. Willis, 200, 204, 205.  
 Wilmot v. Pike, 608.  
 Willmott v. Jenkins, 243.  
 Willoughby v. Willoughby, 131, 725.  
 Wills v. Sayers, 121, 122.  
 Wilson, *in re*, 836.  
 — v. Beddard, 805.  
 — v. Bennett, 265, 267, 533.  
 — v. Broughton, 845.  
 — v. Clapham, 174.  
 — v. Day, 476, 477, 480.  
 — v. Dennison, 297.  
 — v. Dent, 45, 63, 616.  
 — v. Fielding, 686.  
 — v. Foreman, 756.  
 — v. Goodman, 768.  
 — v. Heaton, 564.  
 — v. Hoare, 272.  
 — v. Knubley, 239.  
 — v. Major, 169, 171, 183, 187.  
 — v. Moore, 729, 767.  
 — v. Oldham, 371.  
 — v. Wilson, 113, 875.  
 Wilton v. Hill, 865.  
 — v. Jones, 842, 853.  
 Wiltshire v. Rabbits, 608.  
 Winch v. Brutton, 171.  
 — v. Keeley, 274, 275.  
 Winchelsea v. Norcliffe, 829, 830.  
 Winchester (Bishop of) v. Knight, 753.  
 Winged v. Lefebury, 725.  
 Winn v. Fenwick, 705.  
 Winnall, *ex parte*, 291.  
 Winnington v. Foley, 409.  
 Winslow v. Tighe, 218, 223.  
 Winter, *ex parte*, 838.  
 — v. Rudge, 572.  
 Wise, *in re*, 882.  
 — v. Wise, 233, 609.  
 Wiseman v. Roper, 94.  
 Witham's case, 5, 9.  
 Withers v. Allgood, 142.  
 — v. Withers, 60, 199, 202.  
 Withington v. Withington, 574.  
 Withey v. Mangles, 707.  
 Witter v. Witter, 19, 829.  
 Witts v. Bodington,  
 — v. Dawkins, 123.  
 Wivelescom case, 495.  
 Wolestoncroft v. Long, 487, 488.  
 Wood v. Betlestone, 894, 898.  
 — v. Cox, 168.  
 — v. Dixie, 475.  
 — v. Downes, 473, 867.  
 — v. Hardisty, 238.  
 — v. Harman, 434, 523.  
 — v. Nosworthy, 18.  
 — v. Richardson, 415.  
 — v. Stane, 710.  
 — v. White, 441, 532, 844.  
 — v. Williams, 842.  
 — v. Woods, 857.  
 Wood's Trust, *in re*, 377.  
 Woodcock v. Renneck, 700, 704.  
 Woodhead v. Marriott, 358, 879.  
 Woodin, *ex parte*, 226, 562.  
 Woodhouse v. Hoskins, 144, 404, 408, 409, 410.  
 Woodman v. Horsley, 122.  
 — v. Morrel, 178, 200, 207, 214, 215, 216.  
 Woodmeston v. Walker, 124.  
 Woods v. Woods, 169, 596, 857.  
 Woodyat v. Gresley, 771.  
 Woollet v. Harris, 180, 181.  
 Woolmore v. Burrows, 154, 156, 157, 164, 404.  
 Woolnough v. Woolnough, 603.  
 Worley v. Frampton, 425.  
 Worrall v. Harford, 101, 317, 557, 561.  
 Worsley v. Demattos, 476, 477, 478, 480.  
 Wortham v. Pemberton, 629, 632.  
 Worthington v. Evans, 533.  
 Wrangham, *ex parte*, 495.  
 Way v. Smith, 815.  
 Wray v. Steele, 200, 201.  
 Wren v. Kirton, 295, 296, 333.  
 Wright v. Atkyns, 168, 169, 170, 173.  
 — v. Hall, 195.  
 Wright v. Maunder, 422.  
 — v. Newport Pond School, 506, 508.  
 — v. Pearson, 141, 142, 145, 247, 251, 256.

- Wright v. Rose, 808.  
—— v. Row, 193, 194.  
—— v. Snowe, 39.  
—— v. Wright, 183, 184.  
Wright's settlement, *in re*, 376.  
—— will, *in re*, 377.  
Wrigley v. Sykes, 441, 445, 446, 447.  
Wyatt v. Sharratt, 349, 867, 869.  
Wynch v. East India Company, 721,  
734.  
—— v. Packington, 177, 179, 180.  
Wyche, *in re*, 550.  
Wykham v. Wykham, 253, 604.  
Wynch v. Grant, 239.  
Wynne v. Hawkins, 169, 171.  
—— v. Styan, 733.  
Wynter v. Bold, 420.
- Yallop, *ex parte*, 203.  
—— v. Holworthy, 735.  
Yarnold v. Moorhouse, 135.
- Yates v. Hambly, 842.  
Yervel (Poor of) v. Sutton, 506, 507,  
508.  
York v. Brown, 320, 549, 874.  
York Buildings Company v. Mackenzie,  
466, 467, 471.  
—— v. Eaton, 201, 202.  
Young v. Dennet, 488.  
—— v. Grove, 182.  
—— v. Martin, 172.  
—— v. Peachy, 177, 178.  
—— v. Scott, 857.  
—— v. Waterpark, 729, 747, 748.  
Younge v. Combe, 359, 361.  
Younger v. Welham, 298.  
Younghusband v. Gisborne, 134, 598,  
656.
- Zinck v. Walker, 275.  
Zoach v. Lloyd, 830.  
Zouch v. Parsons, 36, 37, 38.

# TABLE OF STATUTES CITED.

The pages referred to are those between brackets [        ].

## EDWARD I.

- 11, (Statute Merchant), 278.
- 13, st. 1, c. 1, (De Donis), 601.
- st. 1, c. 18, (Elegit), 278.
- st. 1, c. 39, (Levari Facias), 647.
- st. 3, (Statute Merchant), 278.
- EDWARD II.
- 9, st. 2, (Sheriffs), 269.
- EDWARD III.
- 27, st. 2, c. 9, (Statute Staple), 278.
- RICHARD II.
- 15, c. 5, (Mortmain), 43.
- HENRY VI.
- 8, c. 7, (Right of voting for Members of Parliament), 270.
- RICHARD III.
- 1, c. 1, (*Cestui que Use* empowered to pass Legal Estate), 5, 601.
- HENRY VII.
- 4, c. 24, (Fines), 601.
- 19, c. 15, (Execution against Uses), 10.
- HENRY VIII.
- 21, c. 4, (Sales by Executors), 532.
- 26, c. 13, (Forfeiture), 9, 28, 674.
- 27, c. 10, (Statute of Uses), 7, 10.
- 33, c. 20, (Forfeiture), 674, 675, 676.
- ELIZABETH.
- 13, c. 4, (Extents), 673.
- c. 5, (Creditors), 93, 475, 476.
- 27, c. 4, (Purchasers), 92, 93.
- 43, c. 4, (Charitable Uses), 779.
- CHARLES II.
- 22 & 23, c. 25, (Game Act), 593.
- 29, c. 3, s. 5, (Devises of Land), 65.
- s. 7, (Creations of Trust of Land), 60.
- s. 8, (Exception of Implied Trusts), 204, 228, 762.
- s. 9, (Assignments of Trusts), 600.
- s. 10, (Judgments against *cestui que trust*), 664, 690.
- s. 12, (Estates *pur autre vie*), 202.

## WILLIAM AND MARY.

- 3, c. 14, (Action against Devisee), 239, 689, 690.
- 4, c. 3, s. 10, (Bequests of Stock), 32.
- 5, c. 20, s. 20, (Bank of England), 32.
- WILLIAM III.
- 7 & 8, c. 25, s. 7, (Right of voting for Members of Parliament), 270.
- ANNE.
- 4, c. 16, s. 22, (Subpœna), 859.
- 6, c. 35, (Yorkshire Registry), 596.
- 7, c. 19, (Infant Trustees), 38, 832.
- GEORGE I.
- 1, st. 2, c. 19, (Bequests of Stock), 32.
- GEORGE II.
- 4, c. 10, (Lunatics, &c., Trustees of Lands), 833.
- 8, c. 6, (Yorkshire Registry), 596.
- 9, c. 6, (Mortmain), 44, 79, 132.
- 14, c. 20, s. 9, (Estates *pur autre vie*), 202.
- 18, c. 18, s. 1, (Right of voting for Members of Parliament), 271.
- 30, c. 19, s. 49, (Bequests of stock), 32.
- GEORGE III.
- 25, c. 35, (Extents), 673.
- 36, c. 90, (Lunatic, &c., Trustees of Stock), 833.
- 39 & 40, c. 36, (Bank of England), 33, 859.
- c. 56, (Disentailing money-land), 820, 821.
- c. 88, s. 10, (Will of the Sovereign), 25.
- c. 98, (Thellusson Act), 112.
- 47, c. 74, (Traders' Lands, Assets), 273.
- 52, c. 101, (Romilly's Act), 718, 779.
- 54, c. 145, (Corruption of Blood), 28.
- 56, c. 91, (Charity Commissioners), 783.
- 58, c. 95, s. 2, (Right of voting for Coroners), 592.



59, c. 81, (Charity Commissioners), 783.

#### GEORGE IV.

1 & 2, c. 19, (Lunatic Trustees), 834.

6, c. 74, (Trustee Act), 834.

c. 16, (Bankruptcy Act), 479, 557.

7, c. 57, (Sales under Insolvent Debtors' Act), 422.

#### WILLIAM IV.

11 G. 4, & 1 W. 4, c. 40, (Executor Trustee for next of kin), 59, 325.

c. 47, (Action against Devisee, Assets), 239, 273, 474.

c. 60, (Lord St. Leonards' Trustee Act), 713, 834, 835, 836, 837, 838, 839.

1, c. 60, s. 23, (Charities), 716.

1 & 2, c. 32, (Game Act), 593.

2, c. 45, s. 23, (Reform Act, Right of Voting), 271.

c. 57, (Charities), 716.

3 & 4, c. 27, (Limitation of Actions and Suits), 288, 484, 722, 743, 744, 745, 786.

c. 74, (Fines and Recoveries), 16, 148, 156, 157, 236, 237, 411, 472, 604, 817, 822.

c. 104, (Assets), 273, 285, 435, 474, 688, 691, 692, 796.

c. 105, (Dower), 621, 626, 794.

c. 106, (Inheritance), 187, 618, 680.

4 & 5, c. 23 (Escheat), 836.

c. 29 (Lynch's Act), 347, 348.

c. 92, (Fines and Recoveries, Irish), 236.

5 & 6, c. 76, (Municipal Corporation Act), 25, 31, 716, 717.

#### VICTORIA.

1, c. 26, (Wills), 33, 45, 60, 65, 80, 118, 195, 203, 249, 259, 617, 825, 831.

1 & 2, c. 110, (Insolvency, Judgments), 29, 136, 278, 350, 476, 658.

2 & 3, c. 11, (Judgments), 669.

3 & 4, c. 77, (Grammar-school Act), 500.

3 & 4, c. 82, (Judgments), 670.

5, c. 5, (Abolition of Equity Exchequer Jurisdiction), 859.

5 & 6, c. 116, (Insolvent Act), 278.

6 & 7, c. 18, s. 74, (Right of Voting), 271, 593.

c. 73, (Solicitors' Act), 561.

7 & 8, c. 45, s. 2, (Dissenters' Religious Property Limitation Act), 497.

c. 66, (Aliens), 39, 43.

c. 76, (Real Property Amendment Act, *now repealed*), 156, 236, 412.

c. 92, (Right of voting for Coroners), 593.

c. 96, (Insolvency), 278.

8 & 9, c. 16, s. 20, (Companies' Clauses Act), 859.

c. 106, (Real Property Amendment Act), 412, 424, 600, 817.

10 & 11, c. 96, (Trustee Relief Act), 375, *et seq.*, 785.

12 & 13, c. 106, (Bankrupt Law Consolidation Act), 29, 273, 277, 287, 477, 479, 714.

13 & 14, c. 35, (Sir G. Turner's Act), 368.

c. 60, (Trustee Act, 1850), 283, 286, 714, 840, 847.

14 & 15, c. 83, (Court of Appeal in Chancery), 714.

15 & 16, c. 86, (Chancery Amendment Act), 854, 860, 866.

16 & 17, c. 137, (Charitable Trusts Act, 1853), 499, 717, 718, 784, *et seq.*

18 & 19, c. 15, (Judgments), 657, 669.

c. 124, (Charitable Trusts' Amendment Act, 1855), 382, 504, 511, 785, 786.

19 & 20, c. 50, (Sale of Parish Advowsons), 107.

c. 94, (Uniform Administration of Estates), 797.

# INTRODUCTORY VIEW

## OF THE

### RISE AND PROGRESS OF TRUSTS.

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THE origin of trusts, or rather the adaptation of them to the English law, may be traced to the ingenuity of fraud. By the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restrictions directed against the growing wealth of the church by the statutes of mortmain. Another inducement to the adoption of the new system was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates, which, by the narrow policy of the common law, they had hitherto been prevented from exercising.

Originally, the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honour proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, a chancellor in the reign of Richard the Second, originated the writ of *subpœna*, by which the trustee was liable to be summoned \*into Chancery, and compellable to answer upon oath the allegations of his *cestui que trust*. No [\*2] sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to uses. Thus, in the words of an old counsellor, the Parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse.(a)

Of trusts there were two kinds: the *simple* trust, and the *special* trust. The *simple* trust, which also passed by the name of a *use*, was defined in legal phraseology to be, “a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* should take the profit, and that the *terre-tenant* should execute an estate as he should direct.”(b) In order rightly to understand what was meant by this rather technical description, we shall briefly consider the principles that were

(a) Attorney-General v. Sands, Hard. 491.

(b) Co. Lit. 272, b.

recognized by courts of equity (for these had the exclusive jurisdiction of trusts,) first, with reference to the terre-tenant or feoffee to uses, and secondly, with reference to the beneficial proprietor, or *cestui que use*.

With respect to the feoffee to uses, it was held to be absolutely indispensable that there should be *confidence in the person*, and *privity of estate*. For want of the requisite of *personal confidence* it was ruled that a corporation could not stand seised to a use; for how, it was said, could a corporation be capable of confidence when it had not a *soul*? Nor was it competent for the king to sustain the character of trustee; for it was thought inconsistent with his high prerogative that he should be made responsible to his own subject for the due administration of the estate.

[\*3] \*And originally the *subpœna* lay against the trustee himself only, and could not have been sued against either his heir or assign; for the confidence was declared to be personal, and not to accompany the devolution of the property.<sup>(c)</sup> But the doctrine of the court in this respect was subsequently put on a more liberal footing, and it came to be held that both heir and assign should be liable to the execution of the use. An exception however was still made in favour of a purchaser for valuable consideration not affected by notice.<sup>(d)</sup>

The meaning of *privity of estate* may be best illustrated by an example. Had a feoffment been made to A. for life to his own use, with remainder to B. in fee to the use of C., and then A. had enfeoffed D. in fee, in this case, though D. had the land, yet, as he did not take the identical estate in the land to which the use in favour of C. was attached, he was not bound by C.'s equitable claim. And, by the same rule, neither tenant by the curtesy, nor tenant in dower, nor tenant by *elegit*, was liable to the execution of the use, for their interests were new and original estates, and could not be said to have been impressed with the use. So the lord who was *in* by escheat, a disseisor, abator, and intruder, were not amenable to the *subpœna*; for the first claimed by title paramount to the creation of the use; and the three last were seised of a tortious estate, and held adversely to the feoffee to uses.

With respect to the *cestui que use*, the principle upon which his whole estate depended was also what in legal language was denominated *privity*. Thus, on the death of the original *cestui que use*, the right to sue the *subpœna* was held to descend indeed to the heir on the ground of

[\*4] \**hæres cadem persona cum antecessore*; but the wife of the *cestui que use*, or the husband of a feme *cestui que use*, and a judgment creditor, were not admitted to the same privilege; for their respective claims were founded not on privity with the person of the *cestui que use*, but on the course and operation of law. And for the like reason a use was not assets, was not subject to forfeiture, and on failure of heirs in the inheritable line did not escheat to the lord. And as a use was regarded in the light of a *chose in action*, that is, a mere right to enforce a claim against another in a court of equity, the use was held not to be assignable.<sup>(e)</sup>

The *special trust* (for hitherto we have spoken of the simple trust or use only) was where the conveyance to the trustee was to answer some

(c) 8 E. 4, 6; 22 E. 4, 6.

(e) Finch's case, 4 Inst. 85.

(d) Keilway, 42, b.

particular and specific purpose, as upon trust to reconvey in order to change the line of descent, upon trust to sell for payment of debts, &c. In the special trust the duty of the trustee was not, as in the use, of a mere passive description, but imposed upon him the obligation of exerting himself in some active character for the accomplishment of the object for which the trust was created. In case the trustee neglected his duty, the *cestui que trust* was entitled to file a bill in chancery, and compel him to proceed in the execution of his office.(f)

Both the *use* and the *special trust* were applicable to chattels real and personal, as well as to freeholds; but trusts of chattels were for obvious reasons much less frequently in practice. The amount of the property was small; the owner, even without the interposition of a trustee, had the fullest control and dominion over it; and a chattel interest, [\*5] as it followed the person, was equally subject to forfeiture whether in the custody of a trustee, or in the hands of the beneficial proprietor.(g) But to the extent, whatever it was, to which trusts of chattels were adopted, they were conducted upon the same principles, *mutatis mutandis*, as were trusts of freeholds; the right to sue a *subpœna* turned equally on privity,(h) and the interest of the *cestui que trust* was held not to be assignable.(i)

Such was the nature of trusts as they stood at *common law*; but the manifold frauds and mischiefs to which the new system gave occasion, particularly "the great unsurety and trouble arising thereby to purchasers," called loudly from time to time for the enactment of remedial statutes. One of the most important of these was the 1 Ric. 3, c. 1, the substance of which may be well expressed in the terms of the preamble, viz., that "all acts made by or against a *cestui que use* should be good as against him, his heirs, and feoffees in trust," in other words, that all dealings of the *cestui que use* with the trust property should have precisely the same legal operation, as if the *cestui que use* had himself possessed the legal ownership. To what interests the legislature intended this statute to apply has not on all hands been agreed. A feoffment in *fee* to uses was clearly the case primarily intended. Upon a feoffment in *tail*, it seems no use could have been declared, for a tenant in tail was incapacitated by the statute *de donis* from executing estates.(k) With respect to a feoffment for *life* to uses, there appears to be no reason upon principle (except so far as the language of the act may be thought to furnish any inference,) and certainly there is no objection on the \*score of authority, why the *cestui que use* might not have [\*6] passed the legal estate by virtue of the statutory power. It has been contended by Mr. Sanders, that on a feoffment for life no use could have been declared, on the ground that, as the tenant for life held of the reversioner, the consideration of tenure would have conferred a title to the beneficial interest on the tenant for life himself.(l) But this reasoning can have no application where the estate for life was not *created*,

(f) See the case in the reign of Hen. 7, Append. to Treat. of Powers, No. 1.

(g) 5 H. 5, 3, 6.

(h) Witham's case, 4 Inst. 87.

(i) Jenk. 244, c. 30.

(k) Co. Lit. 19, b.

(l) Sand. on Uses, c. 1, s. 6, div. 2.



but was merely *transferred*, for then the assignment of the life estate was not distinguishable in this respect from a conveyance of the fee; in each case there was no consideration of tenure as between the grantor and grantee, but in each case the services incident to tenure were due from the grantee to a third person.<sup>(1)</sup> It is clear that the statute embraced *uses of lands* only, and did not extend either to *special trusts*, or to *trusts of chattels*: not to special trusts, because the trustee combined in himself both the legal estate and the use, though compellable in chancery to direct them to a particular purpose; and not to trusts of chattels, because the preamble and the statute were addressed to *cestui que use* and *his heirs*, and to *feoffees in trust*.

[\*7] \*The mischiefs of the system increasing more and more, (the statute of Richard occasioning still greater evils than it remedied, from the facility it gave to the *cestui que use* and his feoffee, who had now each the power of passing the legal estate, of defrauding by collusion the *bona fide* purchaser,) the legislature again interposed its authority by the 27 Hen. 8, c. 10, and thereby annihilated uses as regarded their fiduciary character, by enacting, that "where any person stood *seised* of any hereditaments to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use, trust, or confidence."<sup>(2)</sup>

*Uses* by the operation of this statute became merged in the legal estate; but *special trusts* and *trusts of chattels* were not within the purview of the act: the former, because the use, as well as the legal interest,

(1) The state of the law upon this subject appears to have been as follows:—  
1. On the *creation* of an estate for life, had no use been mentioned on the face of the instrument, the tenant for life had held for his own benefit in compensation of his services; Perk. s. 535; B. N. C. 60; Br. Feff. al. Uses, 10; and no use could have been *averred* in contradiction to the use implied. See Gilb. on Uses, 57.  
2. Had a use been *expressly* declared by the deed, the tenant had been bound by the terms on which he accepted the estate; Perk. s. 537; Br. Feff. al. Uses, 10, 40.  
3. Unless a rent had been reserved, or consideration paid, in which case a court of equity would not have enforced the use against the purchaser for valuable consideration; B. N. C. 60; Br. Feff. al. Uses, 40.  
4. On the *assignment* of a life estate a use might have been declared, as on a conveyance in fee.

(2) As this statute *does* operate on the use of a life estate, but does *not* apply to a *seisin* in tail, the doctrine of Mr. Sanders, that prior to the 27 Hen. 8, there was no use of a *seisin* either in tail or for life, seems open to the following objections:—1. That the statute in executing the use of a life estate, operates on an interest which at the time of the enactment had no existence; and, 2ndly, That in *not* executing a use declared on a *seisin* in tail, it operates differently on two estates that fall within precisely the same principle. To meet the former objection, Mr. Sanders holds the statute of Hen. 8, to be prospective, and distinguishes it from the statute of Richard, which he considers not to be prospective, by observing that the latter employs the word "use" only, while the former has the additional term of "trust;" but to this it may be answered, that although the *statute* of Richard does not contain the word trust, the *preamble* does, and that the distinction contended for between use and trust had no existence until a comparatively recent period. See *Altham v. Anglesey*, Gilb. Eq. Rep. 17. To obviate the latter objection, it is maintained by Mr. Sanders that tenant in tail *is* within the statute of Hen. 8; an opinion which, it is submitted, is directly opposed to the general stream of authority. Co. Lit. 19, b.; Shep. Touch. 509; Gilb. on Uses, 11, and Sir E. Sugden's note, *ibid*.



was in the trustee; the latter, because a termor is said to be *possessed*, and not to be *seised* of the property.

\*In the room of uses which were thus destroyed as they arose, the judges by their construction of the statute created a novel [\*8] kind of interest, since distinguished by the name of *Trust*. Before the statute of Hen. 8, a person, to have had the complete ownership, must have united the possession of the land and the use of the profits. The possession and the use were even at common law recognised as distinct interests, though the *cestui que use* was left to chancery for his remedy.<sup>(m)</sup> On a feoffment to A. to the use of B. to the use of C., the possession was in A., the use in B., and the limitation over to C. was disregarded as surplusage. When the statute of Hen. 8, was passed, it executed the estate in B. by annexing the possession to the use; but having thus become *functus officio* it did not, as the act was construed, affect the use over to C. However, chancery, now that uses were converted into estates, decreed C. to have a title in equity, and enforced the execution of it under the name of a trust.<sup>(n)</sup>

"Interests in land," said Lord Hardwicke, "thus became of three kinds: first, the *estate in the land itself*, the ancient common-law fee; secondly, the *use* which was originally a creature of equity, but since the statute of uses it drew the estate in the land to it, so that they were joined and made one legal estate; and, thirdly, the *trust*, of which the common law takes no notice, but which carries the beneficial interest and profits in a court of equity, and is still a creature of that court, as the use was before the statute."<sup>(o)</sup>

This newly-created interest was held to be so perfectly \*distinct [\*9] from the ancient use, that the statutory provisions, by which many of the mischiefs of uses had been remedied, as the 19 Hen. 7, c. 15, by which uses had been made liable to writs of execution, and the 26 Hen. 8, c. 13, by which they had become forfeitable to the crown for treason, were decided to have no application.<sup>(1)</sup> However, the trust took the likeness of the use, conforming itself to the nature of special trusts and trusts of chattels, which had never been disturbed by any legislative enactment.

To show how the principles of uses prevailed after the statute of Hen. 8, it was held in the reign of Elizabeth,<sup>(p)</sup> that the equitable term of a *feme covert* did not vest in the husband by survivorship, for a trust, it was said, was a thing in privity, and in nature of an action, and no remedy for it but by writ of *subpœna*. And a few years after in the same reign

(m) Lit. s. 462, 463; Co. Lit. 272, b; and see Carter, 197; Porey v. Juxon, Nels. 135; Megod's case, Godb. 64.

(n) See Hopkins v. Hopkins, 1 Atk. 591.

(o) Willet v. Sandford, 1 Ves. 186; Coryton v. Helyar, 2 Cox, 342.

(p) Witham's case, 4 Inst. 87; S. C. Popham, 106, *sub nomine* Johnson's case.

(1) As the statutes relating to uses have never been repealed, but are merely inoperative from the want of any subject-matter, the question suggests itself whether they be not still applicable to a use created by a bargain and sale not by indenture, or by indenture not duly enrolled; for as the 27 Hen. 8, c. 10, is prevented from transferring the possession, the old common-law use seems in this case to survive. See Shep. Touch. 508.

it was resolved by all the judges that a trust was a matter of privity and in nature of a *chose in action*, and therefore was not assignable.<sup>(g)</sup> And in the sixth year of King Charles the First it was decided by the judges, that as a feme was dowable by act or rule of law, and a Court of Equity had no jurisdiction where there was not fraud or covin, the widow of a trustee was entitled beneficially to her dower out of the trust estate.<sup>(r)</sup>

[\*10] But during the reigns of Charles the First and Charles \*the Second, and particularly during the chancellorship of Lord Nottingham, who, from the sound and comprehensive principles upon which he administered trusts, has been styled the father of equity,<sup>(s)</sup> the courts gradually threw off the fetters of uses, and disregarding the operation of mere technical rules, proceeded to establish trusts upon the broad foundation of conformity to the course of common law. "In my opinion," said Lord Mansfield, "trusts were not on a true foundation till Lord Nottingham held the great seal; but by steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised; so that trusts are now made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8, meant to avoid."<sup>(t)</sup>

As to the changes that were successively introduced, it was held *with reference to the trustee*, that *actual confidence in the person* was no longer to be looked upon as essential. A body corporate therefore was not exempted from the writ of *subpana* on the ground of incapacity;<sup>(u)</sup> and even the king, notwithstanding his high prerogative, was invested with the character of a royal trustee,<sup>(v)</sup> though the precise mode of enforcing the trust against him was not exactly ascertained: to use the language of Lord Northington, "the arms of equity were very short against the prerogative."<sup>(w)</sup> The subtle distinctions which had \*formerly

[\*11] attended the notion of *privity of estate* were also gradually discarded. Thus it was laid down by Lord Hale, that tenant in dower should be bound by a trust as claiming in the *per* by the assignment of the heir;<sup>(x)</sup> and so it was afterwards determined by Lord Nottingham;<sup>(y)</sup> and when an old case to the contrary was cited before Lord Jeffries, it was unanimously declared both by the bench and the bar to be against equity and the constant practice of the court.<sup>(z)</sup> A tenant by statute merchant was held to be bound upon the same principle, for he took, it was said, by the act of the party, and the remedy which the law gave thereupon.<sup>(a)</sup> But as to tenant by the curtesy, Lord Hale gave his

(g) Sir Moyl Finch's case, 4 Inst. 86.

(r) Nash v. Preston, Cro. Car. 190.

(s) Philips v. Brydges, 3 Ves. 127; Kemp v. Kemp, 5 Ves. 858.

(t) Burgess v. Wheate, 1 Ed. 223.

(u) See Green v. Rutherford, 1 Ves. 468; Attorney-General v. Whorwood, 1 Ves. 536.

(v) See Penn v. Lord Baltimore, 1 Ves. 453; Earl of Kildare v. Eustace, 1 Vern. 439.

(w) Burgess v. Wheate, 1 Ed. 256.

(x) Pawlett v. Attorney-General, Hard. 469. (y) Noel v. Jevon, Freem. 43.

(z) MS. note by an old hand in the copy of Croke's Reports in Lincoln's Inn Library, Cro. Car. 191.

(a) Pawlett v. Attorney-General, Hard. 467, per Lord Hale.

opinion, that one in the *post* should not be liable to a trust *without express mention made by the party who created it*; and therefore tenant by the curtesy should not be bound: *(b)* but his lordship's authority on this point was subsequently overruled, and curtesy as well as dower was made to follow the general principle.

With respect to the *cestui que trust*, or the person entitled to the *sub-pœna*, the narrow doctrine contained under the technical expression of privity began equally to be waived, or rather to be applied with considerable latitude of construction. "The equitable interest," said Justice Rolle, "is not a *thing in action*, but an *inheritance* or *chattel*, as the case may fall out;" *(c)* and when once the trust, instead of passing as a *chose in action*, came to be treated on the footing of an actual *estate*, it soon drew to \*it all the rights and incidents that accompanied property at law; thus, the equity of the *cestui que trust*, though [\*12] a bare contingency or possibility, *(d)* was admitted to be assignable; *(e)* and Witham's case, that a husband who survived his wife could not, for want of privity, claim her equitable chattel, was declared by the court to be no longer an authority. *(f)* So a judgment creditor, it was held by Lord Nottingham, might prosecute an equitable *fieri facias*; *(g)* and though Lord Keeper Bridgman refused to allow an equitable *elegit*, *(h)* it is probable, had the question arisen before Lord Nottingham, his lordship would in this, as in other cases, have acted on a more liberal principle; at all events, the creditor's right to relief in this respect has since been established by the current of modern authority. *(i)* Again, a trust was decided by Lord Nottingham to be assets in the hands of the heir; *(k)* and though Lord Guildford afterwards overruled this decision, *(l)* yet Lord Nottingham's view of the subject appears to have been eventually established. *(m)* Curtesy also was permitted of a trust estate, though the widow of *cestui que trust* could never make good her title to dower; *(n)* "not," said Lord Mansfield, "on reason or principle, but because wrong determinations had misled in too many instances to be then set right;" *(o)* or rather, as Lord Redesdale thought, because the admission of dower would \*have occasioned great inconvenience to purchasers—a mischief that in the case of curtesy was not equally to be apprehended. *(p)* [\*13]

Lord Mansfield was for carrying the analogy of trusts to legal estates, beyond the legitimate boundary. "A use or trust," he said, "was heretofore understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestui que use*, and all claiming under him in like privity; nobody in

*(b)* S. C. Ib. 469.

*(c)* King v. Holland, Styl. 21; see Casburne v. Casburne, 2 J. & W. 196.

*(d)* Warmstrey v. Tanfield, 1 Ch. Re. 29; Lord Cornbury v. Middleton, 1 Ch. Ca. 208; Goring v. Bickerstaff, 1 Ch. Ca. 8.

*(e)* Courthope v. Heyman, Cart. 25, per Lord Bridgman.

*(f)* King v. Holland, Al. 15.

*(g)* Anon. case, cited Balsh v. Wastall, 1 P. W. 445; Pit v. Hunt, 2 Ch. Ca. 73.

*(h)* Pratt v. Colt, Freem. 139.

*(i)* See *infra*.

*(k)* Grey v. Colville, 2 Ch. Re. 143.

*(l)* Creed v. Covile, 1 Vern. 172.

*(m)* See *infra*.

*(n)* Colt v. Colt, 1 Ch. Re. 254.

*(o)* Burgess v. Wheate, 1 Ed. 224.

*(p)* See *infra*.



the *post* was entitled under or bound by the agreement; but now the trust in this court is the same as the *land*, and the trustee is considered merely as an instrument of conveyance.”(q) And in the application of this principle his lordship argued, that the estate of the *cestui que trust* was subject to escheat, and that, on failure of heirs of the trustee, the lord who took by escheat was bound by the trust. But to these propositions the courts of equity have never yet assented. The limit to which the analogy of trusts to legal estates ought properly to be allowed was well enunciated by Lord Northington in the case of *Burgess v. Wheate*. “It is true,” he said, “this court has considered trusts *as between the trustee, cestui que trust, and those claiming under them*, as imitating the possession; but it would be a bold stride, and, in my opinion, a dangerous conclusion, to say therefore this court has considered the creation and instrument of trust as a mere nullity, and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it: for my own part *I know no instance where this court has permitted the creation of the trust to affect the* [\*14] *\*right of a third person* ;”(r) that is, to illustrate the principle by instances, a tenant by the curtesy, or in dower, or by *elegit*, as claiming through the *cestui que trust* or trustee, though in the *post*, is bound by and may take advantage of the trust; but, according to Lord Northington, the lord, who comes in by escheat is not in any sense a privy to the trust, and therefore can neither reap a benefit from it on failure of heirs of the *cestui que trust*, nor is bound by the equity on failure of heirs of the trustee.(s)

[\*15]

## CHAPTER I.

## DEFINITION OF A TRUST.

As the doctrines of trusts are equally applicable to *real* and *personal* estate, and the principles that govern the one will be found, *mutatis mutandis*, to govern the other, we cannot better describe the nature of a trust generally, than by adopting Lord Coke's definition of a *use*, the term by which, before the Statute of Uses, a trust of lands was designated.(a) A trust, in the words applied to the use, may be said to be “*A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privy to the estate of the land, and to the person touching the land, for which cestui que trust has no remedy but by subpoena in Chancery.*”(b)

1. It is a *confidence*; not necessarily a confidence *expressly* reposed by

(g) *Burgess v. Wheate*, 1 Ed. 226.

(r) *Ib.* 250, 251.

(s) It is clear that the lord cannot acquire an equitable interest by escheat; *Burgess v. Wheate*, 1 Ed. 177; *Cox v. Parker*, 2 Jur. N. S. 842; but whether a lord taking the legal estate by escheat shall or not be bound by the trust, has never been decided. See *Evans v. Brown*, 5 Beav. 114; *Viscount Downe v. Morris*, 3 Hare, 409.

(a) *Burgess v. Wheate*, 1 Ed. 248, per Lord Keeper Henley; *Lloyd v. Spillet*, 2 Atk. 150, per Lord Harkwicke.

(b) *Co. Lit.* 272, b.



one party in another, for it may be raised by implication of law : and the trustee of the estate need not be *actually* capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate ; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a legal property, nor a legal right to property.(c)

2. It is a confidence *reposed in some other* ; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than *cestui que trust* ; for as a man cannot sue a *sub-pœna* against himself, he cannot be said to hold upon trust for himself.(d) If the legal and \*equitable interests happen to meet in the same [ \*16 ] person, the equitable is for ever absorbed in the legal ; as if A. be seised of the legal inheritance *ex parte paterna*, and of the equitable *ex parte materna*, upon the death of A. the heir of the maternal line has no equity against the heir of the paternal.(e) And the same rule prevails as to leaseholds for lives.(f) If, for instance, the legal estate in a freehold lease be vested in a husband and his heirs, in trust for the wife and her heirs, the child who is the heir of both, and takes the legal estate *ex parte paterna*, and the equitable estate *ex parte materna*, will, by the merger of the equitable in the legal, become seised both at law and in equity *ex parte paterna*, and the subsequent devolution will be regulated accordingly.

But this rule holds only where the legal and equitable estates are co-extensive and commensurate ; for if a person be seised of the legal estate in fee, and have only a partial equitable interest, to merge the one in the other might occasion an injurious disturbance of rights. Thus before the Fines and Recoveries Act,(g) if lands had been conveyed to A. and his heirs, in trust for B. in tail, with remained to A. in fee, had the equitable remainder limited to A. been converted into a legal estate, it would not have been barrable by B.'s equitable recovery.(h) Lord Alvanley upon this case observed—"It was maintained, that where there is in the same person a legal and equitable interest, the former absorbs the latter. I admit that where he has the same interest in both, he ceases to have the equitable estate, and has the legal estate, upon which the court will not act, but leaves it to the rules of law ; but I do not by any means admit, that where he has the whole legal estate and a partial equitable estate, the latter sinks into the former. It has been very ably argued, that there seems an absurdity in saying he had an equitable remainder for himself, \*where he had the whole legal fee ; but it is much more absurd to say he had a legal remainder. [ \*17 ]

(c) Bacon on Uses, 5. See *Wainewright v. Elwell*, 1 Mad. 634.

(d) *Goodright v. Wells*, Dougl. 747, per Lord Mansfield.

(e) *Selby v. Alston*, 3 Ves. 339; *Goodright v. Wells*, Dougl. 747, per Lord Mansfield; *Wade v. Paget*, 1 B. C. C. 363; S. C. 1 Cox, 74; *Philips v. Brydges*, 3 Ves. 126, per Lord Alvanley; *Finch's case*, 4 Inst. 85, 3rd resolution; *Harmood v. Oglander*, 8 Ves. 127, per Lord Eldon.

(f) *Creagh v. Blood*, 3 Jones & Lat. 133.

(g) 3 & 4 W. 4, c. 74.

(h) *Philips v. Brydges*, 3 Ves. 120; *Robinson v. Cuming*, Rep. t. Talb. 164; S. C. 1 Atk. 473; and see *Boteler v. Allington*, 1 B. C. C. 72; *Merest v. James*, 6 Mad. 118.

It is impossible—it would be a solecism—to state to a lawyer that he could have an estate in fee with a remainder in tail expectant in law upon it; but there is no such absurdity in saying he might have the whole legal estate, and a limited interest in the beneficial interest of that estate. When I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction—that it is the same estate in law and in equity: for then there is no person upon whom the court can act—the equitable estate is absorbed—the better phrase is, that it is no longer exists; but when for the purposes of justice it is necessary it should exist, that circumstance shall not put a party entitled into a worse condition.<sup>(i)</sup>

Again, in *Habergham v. Vincent*,<sup>(k)</sup> a testator devised copyhold lands to five trustees, upon trust to convey the estate to certain uses, which failed, with an ultimate limitation to the heirs of the surviving trustee. On a bill filed by the heir-at-law of the testator against the surviving trustee, Lord Loughborough observed—“It is impossible to contend that under the limitation to the right heir of the surviving trustee, the trustee can take the fee beneficially.” But on a subsequent day, he added—“I am not so clear that if anything passed under the remainder to the right heir of the surviving trustee, it would not be the fee to the trustee himself. Otherwise I must declare him a trustee for his own right heir. I doubt whether a man having the legal estate himself could be a trustee of the equitable interest for his own right heir. I take it a man owes no duty to his own heir-at-law.” But eventually the court arrived at a different conclusion, and a settlement was directed, so as to give the ultimate remainder to the right heir of the trustee as a purchaser.

In the case of a mortgage in fee it is said, a man and his heirs are trustees for himself and his executors;<sup>(l)</sup> the meaning is that, until a release, or foreclosure of the equity of redemption, the interest of the [ \*18 ] mortgagee is of the nature of \*personalty, and passes on his death to his personal representative; the heir, therefore, takes the estate upon trust for the executor. A release or foreclosure, unless it happen in the lifetime of the mortgagee, comes too late after his decease to alter the character of the property, for, *as the tree falls, so it must lie.*<sup>(m)</sup><sup>(1)</sup>

3. A trust is *not issuing out of the land, but as a thing collateral to it*. A legal charge, as a rent, issues directly out of the land itself, and therefore binds every person, whether in the *per* or *post*, whether a purchaser for valuable consideration or volunteer, whether with notice or without; but a trust is not part of the land, but an incident made to accompany it, and that not inseparably, but during the continuance only of certain indispensable adjuncts; for—

(i) *Philips v. Brydges*, 3 Ves. 125-127.

(k) 2 Ves. jun. 204.

(l) *Kendal v. Micfield*, Barn. 50, per Lord Hardwicke.

(m) *Cunning v. Hicks*, 2 Ch. Ca. 187; S. C. 1 Vern. 412; *Tabor v. Grover*, 2 Vern. 367; S. C. 1 Eq. Ca. Ab. 328; *Clerkson v. Bowyer*, 2 Vern. 66; *Gobe v. Earl of Carlisle*, cited *ib.*; *Wood v. Nosworthy*, cited *Awdley v. Awdley*, 2 Vern. 193.

(1) But if the heir foreclose, or obtain a release of the equity of redemption, it is said he may keep the estate, and pay the executor the debt only. *Clerkson v. Bowyer*, 2 Vern. 67, per Cur. But *quære*.

4. A trust is *annexed in privity to the estate*, that is, must stand or fall with the interest of the person by whom the trust is created; as, if the trustee die and leave no heir, it was the opinion of Lord Northington that the lord who takes by escheat is not a privy to the estate upon which the trust was ingrafted, and therefore will not be bound by it, but will hold beneficially.<sup>(n)</sup> And upon the same principle, if the trustee be disseised, the tortious fee is adverse to that impressed with the trust, and therefore the equitable owner cannot sue the disseisor in Chancery, but must bring an action against him at law in the name of the trustee.<sup>(o)</sup>

During the system of *uses*, and also while *trusts* were in their infancy, the notion of privity of estate was not extended to tenant by the curtesy, or in dower, or by *elegit*, or in fact to any person claiming by operation of law, though through the trustee; but in this respect the landmarks have since been \*carried forward, and at the present day a trust [ \*19 ] follows the estate into the hands of every one claiming under the trustee, whether in the *per* or *post*. A lord by escheat, as Lord Northington thought, would be still an exception; and a disseisor is unquestionably not bound, for he asserts a new and adverse estate.

5. A trust is *annexed in privity to the person*. To entitle the *cestui que trust* to relief in equity it is not only necessary he should prove the creation of the trust, and the continuance of the estate supporting it, but should also evince that the assign is personally privy to the equity, and therefore amenable to the *subpœna*. If it can be shown that the assign had *actual* notice, then, whether he paid a valuable consideration or not, he is plainly privy to the trust, and bound to give it effect; but if actual notice cannot be proved, then, if he be a volunteer, the court will still affect him with notice by presumption of law; but if he be a purchaser, the court must believe, that having paid the full value of the estate, he was ignorant, at the time he purchased, of another's equitable title. A purchaser for valuable consideration without notice is therefore the only assign against whom privity annexed to the person cannot at the present day be charged.

6. The *cestui que trust* has no remedy but by *subpœna* in Chancery: and by chancery must be understood, not exclusively the court of the lord chancellor, but any court invested with an equitable jurisdiction, as opposed to common law courts,<sup>(p)</sup> and spiritual courts,<sup>(q)</sup> neither of

(n) See Viscount Downe v. Morris, 3 Hare, 394; Evans v. Brown, 5 Beav. 114.

(o) Finch's case, 4 Inst. 85, 1st resolution; and see Gilbert on Uses, edited by Sir E. Sugden, p. 429, note 6.

(p) Sturt v. Mellish, 2 Atk. 612, per Lord Hardwicke; Allen v. Imlett, F. L. Holt's Rep. 641; Holland's case, Styl. 41, per Rolle, J.; Queen v. Trustees of Orton Vicarage, 14 Q. B. Re. 139; Vanderstegen v. Witham, 6 M. & W. 457; Bond v. Nurse, 10 Q. B. Re. 244. In The Queen v. Abrahams, 4 Q. B. Re. 157, the court professed to proceed upon the *legal* right, so that the principle was not disturbed, though there may be a question how far the facts justified the assumption upon which the court acted. In Roper v. Holland, 3 Ad. & Ell. 99, a *cestui que trust* recovered upon an action of debt for money had and received on proof of the admission by the trustee that he had a balance in hand for the plaintiff. Sloper v. Cottrell, 2 Jur. N. S. 1046.

(q) Miller's case, 1 Freem. 283; King v. Jenkins, 3 Dowl. & Ry. 41; Farrington v. Knightly, 1 P. W. 549, per Lord Parker; Edwards v. Graves, Hob. 265; Witter v. Witter, 3 P. W. 102, per Lord King.



[\*20] which have any \*cognizance in matters of trust. A common-law court could never indeed, from the defective nature of its proceedings, have specifically enforced a trust; but at one time it affected to punish a trustee in damages for breach of the implied contract:(*r*) an exercise of authority, however, clearly extra-provincial, and long since abandoned.(*s*) Should a spiritual court attempt to meddle with a trust, the Court of Queen's Bench might be moved to issue a prohibition.(*t*)

[\*21]

## CHAPTER II.

### CLASSIFICATION OF TRUSTS.

THE first and natural division of trusts is into *simple* and *special*.

The *simple* trust is where property is vested in one person *upon trust* for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of the law. In this case the *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs.

The *special* trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts.

Special trusts have again been subdivided into *ministerial* (or *instrumental*) and *discretionary*. The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment.

A trust to convey an estate must be regarded as ministerial; for, provided the *cestui que trust* be put in possession of the estate, it is perfectly immaterial to him by whom the conveyance is executed.

Mr. Fearne was of opinion, that even a trust for sale should be considered as ministerial; "for the price," he said, "is not arbitrary, or at the trustee's discretion, but to be the best that can be gotten for the estate, which is a fact to be ascertained \*independently of any discretion in the trustee."*(a)* But there is much room for judgment in the manner of proceeding to a sale, and the precautions that are taken will have a material influence upon the price.

(*r*) Megod's case, Godb. 64; Jevon v. Bush, 1 Vern. 344, per Lord Jeffries; Smith v. Jameson, 5 T. R. 603, per Buller, J.; and see 1 Eq. Ca. Ab. 384, D. (*a*).

(*s*) Barnardiston v. Soame, 7 State Trials, 443, Harg. ed., per Chief Justice North; Sturt v. Mellish, 2 Atk. 612, per Lord Hardwicke; Holland's case, Styl. 41, per Rolle, J.; Allen v. Imlett, F. L. Holt's Rep. 14.

(*t*) Petit v. Smith, 1 P. W. 7; Edwards v. Freeman, 2 P. W. 441, per Sir J. Jekyll; Barker v. May, 4 M. & R. 386.

(*a*) Fearne's P. W. 313.



A fund in trustees upon trust to distribute among such charitable objects as the trustees shall think fit,<sup>(b)</sup> or an advowson conveyed to them upon trust to elect and present a proper preacher,<sup>(c)</sup> is clearly a discretionary trust; for the selection of the most deserving objects in the first instance, and the choice of the best candidate in the second, is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the candidates, and all the particular circumstances of the case.

A trust "to distribute at the discretion of the trustees" is frequently designated in the books as a *mixture of trust and power*,<sup>(d)</sup> that is, a trust of which the outline only was sketched by the settlor, while the details were to be filled up by the good sense of the trustees. The *exercise* of such a power is *imperative*, while the *mode* of its execution is matter of judgment and *discretionary*.

A *mixture of trust and power* is not to be confounded with a *common trust to which a power is annexed*; for, in the latter case, the trust itself is complete, and the power, being but an accessory, may be exercised or not, as the trustee may deem it expedient; as where lands are limited to trustees with a power of varying the securities: for in such a case the power forms no integral part of the trust, but is merely collateral and subsidiary, and the execution of it, in the absence of fraud, cannot be compelled by application to the court.

Again, trusts may be divided, with reference to the object in view, into *lawful* and *unlawful*. The former, such as are directed to some honest purpose, as a trust to pay debts, &c., which are called by Lord Bacon *Intents* or *Confidences*, and will be administered by the court. The latter are trusts \*created for the attainment of some end [ \*23 ] contravening the policy of the law, and therefore not to be sanctioned in a forum professing not only justice but equity, as a trust to defraud creditors or to defeat a statute. Such are designated by Lord Bacon as *Frauds*, *Covins*, or *Collusions*.<sup>(e)</sup>

Another divisions of trusts is into *public* and *private*. By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for *charitable* purposes, and indeed *public* trusts and *charitable* trusts may be considered as synonymous expressions.<sup>(f)</sup> In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is competent to control, modify, or determine the trust; the duration of trusts of the latter kind cannot be extended by the will of the settlor beyond the limits of legal

(b) Attorney-General v. Gleg, 1 Atk. 356; Hibbard v. Lambe, Amb. 309; Cole v. Wade, 16 Ves. 27; Gower v. Mainwaring, 2 Ves. 7.

(c) Attorney-General v. Scott, 1 Ves. 413; Potter v. Chapman, Amb. 98.

(d) Cole v. Wade, 16 Ves. 43; Gower v. Mainwaring, 2 Ves. 89.

(e) Bac. on Uses, 9.

(f) See Attorney-General v. Aspinall, 2 M. & Cr. 622; Attorney-General v. Heelis, 2 S. & S. 76; Attorney-General v. Corporation of Shrewsbury, 6 Beav. 220.

limitations, viz., a life or lives in being with an ingraftment of twenty-one years. But the objects of a public trust are an uncertain and fluctuating body, and the trust itself is of a permanent and lasting character, and is not confined within the limits prescribed to a settlement upon a private trust.(g)

[ \*24 ]

## \*CHAPTER III.

## OF THE PARTIES TO THE CREATION OF A TRUST.

Now that we have defined and distributed trusts, we shall next enter upon the creation of them; *first*, by the act of a party, and *secondly*, by operation of law. Upon the subject of the former class, we propose to treat, *First*, Of the necessary parties to the creation of a trust; *Secondly*, What property may be made the subject of a trust; *Thirdly*, With what formalities a trust may be created; *Fourthly*, What may be the object or scope of a trust; and *Fifthly*, In what language a trust may be declared. In *this* chapter, we shall consider the necessary parties to a trust.

## SECTION I.

## OF THE SETTLOR.

THE creation of a trust implies the presence of three persons, or at least of three characters, namely,—1, a settlor; 2, a trustee; and 3, a *cestui que trust*.

As the creation of a trust is a modification of property in a particular form, it may be laid down as a general rule that whoever is competent to deal with the legal estate, may vest it in a trustee for the purpose of executing the settlor's intention.

The *sovereign*, as to his private property, may, by letters patent, grant it to one person upon trust for another.(a) But the trust must appear upon the face of the letters patent; for if the grant be expressed to be made to one person, a trust in favour of another cannot be proved by [ \*25 ] *parol* in favour of \*another, for this would contradict the nature of the instrument which purports to be an act of bounty to the grantee.(b) However, if the grant be to A. and his *heirs* with the limitation of a beneficial interest to A. for life only, a trust of the remainder will not pass to the grantee, but will result to the crown, for the presumption of bounty as to the whole is rebutted by the declared intention as to the part.(c)

All prizes taken in war vest in the sovereign, and may by the royal warrant be granted to trustees upon trust to distribute in a prescribed form amongst the captors; but an instrument of this kind is held not to

(g) *Christ's Hospital v. Grainger*, 1 Mac. & Gord. 460.

(a) *Bac. on Uses*, 66.

(b) *Fordyce v. Willis*, 3 B. C. C. 577.

(c) *Bac. on Uses*, 66.

vest an interest in the *cestuis que trust* which they can enforce in equity, but to resemble a power of attorney for reducing the prizes into possession, or a creditor's deed to which the creditors are not parties, and may at any time be revoked or varied at the pleasure of the sovereign before the general distribution.(d)

The crown may by *will* bequeath its private personal property to one person in trust for another, but the will must be in writing and under the sign manual,(e) though the Ecclesiastical court has no jurisdiction to admit it to probate.(f)

As to the power of *Corporate Bodies* to create a trust, it was competent to them, before the late Municipal Corporations Act,(g) (subject as to ecclesiastical corporations to the restraining statutes of Elizabeth,) to alienate their property, and as a consequence to vest it in a trustee.(h) But now civil corporations are themselves trustees of their property, for the public purposes prescribed by the Municipal Corporations Act, and are debarred from alienating their real(i) or personal estate(k) without the consent of the Lords of the Treasury.

A *Feme Covert* may create a trust of real estate, but it must be with the consent of her husband, and there must be all the attendant formalities required by the Fines and Recoveries \*Act. It is somewhat singular that by our law a married woman is under a total [\*26] disability as to her *choses en action*. The husband, however, may create a trust of them *sub modo*: that is, if they be reduced into possession during the coverture, the settlement will be unimpeachable, but if they remain *choses en action* at the death of the husband, the wife will be entitled to them by survivorship. And the husband may, subject to the wife's equity to a settlement,(l) create a trust of the wife's equitable chattel real,(m) unless the chattel be of such a nature that it cannot possibly fall into possession during the coverture.(n)

As regards property settled to the separate use of a feme covert, without a clause against anticipation, she is to all intents and purposes considered a feme sole, as if real estate be conveyed to a trustee and his heirs, or if personal estate be vested in a trustee and his executors upon trust for the feme covert, for her sole and separate use, and to be at her sole disposal as to the fee simple in the one case and the absolute interest in the other, she has the entire control and may exercise her ownership or implied power of appointment by creating a trust, extending even beyond the coverture. If the feme covert be tenant for life only to her separate use without any clause against anticipation, she has full power to make a settlement of her life estate. Where the power of anticipation is restrained the feme covert of course can make no disposition of the property, except as to the annual produce which has actually become due.

(d) *Alexander v. Duke of Wellington*, 2 R. & M. 35.

(e) 39 & 40 G. 3, c. 88, s. 10.

(f) *Williams on Executors*, 13, 5th ed.

(g) 5 & 6 W. 4, c. 76.

(h) *Colchester v. Lowten*, 1 V. & B. 226.

(i) 5 & 6 W. 4, c. 76, s. 94.

(k) *Attorney-General v. Aspinall*, 2 M. & Cr. 613; *Attorney-General v. Wilson*, Cr. & Ph. 1.

(l) *Hanson v. Keating*, 4 Hare, 1.

(m) *Donne v. Hart*, 2 R. & My. 360.

(n) *Duberly v. Day*, 16 Beav. 33.



If an *Infant* before the Fines and Recoveries Act had levied a fine or suffered a recovery, he might also have declared the uses,<sup>(o)</sup> and unless the fine or recovery had been reversed by him during his nonage he had been bound by the declaration,<sup>(p)</sup> but deeds have now been substituted for fines and recoveries, and every deed of an infant, whether under the act or independent of it, either is void or may be avoided. An infant at the present day might make a feoffment and at the same time declare [\*27] a use upon it, and both feoffment and use \*would be voidable only and not void,<sup>(q)</sup> and by analogy it might be held that the infant can also engraft a trust upon the legal estate, but a court of equity would never allow any equitable interest to be enforced against the infant to his prejudice, but would give him the same power of avoidance over the equitable as he had over the legal estate, and if the infant has died without having avoided the trust, it is conceived that a court will still investigate the transaction, and see that no unfair advantage had been taken.<sup>(r)</sup>

An infant may by the custom of Kent for valuable consideration certainly, and according to the better opinion, without value,<sup>(s)</sup> make a feoffment at the age of fifteen, and upon such feoffment he may declare uses.<sup>(t)</sup> But a court of equity would no doubt confine such a custom within its narrowest bounds, or as trusts have sprung into being since the statute of Hen. 8, might hold the custom to be void as of recent growth in respect of the equitable interest, and at all events would not allow the custom to be made an instrument of fraud.

Before the late Wills Act<sup>(u)</sup> an infant of the age of fourteen years might have bequeathed his personal estate and have created a trust of it, but now, as regards personal as well as real estate, every testator must be of the age of twenty-one years.

*Lunatics or Idiots* might, before the Fines and Recoveries Act, have levied a fine or suffered a recovery, and the uses declared would have been valid until the fine or recovery had been reversed. But now fines and recoveries have been abolished and the deed of a lunatic or idiot is *ipso facto* void.<sup>(v)</sup> The feoffment of a lunatic or idiot is voidable by the heir only.<sup>(w)</sup> However, should a lunatic or idiot engraft a declaration of trust upon a feoffment a court of equity would have jurisdiction to set it aside;<sup>(x)</sup> though generally it declines to interfere even in this case as against a purchaser for valuable consideration without notice of the lunacy or idiocy.<sup>(y)</sup>

[\*28] \*An *Alien* may acquire real estate by *purchase*, though he cannot take it by *descent* or operation of law, and if he purchase

(o) Gilb. on Uses, 41, 245, 250.

(p) Ib. 246.

(q) Bac. on Uses, 67; Bac. Ab. Uses, E.

(r) See Cr. Dig. vol. iv. p. 130.

(s) Robinson on Gavelkind.

(t) Gilb. on Uses, 250.

(u) 1 Vict. c. 26.

(v) But as to the contracts of a lunatic, see *Molton v. Camroux*, 2 Exch. Rep. 487, 4 Exch. Rep. 17.

(w) Co. Lit. 247, b.

(x) See *Cruise*, vol. iv. p. 130, vol. v. p. 253; *Niel v. Morley*, 9 Ves. 478.

(y) See *Price v. Berrington*, 3 Mac. & Gord. 486; *Greenslade v. Dare*, 20 Beav. 284.



it he may hold it until office found, but cannot give an alienee a better title than he had himself. An alien, therefore, can only create a trust of real estate until the crown steps in. As to personal estate an alien *enemy* cannot even hold it, but an alien *friend* may be the lawful owner of chattels personal, and may exercise the ordinary rights of proprietorship over them, and consequently may create a trust.

With regard *Traitors, Felons, and Outlaws*, a distinction must be taken between real and personal estate. In high treason, lands, whether held in fee simple, or fee tail,(z) or for life, are upon attainder forfeited absolutely to the crown.(zz) In petty treason and murder,(a) lands in fee (subject to the year, day, and waste of the sovereign,) escheat to the lord of the fee, and lands in tail are forfeitable to the crown for the life of the offender, and on his death devolve on the issue in tail. Outlawry for treason, petty treason, or felony, is equivalent to attainder, and the lands of the outlaw are forfeited, or escheat, exactly in the same manner as if a judgment had been pronounced.(l) In treason, petty treason, and felony, or in outlawry for those crimes, the forfeiture works from the time of the offence, and therefore from that date no trust can be created as to lands: but the goods and chattels of traitors, felons, and outlaws, are forfeited only from the time of conviction, or declaration of outlawry, and therefore up to that period the traitor, felon, or outlaw, may vest his goods and chattels in a trustee upon trusts. However, the law will not allow this power of disposition to be exercised collusively for the purpose of defeating the just rights of the crown;(c) but the traitor, felon, or outlaw may sell the goods for valuable consideration.(d) And so he may assign the property upon trust to secure the *bona fide* debt of a creditor;(e) but the existence of the debt must be actually \*proved, and the mere recital of it in the security will not be sufficient.(f) An assignment upon a meritorious consideration, [ \*29 ] as a bargain and sale to a trustee for the purpose of making provision for a son, will not support the deed.(g) "Though a sale," said Lord Holt, "*bona fide*, and for a valuable consideration, had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet such a conveyance as this could not be intended to any other purpose than to prevent a forfeiture and defraud the king;" and added, "that there was a fraud at common law in such a case."(h)

Outlawry in misdemeanors and civil actions is a contempt of court, and works a forfeiture of the profits of the offender's lands for his life, and of his goods and chattels, whether real or personal, absolutely. The person so outlawed, therefore, cannot from that time affect the pernancy

(z) 26 Hen. 8, c. 13. See 2 Bac. Ab. 576, 580.

(zz) Attainder is necessary to support the crown's right, even to the year, day, and waste. *Rex v. Bridger*, 1 M. & W. 145.

(a) See 54 G. 3, c. 145.

(b) See Co. Lit. 390, b; *Holloway's case*, 3 Mod. 42; *King v. Ayloff*, 3 Mod. 72.

(c) See *Anon.* 2 Sim. N. S. 71. (d) *Hawk. Pleas of the Cr.*, book 2, c. 49.

(e) *Perkins v. Bradley*, 1 Ha. 219; *Whitaker v. Wisbey*, 12 C. B. R. 44.

(f) *Shaw v. Bran*, 1 Stark. 320. (g) *Jones v. Ashurst, Skinn.* 357.

(h) 4 Black. Comm. 387, 388.

of the profits of his real estate, nor make any settlement of his personal estate.

If a man be declared a *bankrupt*, all the real and personal estate to which he may acquire a title up to the time of obtaining his certificate, becomes vested in his assignees; <sup>(i)</sup> but the surplus after payment of his debts still belongs to him, and of this interest he may create a trust.

In the case of an *insolvent*, all the real and personal estate which may be vested in or may accrue to him up to the date of the final discharge, is transferred by the act to his assignees; <sup>(k)</sup> and as to subsequently acquired property, the assignees may, by virtue of the judgment to be entered up against him, at any time divest it out of the insolvent by taking out execution, but they must first obtain the order of the court. <sup>(l)</sup> An insolvent, therefore, can make no settlement of property which he has acquired before the final discharge, and the claim of the assignees, should it be ever advanced, would by the lien of the judgment over-ride a trust of any real or leasehold estate to which he might have become entitled even subsequently to the final discharge.

[ \*30 ]

## \*SECTION II.

## WHO MAY BE A TRUSTEE.

The *Sovereign* may sustain the character of a trustee, so far as regards the capacity to take the estate, and to execute the trust; but great doubts have been entertained whether the subject can, by any legal process, enforce the performance of the trust. The *right* of the *cestui que trust* is sufficiently clear, but the defect lies in the *remedy*. <sup>(a)</sup> The Court of Chancery has no jurisdiction over the king's conscience, for that it is a power delegated by the king to the chancellor to exercise the king's equitable authority betwixt subject and subject. <sup>(b)</sup> The Court of Exchequer has, in its character of a court of revenue, an especial superintendence over the royal property; and it has been thought that through that channel a *cestui que trust* might indirectly obtain the relief to which, on the general principles of equity, he is confessedly entitled. No such jurisdiction, however, appears to have been known when Lord Hale was chief baron. <sup>(c)</sup> Lord Hardwicke once observed in chancery, "I will not decree a trust against the crown in this court, but it is a notion established in courts of revenue by modern decisions that the king may be a royal trustee;" <sup>(d)</sup> but the doctrine was still unsettled in the time of Lord Northington. <sup>(e)</sup> And in a recent case, <sup>(f)</sup> it was decided that though

(i) 12 & 13 Vict. c. 106, ss. 141, 142.

(k) 1 & 2 Vict. c. 110, s. 37.

(l) 1 & 2 Vict. c. 110, s. 87.

(a) Pawlett v. Attorney-General, Hard. 467, 469; Burgess v. Wheate, 1 Ed. 255; Kildare v. Eustace, 1 Vern. 439.

(b) Said by counsel in Pawlett v. Attorney-General, Hard. 468.

(c) See Pawlett v. Attorney-General, Hard. 467, 469; and see Wike's case, Lan. 54.

(d) Penn v. Lord Baltimore, 1 Ves. 453; and see Reeve v. Attorney-General, 2 Atk. 224; Hovenden v. Lord Annesley, 2 Sch. & Lef. 617.

(e) See Burgess v. Wheate, 1 Ed. 255.

(f) Hodge v. Attorney-General, 3 Y. & C. 342.

the Court of Exchequer could decree the possession of the property according to the equitable title, it had no jurisdiction to direct the crown to convey the legal estate. The subject may undoubtedly appeal to the sovereign by presenting a petition \*of right, (g) and it cannot be supposed that the fountain of justice would not do justice. (h) [ \*31 ]

A corporation could not have been seised to a use, for it was gravely observed, it had no soul, and how then could any confidence be reposed in it? But the technical rules upon which this doctrine proceeded, have long since ceased to operate in respect of trusts; and at the present day every body corporate is compellable in equity to carry the intention into execution. (i) Indeed, every corporation since the Municipal Corporations Act (k) has become a trustee, for a corporation has now no longer the power to alien and dispose of its property, except with the sanction of the lords of the treasury, but is bound to apply it to certain public purposes pointed out by the act; and if there be any misapplication of that fund, there lies a remedy in chancery by information. (l) But although the court has ample jurisdiction to oblige a corporation to the observance of good faith, and the property already vested in a corporate body will be administered upon the trust attached to it, yet by the statute of mortmain no real estate can now be conveyed to a corporation upon any trust without the license of the crown. However, there is no objection to an assignment or bequest of pure personal estate to a corporation upon a trust.

The Bank of England cannot directly or indirectly be made a trustee of stock. The corporation manages the accounts of the public funds, and is charged with the care of paying the dividends; but refuses, and cannot be compelled by law, to \*notice any rights but those of the legal proprietors in whose names the stock is standing. [ \*32 ]

The company will not enter notice of instruments *inter vivos* upon their books; and though they are obliged by certain Acts of Parliament to enter the wills, or at least extracts from the wills, of deceased proprietors of stock, the object of the legislature, as the court has now clearly determined, was not to make the company responsible for the due administration of the fund according to the equitable right, but to enable them to ascertain who under the will were the persons legally entitled. (m) (1)

(g) As to the transfer of the equity jurisdiction of the Court of Exchequer to the Court of Chancery, see 5 Vict. c. 5, s. 1; and *Attorney-General v. Corporation of London*, 8 Beav. 270, 1 H. of L. Ca. 440.

(h) *Scounden v. Hawley*, Comb. 172, per Dolben, J.; *Reeve v. Attorney-General*, cited *Penn v. Lord Baltimore*, 1 Ves. 446.

(i) See *Attorney-General v. Landerfield*, 9 Mod. 286; *Dummer v. Corporation of Chippenham*, 14 Ves. 252; *Green v. Rutherford*, 1 Ves. 468; *Attorney-General v. Whorwood*, 1 Ves. 536; *Attorney-General v. Mayor of Stafford*, Barn, 33; *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 46; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499; *Attorney-General v. Caius College*, 2 Keen, 165.

(k) 5 & 6 W. 4, c. 76.

(l) *Attorney-General v. Aspinall*, 1 Keen, 513, 2 M. & C. 613; *Attorney-General v. Borough of Poole*, 4 M. & C. 17; *Parr v. Attorney-General*, 8 Cl. & Finn. 409; *Attorney-General v. Corporation of Lichfield*, 11 Beav. 120.

(m) *Hartga v. Bank of England*, 3 Ves. 55; *Bank of England v. Parsons*, 5 Ves.

(1) By an act of William & Mary (4 W. & M. c. 3, s. 10,) the will was directed



Were the construction to be otherwise, the Bank of England would be trustee for half the families in the kingdom.

As the bank is not bound to recognize even the contents of the will beyond the legal devise, *a fortiori* it will not be converted into a trustee by notice of any agreement, by which the interests taken under the will have subsequently shifted from one person to another; as, if stock be [\*33] devised to A. for life, \*with remainder to B., and A. assign to B., or B. release to A., although in equity the whole beneficial

665; Bank of England v. Lunn, 15 Ves. 583, per Lord Eldon; Humberstone v. Chase, 2 Y. & C. 209.

to be entered in the Receipt Office of the Exchequer, where the annuities were then payable; but by a subsequent act in the same reign (5 W. & M. c. 20, s. 20,) the Bank was incorporated; and by statutes of George the First and George the Second (1 Geo. 1, st. ii. c. 19, s. 12; 30 Geo. 2, c. 10, s. 40,) it was enacted, that "a person possessed of stock might devise the same by will in writing, attested by two credible witnesses; but that such devisee should receive no payment thereon, till so much of the will as related to the said stock should be entered in the office of the Bank; and in default of such devise, the stock should go to the executors or administrators."

Upon the effect of these provisions it has been held—1st, That although stock be specifically devised, and the will be duly attested by two witnesses, yet, until the executor assent to the specific bequest, the legal property of the stock remains vested in the executor; and if it be necessary to make use of it as assets, he may bring an action at law against the bank for refusing to transfer in obedience to his directions. *Franklin v. The Bank of England*, 9 B. & C. 150. And of course the bank cannot obtain an injunction in equity against the legal proceedings; *Bank of England v. Moffat*, 3 B. C. C. 269; *Bank of England v. Lunn*, 15 Ves. 569; *Bank of England v. Parsons*, 5 Ves. 625; for, as Lord Eldon observed, if the executor cannot maintain an action at law, the bank has no need of assistance from a court of equity; and if he can maintain his action, then he must be authorized to do so by the statute, and equity cannot interfere. *Bank of England v. Lunn*, 15 Ves. 583. Lord Thurlow once expressed an opinion that the devise of stock was in the nature of a parliamentary appointment, and did not require the executor's assent: *Pearson v. Bank of England*, 2 Cox, 178, 179; but he afterwards changed his opinion, and conceived the executor's assent to be necessary, as in a specific devise of leaseholds. *Bank of England v. Moffat*, 3 B. C. C. 269; compare *Bank of England v. Parsons*, 5 Ves. 628. Lord Eldon said, that, as by a clause in the act, stock could not be attached, sequestered, or taken in execution, during the lifetime of the holder, he had always doubted whether the legislature did not intend to give it a peculiar value by enabling the party to devise it, like land, independently of the executor; but his lordship said, the construction adopted in practice was, that, though specifically bequeathed, it must have the executor's assent, and was liable, as assets, to the payment of debts; *Bank of England v. Lunn*, 15 Ves. 517, 518; and so the law is now clearly settled. 2ndly, There is no doubt, that, after the executor's assent, the specific legatee, if the will was attested by two witnesses, becomes the perfect legal proprietor, and may bring an action at law against the bank for refusing to transfer into his name. See *Bank of England v. Lunn*, 15 Ves. 518, and following pages. 3rdly, If the stock be specifically bequeathed, but the will be not attested by two witnesses, then the legal property of the funds vests absolutely in the executor; but, as the act does not express how the executor shall apply it, the court considers him to hold it upon trust, subject to the payment of debts, for the person to whom it was informally devised. The legatee could of course have no legal interest in the stock until the executor had made an actual transfer to him. See *Bank of England v. Lunn*, 15 Ves. 578; *Rider v. Kidder*, 10 Ves. 369; *Ripley v. Waterworth*, 7 Ves. 440, 452.

Now by the late Will Act (7 Gul. 4, & 1 V. c. 26,) the gift of stock by will has been put on the same footing with the testamentary disposition of all other property.

By the 8 & 9 Vict. cap. 97, the provisions of the former acts relating to registration of testamentary instruments in the office of the bank, were repealed.



interest has thus become vested in A. or B., the bank will not transfer the stock during the life of A. to the one or the other; but, on A.'s decease, will transfer to B. or his personal representative. However, a suit may be instituted for the purpose of compelling the bank to give effect to the equitable title; but, the refusal of the company to act without the order of the court, will be considered as justifiable and proper, and therefore the bank in such suits will be allowed their costs.<sup>(n)</sup>

\*A *feme covert* may be a trustee, but it would not be advisable to select a *feme covert*.<sup>(o)</sup> [\*34]

There appears, indeed, to be no want of discretion for the due execution of the trust, for a woman has no less judgment after marriage than before;<sup>(p)</sup> nay, as was quaintly added by Sir John Trevor, she rather improves it by her husband's teaching.<sup>(q)</sup> The reasons upon which her disabilities are founded, are her own interest or her husband's, or both;<sup>(r)</sup> and, where these are not concerned, she possesses as much legal capacity as if she were perfectly *sui juris*; thus, she may execute powers simply collateral,<sup>(s)</sup> and (somewhat contrary to principle) even powers appendant, or in gross.<sup>(t)</sup> At law, the trustee is considered as the sole and absolute proprietor, and therefore he can have no power that does not flow from the legal ownership; but in equity, the absolute interest is vested in the *cestui que trust*, and, as the trustee is regarded in the light of a mere instrument, any authority communicated to a trustee must have the character of a power simply collateral.<sup>(u)</sup> It follows, that if a discretionary trust be committed to a *feme covert*, there is nothing to prevent her due administration of it, so far as relates to her legal judgment and capacity. At the same time it must be admitted that a woman's will is not her own, and that if a trust were confided to a *feme covert*, the husband would, in fact, exercise no little influence. Indeed, as the husband would be liable for her breaches of trust, he must, for his own protection, look to the manner in which she discharges the office.<sup>(v)</sup>

But further, the appointment of a *feme covert* is attended \*with inconvenience from her inability to join in the requisite assurances. At common law, if lands be vested in a *feme covert* upon condition to enfeoff another, she may execute the feoffment by her own act, without the intervention of her husband;<sup>(w)</sup> and hence it has been

(n) *Pearson v. Bank of England*, 2 B. C. C. 529; *Austin v. Bank of England*, 8 Ves. 522; *Marryatt v. The Bank*, and *Aynsworth v. The Bank*, cited *ib.* 524, note (b). As to making the bank parties, see 39 & 40 G. 3, c. 36.

(o) *Lake v. De Lambert*, 4 Ves. 595, per Lord Loughborough.

(p) *Compton v. Collinson*, 2 B. C. C. 387, per Buller, J.; *Hearle v. Greenbank*, 1 Ves. 305, per Lord Hardwicke; *Bell v. Hyde*, Pr. Ch. 330, per Sir John Trevor; and see marginal note to *Moore v. Hussey*, Hob. 95; and see *Needler v. Bishop of Winchester*, Hob. 225.

(q) *Bell v. Hyde*, Pr. Ch. 330.

(r) *Compton v. Collinson*, 2 B. C. C. 387, per Buller, J.

(s) Co. Lit. 112, a; *ib.* 187, b; *Lord Antrim v. Duke of Buckingham*, 2 Freem. 168, per Lord Keeper Bridgman; *Blithe's case*, *ib.* 91, *vid.* 2nd resolution; *Godolphin v. Godolphin*, 1 Ves 23, per Lord Hardwicke.

(t) See Sugden on Powers, c. 3, sect. 1.

(u) See *infra*.

(v) See *Smith v. Smith*, 21 Beav. 385.

(w) *Daniel v. Ubley*, Sir W. Jones, 137.

argued, that, in the case of a trust, she may, equally without her husband's concurrence, convey the estate to the parties *equitably* entitled.(x) But between the two cases there is this clear and obvious distinction, that a *condition* is part and parcel of the common law, while a *trust* is only recognised in the *forum* of a court of equity; except, therefore, the trust be so worded as to bear the construction of a legal condition, it seems impossible to contend that an instrument otherwise inoperative should, from the mere circumstance of the trust, which a court of law cannot notice, acquire a validity.(y) Mr. Fonblanque suggests the additional reason, that if a married woman were allowed to convey a trust estate without her husband's concurrence, she might convey it before the several objects of the trust were satisfied, for which he might, jointly with her, be responsible to the *cestui que trust*.(z)

It is almost equally undesirable to appoint a *feme* who is single a trustee, for should she marry, the character of the trust is altered, and the husband, as liable for her breaches of trust, must have a control over her acts. On these grounds the court has refused to appoint a *feme sole* a trustee, as, in the event of her marriage, the inconveniences above suggested would arise.(a)

An *infant* labours under still greater disability than a *feme covert*; for, first, as regards *judgment and discretion*, a *feme* is admitted to have capacity, though she cannot in all cases freely exercise it; but an infant is said altogether to want capacity.(b) An infant cannot be steward of [ \*36 ] the court of a \*manor,(c) or attorney for a person in a suit,(d) or guardian to a minor,(e) or be a bailiff or receiver;(f) but can only discharge such acts as are merely ministerial, as to be an attorney to deliver seisin,(g) or as lord of a manor to give effect to the custom.(h) So, as executor, he might, until a recent act, have been the channel or conduit pipe through which the assets found their way to the hands of the creditors in a due course of administration;(i) but had he acted otherwise than ministerially, as by signing an acquittance without receipt of the money, such an exercise of discretion had been actually void.(k) It follows that an infant cannot exercise even a power simply collateral (of

(x) Daniel v. Ubley, Sir W. Jones, 138, *per* Whitlock, and Dodridge, J.

(y) See Mr. Hargrave's Observations, Co. Lit. 112, a, note (6), and Mr. Fonblanque's Treat. on Equity, vol. i. p. 92.

(z) Treat. on Equity, vol. i. p. 92.

(a) Brook v. Brook, 1 Beav. 531.

(b) Hearle v. Greenbank, 3 Atk. 712, and 1 Ves. 305, *per* Lord Hardwicke; Grange v. Tiving, O. Bridg. 108, *per* Sir O. Bridgman; Compton v. Collinson, 2 B. C. C. 387, *per* Buller, J.; and see Sockett v. Wray, 4 B. C. C. 486.

(c) Co. Lit. 3, b; and see Mr. Hargrave's note (4), *ib.* But acts done by an infant in the character of steward cannot be avoided by reason of his disability. Eddleston v. Collins, 3 De Gex, Mac. & Gord. 1.

(d) Co. Lit. 128, a; Br. Ab. "Covert. and Infant," pl. 55, and see Hearle v. Greenbank, 3 Atk. 710.

(e) Co. Lit. 88, b.

(f) Co. Lit. 172, a.

(g) Co. Lit. 52, a; Br. Ab. "Covert. and Infant," pl. 55.

(h) 1 Watk. on Copyh. 24; and see Halliburton v. Leslie, 2 Hog. 252.

(i) Toller on Executors, 31.

(k) Russell's case, 5 Re. 27, a; Co. Lit. 172, a; *ib.* 264, b; 1 Roll. Ab. 730, F. 2.

which kind are powers communicated to trustees) if requiring the application of prudence and discretion.<sup>(l)</sup>

With respect to an infant's ability to pass the estate, it seems to be generally agreed that, at common law, a feoffment of lands,<sup>(m)</sup> or an actual delivery of goods and chattels,<sup>(n)</sup> is an act of so great solemnity, that it serves to carry the present possession, and is voidable only, and not void.

Where the property is of an incorporeal nature, as the delivery of the thing itself is impossible, the common law has substituted the kindred precaution of delivery of the deed. The effect of a deed delivered by an infant has been much disputed; by some it has been held to be absolutely null and void,<sup>(o)</sup> \*by others to be voidable only,<sup>(p)</sup> and by others [ \*37 ] again to be void or voidable, as the validity of the execution is taken to be for the infant's benefit or not.<sup>(q)</sup> Another opinion still (which is that of Perkins,<sup>(r)</sup> and was adopted in the case of *Zouch v. Parsons*,<sup>(s)</sup> and may therefore be regarded as the doctrine of the present day) is, that an infant's deed, where the delivery of it answers to the livery of seisin, and operates as the conveyance of an interest, is merely voidable; but where it does not take effect as an assurance by delivery of the hand, as in a power of attorney,<sup>(t)</sup> it is then actually void. Lord Mansfield, however, subjoined the qualification, that if a case should arise where it would be more beneficial to the infant that the deed should be considered as void; as, if he might incur a forfeiture, or be subject to damage, or a breach of trust in respect of a third person,<sup>(u)</sup> unless it was deemed void, the reason of an infant's privileges would in such case warrant an exception from the rule.<sup>(v)</sup>

Where the instrument *carries no solemnity with it*, the validity of the act must then depend on the question how far the assurance promotes the interest of the infant. Thus in *Humphreston's case*,<sup>(w)</sup> where a minor had made a lease for years by parol, it was held by Justice Gawdy,

(l) See *Grange v. Tiving*, O. Bridg. 109; *Hearle v. Greenbank*, 3 Atk. 695; S. C. 1 Ves. 298.

(m) *Thompson v. Leach*, 3 Mod. 311, per Cur.; Br. Ab. "Covert. and Inf." pl. 1; and see Co. Lit. 42, b. 51, b; *Whittingham's case*, 8 Rep. 42, b; Br. Ab. "Covert. and Inf." pl. 40.

(n) Perk. 14; Br. Ab. "Covert. and Inf." pl. 1.

(o) Br. Ab. "Covert. and Inf." pl. 1 and 10; *Lloyde v. Gregory*, Cr. Car. 502, per Cur.; *Thompson v. Leach*, 3 Mod. 310, per Cur. See observations on the two last cases in *Zouch v. Parsons*, 3 Burr. 1806 and 1807; and see *Humphreston's case*, 2 Leon. 216.

(p) *Norton v. Turvil*, 2 P. W. 145, per Sir J. Jekyll.

(q) See *Zouch v. Parsons*, 3 Burr. 1804; and see *Humphreston's case*, 2 Leon. 216; *Lloyde v. Gregory*, Cr. Car. 502; *Nightingale v. Earl Ferrers*, 3 P. W. 210.

(r) Sects. 12 and 154; and see Br. Ab. "Dum fuit infra ætatem," pl. 1; id. "Covert. and Inf." pl. 12; *Stone v. Wythipole*, Cr. El. 126; *Marlow v. Pitfield*, 1 P. W. 559.

(s) 3 Burr. 1807; confirmed by the recent case of *Allen v. Allen*, 1 Conn. & Laws, 427, 2 Drur. & War. 307.

(t) See Br. Ab. "Covert. and Inf." pl. 1; *Whittingham's case*, 8 Rep. 45, a.

(u) *Quære* if a court of law could notice a breach of trust. See *Warwick v. Richardson*, 10 Mees. & Wels. 295.

(v) *Zouch v. Parsons*, 3 Burr. 1807.

(w) 2 Leon. 216; and see *Lloyde v. Gregory*, Cr. Car. 502, Co. Lit. 51, b; *Grange v. Tiving*, Sir O. Bridg. 117.



that, the lease having been made to try the title of the land, which was a good consideration, and to the profit of the infant, and for his advancement, the lease was not void : but Justice Southcote and Chief Justice Wray conceived that the lease being without rent, profit, or other recompense, it was void *ab initio* for want of a consideration ; \*so [ \*38 ] that all the judges agreed in making the infant's benefit the criterion, though they differed in the application of it to the particular circumstances of the case.

Supposing the infant's assurance not to have been a nullity *ab initio*, it is still in his power to defeat the act by a subsequent avoidance.

It is laid down, indeed, by Lord Mansfield, in *Zouch v. Parsons*,<sup>(x)</sup> that if an infant do a right act, which he ought to do, which he is compellable to do, it shall bind him ; as if he make equal partition, if he pay rent, if he admit a copyholder upon a surrender. And upon this principle the court decided, in that case, that a mortgagee's infant heir, who had conveyed the trust estate by the mortgagee's direction, could not subsequently avoid it. But this determination seems open to objection ; for, if the court proceeded on the ground that the conveyance was a right and proper act, on principles of equity, such a doctrine would manifestly confound the legal and equitable jurisdictions ; for, independently of the trust, the avoidance had been effectual, and if, on the equity of the case, it was declared to be a nullity, the decree of the court amounted to a precedent for granting equitable relief. But if the court considered the infant as compellable to convey under the statute of 7 Ann. c. 19, this appears not exactly the truth ; for the act is not imperative, but discretionary ; it declares that it shall be lawful for the infant to convey ; and the infant's assurance is to be made upon the direction of the Court of Chancery or Exchequer ; so that a court of common law, in deciding the validity of the infant's conveyance, assumed to itself that discretion which the legislature had expressly delegated to one of the courts of equity. Lord Mansfield in conclusion observed, that by this decision circuitry of suit was avoided ; for, if a court of law should declare the conveyance inoperative, a court of equity would not hesitate to decree a new conveyance. It was under cover of this plea that the legal and equitable jurisdictions were in the last century almost confounded ; but the tendency of the courts at the present day is to keep the jurisdictions distinct.

[ \*39 ] \*Another objection to an infant trustee is, that he cannot be decreed to make satisfaction on the ground of a breach of trust.<sup>(y)</sup> However, an infant has no privilege to cheat men,<sup>(z)</sup> and therefore he will not be protected, if he be old and cunning enough to contrive a fraud.<sup>(a)</sup>

(x) 3 Burr. 1801.

(y) See *Whitmore v. Weld*, 1 Vern. 328 ; *Russell's case*, 5 Re. 27, a ; *Hindmarsh v. Southgate*, 3 Russ. 324.

(z) *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 489, per Lord King.

(a) See *Cory v. Gertcken*, 2 Mad. 40 ; *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 488 ; *Earl of Buckingham v. Drury*, 2 Ed. 71, 72 ; *Clare v. Earl of Bedford*, 13 Vin. 536 ; *Watts v. Cresswell*, 9 Vin. 415 ; *Beckett v. Cordley*, 1 B. C. C. 358 ; *Savage*



From the great inconveniences attending the appointment of an infant as trustee, there arises a strong presumption, wherever property is given to an infant, that he is intended to take it beneficially.(b)

An *alien* may effectually be appointed a trustee in respect of chattels personal, but not in respect of freeholds or chattels real. The policy of the law will not allow an alien to sue or be sued touching lands in any court, of law or equity;(c) and on inquisition found, the legal estate of the property would vest by forfeiture in the crown.

In a case where a testator devised real estate to his wife and an *alien* upon trust to sell, and they sold accordingly, and executed a conveyance; a question afterwards arose whether the purchaser had a good title, and with a view of curing the defect an Act of Naturalization was obtained: but it was held, that the common form of the Act of Naturalization did not confirm the purchaser's title retrospectively, but that the objection remained. The parties had endeavoured to introduce into the bill special words to meet the case, but a departure from the usual course was found impracticable.(d)

\*If the alien be domiciled abroad, it is an objection to his fitness for the office of trustee, that he is not amenable to the jurisdiction of the court. [ \*40 ] But where the personal property of a lady was settled on her marriage with a *foreigner*, who at the time of the marriage was resident in England but domiciled in America, and the settlement specially authorized an investment on American securities; it was held that the subsequent appointment of three Americans to be trustees, in contemplation of a residence in America and of an investment upon American securities, was justifiable.(e)

Bankrupts and insolvents may of course be appointed trustees, should any one be disposed to commit the administration of his property to those who have not been equal to the prudent management of their own. The past or any subsequent act of bankruptcy or insolvency will have no operation upon the trust estate.

Similarly, *cestuís qui trust* are not, as such, incapacitated from being trustees; though, as a general rule, they are not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and that of some *co-cestui que trust*, in which event they could hardly be expected to hold an even hand. So, although the present Master of the Rolls considers it objectionable to appoint any relative a trustee, from the frequency of breaches of trust committed by trustees at the instance of *cestui que trust* nearly connected with them,(f) there is no positive legal objection to appointing a relative. Indeed it is not

v. Foster, 9 Mod. 37; Overton v. Banister, 3 Hare, 503; Stikeman v. Dawson, 1 De Gex & Sm. 503; Wright v. Snowe, 2 De Gex & Sm. 321.

(b) Lamplugh v. Lamplugh, 1 P. W. 112; Blinkhorne v. Feast, 2 Ves. 30; Mumma v. Mumma, 2 Vern. 19; Taylor v. Taylor, 1 Atk. 386; Smith v. King, 16 East, 283; and see King v. Denison, 2 V. & B. 278.

(c) Gilb. on Uses, 43; and see Fish v. Klein, 2 Mer. 431. See late act 7 & 8 Vict. c. 66. The exceptions in the 5th section enabling subjects of a friendly state to hold lands for 21 years for purposes of residence, &c., cannot, of course, apply to the case of a trustee.

(d) Fish v. Klein, 2 Mer. 431.

(e) Meinertzhagen v. Davis, 1 Coll. 335.

(f) Wilding v. Bolder, 21 Beav. 222.

always easy to find a trustee who is neither a relative nor a *cestui que trust*, and this the court itself has experienced; for notwithstanding its repugnance, it has been obliged, occasionally, to appoint not merely a relative, but even a *cestui que trust* to be a trustee.(g)

We may here remark, that care should be taken to provide not only for the fitness of the trustee, but also for an adequate number of trustees. A single trustee, whether originally appointed such or become so by survivorship, has the absolute and unlimited control over the property; and [ \*41 ] should he \*become involved in difficulties, he is under a strong temptation to sustain his credit by resorting to a fund of which he can with certainty possess himself, and without the fear of immediate detection. The fallacious hope of replacing the money before the day of payment arrives, has lulled the conscience of many, not the worst of mankind, when suffering under the pressure of poverty. There can be no objection to the appointment of a single trustee, where, as in uses to bar dower, the trust reposed in him is merely a nominal confidence; but where the administration of the trust involves the receipt and custody of money, the safeguard of at least two trustees ought never to be dispensed with. And on the death of one of the original trustees, no time should be lost in restoring the fund to its proper security by the substitution of a new trustee, a precaution, it is feared, but too frequently neglected from motives of delicacy, as the surviving trustee is sensitive, and conceives his honesty is called into question: and the *cestuis que trust*, often too ignorant of the world to see the necessity of taking precautions against fraud, are apt to suspect their legal adviser of a wish to create business at the expense of the estate. To guard against the constant recurrence of appointment of new trustees, it is common, at least where the property is considerable, to appoint, four trustees originally, for then, on the decease of the first or even a second trustee, an immediate substitution is not very material, but the safe rule is, to appoint three, and keep the number always full.

More than four are hardly ever appointed, because it is a general rule of the bank not to allow stock to be transferred into the names of more than four joint proprietors. But in special cases, so many as five or six have been admitted.

### SECTION III.

#### WHO MAY BE CESTUI QUE TRUST.

It may be laid down as a general rule, that as *æquitas sequitur legem*, those who are capable of taking the legal estate, may, through the channel of the trust, be made the recipients of the equitable.

[ \*42 ] \*A trust may be declared in favour of the *Sovereign*. While uses were in their fiduciary state, it was held that in order effectually to limit a use to the crown, the title must have been matter of record. "It behoveth," says Lord Bacon, "that both the declaration

(g) *Ex parte Clutton*, 17 Jurist, 988.

of the use and the conveyance itself be matter of record, because the king's title is compounded of both ; I say not appearing of record, but by conveyance of record. And, therefore, if I covenant with J. S. to levy a fine to him to the king's use, which I do accordingly, and the deed of covenant be not enrolled, and the deed be found by office, the use vesteth not. *E converso*, if enrolled. If I covenant with J. S. to enfeof him to the king's use, and the deed be enrolled and the feoffment also, and it be found by office, the use vesteth not. But if I levy a fine, or suffer a recovery to the king's use, and declare the use by deed of covenant enrolled, though the king be not a party yet it is good enough."(*h*) However, in trusts it is clear, that where the operation of law, as in the case of *bona vacantia*, gives a right to the crown, that of itself is sufficient ;(*i*) and perhaps it may be laid down generally that the crown may now, in all cases, enforce an equitable interest in the same manner as a private person. In *Burgess v. Wheate*,(*k*) Sir Thomas Clarke was of this opinion, and apparently his colleagues, Lord Mansfield and Lord Northington, concurred in the same view. He laid down that it was the prerogative of the crown not to implead with the subject before it took possession ; but that if the crown intended to take possession without suit, it was necessary, in order to protect the subject and inform him of the point in issue, that the foundation of the right in the crown should appear upon record : but that the crown might waive the privilege of taking possession before suit, and might seek the adjudication of the court without previous seizure : that an inquisition did not give a title to the crown, even where the legal estate was in question, and indeed, as to the equitable interest, was nugatory in itself.(*l*)

\*A trust of lands cannot be limited to a corporation without a license from the crown ; both on general principles, and also by [\* 43] analogy to the statutory enactment as to uses.(*m*)

As regards an *alien*, a trust of lands may be declared in his favour,(*n*) but cannot be enforced by him for his own benefit ;(*o*) it being contrary to law that an alien should plead, or be impleaded, touching lands in any court in the kingdom :(*p*) and the king, on inquest found, will be entitled to the trust by forfeiture, for the mischief is the same as if the alien had purchased the lands themselves.(*q*) But the forfeiture vests not in the king the legal estate,(*r*) but merely transfers to him the right

(*h*) Bac. on Uses, 60 ; and see Gilb. on Uses, 44, 204.

(*i*) *Middleton v. Spicer*, 1 B. C. C. 201 ; *Brummell v. Macpherson*, 5 Russ. 263.

(*k*) 1 Ed. 188.

(*l*) *Burgess v. Wheate*, 1 Ed. 187.

(*m*) See *Shep. Touch.* 509 ; *Sand. on Uses*, 339, note E ; 15 Ric. II. c. 5.

(*n*) *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92 ; and see *Vin. ab. Alien*, A. 8 ; *Godfrey v. Dixon*, *Godb.* 275. See *Br. Feff. al. Uses*, 389, a, pl. 29.

(*o*) *King v. Holland*, Al. 16, *per* Bacon, J. ; S. C. Styl. 21, *per* Rolle, J. See *Burney v. Macdonald*, 15 Sim. 6. But of course the special exceptions in the 7 & 8 Vict. c. 66, s. 5, would apply to the case of an equitable interest.

(*p*) *Gilb. on Uses*, 43.

(*q*) *Attorney-General v. Sands*, Hard. 495, *per* Lord Hale ; *Fourdrin v. Gowdey*, 3 M. & K. 383. See *Burney v. Macdonald*, 15 Sim. 6.

(*r*) *King v. Holland*, Al. 14 ; *Sir John Dack's case*, cited *Ib.* 16 ; *Attorney-General v. Sands*, Hard. 495, *per* Lord Hale.



of suing a *subpœna* against the trustee in equity.<sup>(s)</sup> A distinction has been taken, that although where a trust is perfected in favour of an alien the crown may be entitled, yet where a trust in favour of an alien is not in *esse*, but only in *feri* and executory, the court will do no act to give it to an alien, who, by law, cannot hold.<sup>(t)</sup>

In a recent case<sup>(u)</sup> it was decided, that where a testator directs an estate to be sold, and the proceeds divided amongst certain persons, some of whom are aliens; there, as according to the intention which is supposed to be executed at the time of the death, the interest devised, is money, the crown is not entitled, for the mere purpose of working a forfeiture, to exercise an election by retaining the property as land; and, [\*44] therefore, that the aliens are not debarred from enjoying their \*legacies in the pecuniary character which the testator stamped upon them.

It may be remarked, that in certain cases persons are capable of taking an equitable interest, to whom the legal estate could not have been similarly limited. Thus, at common law, no property, real or personal, can be so limited to a married woman, as to exclude the legal rights of the husband during coverture; but, by way of trust, the beneficial interest can be placed entirely at the disposal of a married woman, so that she shall be regarded as a *feme sole*, and the husband shall not participate in the enjoyment. And this may be effected even without the interposition of a special trustee; the only distinction being that, where no trustee is interposed, the husband will, in respect of his legal rights, be held by a court of equity to be a trustee for his wife,<sup>(v)</sup> and would, it is conceived, be bound to deal with any legal interest vested in him according to his wife's direction; while, in the case of the legal interest being vested in a trustee, the husband's concurrence in any act of alienation or other dealing of his wife is wholly unnecessary.

So the legal estate cannot be limited to the objects of a charity, as to the poor of a parish, in perpetual succession; but in a court of equity, where the feudal rules do not apply, the intention of the donor will be carried into effect,<sup>(w)</sup> provided of course the requisitions of the 9th G. 2, c. 36, be complied with.

It may here be observed, that the act just referred to operates, not by producing any incapacity to take as *cestui que trust*, but by forbidding the alienation of land, or of property savouring of the realty, (except in the mode prescribed by the act,) for objects falling within the legal definition of charitable purposes.

(s) King v. Holland, Al. 16, *per* Rolle, J.; Roll. Ab. 194, pl. 8. See Burney v. Macdonald, 15 Sim. 6; Burgess v. Wheate, 1 Ed. 188.

(t) See Burney v. Macdonald, 15 Sim. 14.

(u) Du Hourmelin v. Sheldon, 1 Beav. 79, 4 Myl. & Cr. 525; and see Master v. De Croismar, 11 Beav. 184.

(v) Newlands v. Paynter, 4 M. & Cr. 408; and compare Baggett v. Meux, 1 Collyer, 188; 1 Phil. 627; and Waters v. Wood, 14 M. & W. 166.

(w) Gilb. on Uses, 204.



## \*CHAPTER IV.

[\*45]

## WHAT PROPERTY MAY BE MADE THE SUBJECT OF A TRUST.

As a general rule, all property, whether real or personal, may be made the subject of a trust, provided the policy of the law, or any statutory enactment, do not prevent the legal proprietor from parting with the beneficial interest in favour of another person.

As to lands regulated by a local custom, as copyholds, trusts may also be created; thus, A., tenant of a manor, may surrender to the use of B. and his heirs, upon trust for C. and his heirs. And as equity follows the law, the trust in C. will devolve in the same manner as the legal estate. It will descend for instance not to the heir-at-law, but the customary heir;(x) and as the copyholder might, until the late act,(y) have devised the *legal estate* in the copyhold by a will, neither signed nor attested, the *cestui que trust* might in like manner have passed the equitable interest by a will equally informal.(z)

The same principle would seem to require that where the legal estate in copyholds was not devisable at all,(a) the *cestui que trust* should have no power of intercepting by his will the descent of the equitable interest upon the customary heir. The courts, however, have leaned strongly in favour of a power of testamentary disposition, notwithstanding the want of a custom in respect of the legal estate. Thus in *Wilson v. Dent*,(b) A. surrendered to the use of B. in fee upon trust for A. for his life, and after his death upon the trusts of his will. The \*custom of the manor did not recognize any mode of passing the estate by will, [\*46] but the court nevertheless decided that the will operated as a testification, for whose benefit the trustee was to hold the estate, and that the surrenderee was a trustee for the devisees.

So in *Lewis v. Lane*,(c) a copyhold was granted by the lord to A., a purchaser for valuable consideration, for the successive lives of himself and B. A. in his lifetime could have passed the estate by surrender for both lives, but lands held of the manor were not devisable; and on the death of A., without having surrendered, B., by the custom, could claim admittance for his life. As A. had paid the purchase-money, B. was held to be a trustee for him; and as A. could not have devised the legal estate, the question was whether his will served to pass the resulting trust. Lord Cottenham, then M. R., observed: "If there be an equitable interest, how can it be that the owner has not the power of devising it? Can it be said that if A. purchase in the name of B. and pay the purchase-money, the property shall belong to B. and not to A.?"

(x) *Trash v. Wood*, 4 Myl. & Cr. 324.

(y) 7 W. 4, &amp; 1 Vict. c. 26.

(z) *Appleyard v. Wood*, Select Ch. Cas. 42; *Wagstaff v. Wagstaff*, 2 P. Will. 258; *Tuffnell v. Page*, 2 Atk. 37.(a) As to the power of devising the legal estate, even before the late Wills Act. see *Pike v. White*, 3 B. C. C. 286; *Doe v. Thompson*, 7 Q. B. Rep. 897.

(b) 3 Sim. 385.

(c) 2 Myl. &amp; Keen, 449.

I cannot agree that this is a question of custom at all, or that, if it were, it would be reasonable."

If the custom of the manor permit an entail of the legal estate, an entail may in like manner be created in the equitable;(d) but if there be no such custom as to the legal estate, there can be no entail of the equitable. "The trust estate of a copyhold," said Lord Hardwicke, "can in no case be capable of an entail when the legal estate is not, it being necessary that there should be the same rule concerning property in law and in equity."(e) Where, therefore, the equitable interest in lands held of a manor not permitting an entail is limited to A., and the heirs of his body, the estate is not construed as an entail but as a fee conditional, that is, on issue born the condition is fulfilled, and A. may alienate in fee.

How far equitable interests may be engrafted on *foreign* property [ \*47 ] requires consideration. As regards *personal* estate \*there is no difficulty, for it follows the person, and if the settlor himself be domiciled within the jurisdiction of the court, all his personal estate, whether in the East or West Indies, or elsewhere, has no locality abroad, but is deemed to be at home, and governed by the law of this country. A trust, therefore, may freely be created of such interests, and would be enforced in equity. In certain cases, however, there might be practical obstructions in the way of executing the trust, from the circumstance of the property lying in fact beyond the reach of the court.

As to *lands* lying in a foreign country, the court will unquestionably enforce natural equities, and compel the specific performance of contracts, provided the parties be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree.

Thus in a West India estate, a tenant in common and consignee had expended various sums in the management of the property; an inquiry was directed whether there was, by the local law or usage, a lien by a consignee or tenant in common for proper advances to the estate, and the master not finding any such lien for want of evidence before him, Lord Eldon said "that the estate could not be carried on without a consignee, and that as the person intrusted had made no complaint, he should allow the lien upon the application of general principles to estates in the West Indies.(f)

In the leading case of *Penn v. Lord Baltimore*,(g) the court enforced certain articles between the parties, for ascertaining the boundaries of two provinces in America; and Lord Hardwicke observed, that as to the courts not enforcing the execution of this judgment, if that were so, it would be in vain to make a decree; but though the court could not enforce the decree *in rem*, it could *in personam*; and though the decree could not be enforced by putting the party in possession, yet it could be by process of contempt, which had been originally the only jurisdiction

(d) *Pullen v. Middleton*, 9 Mod. Rep. 484; 1 Preston, Conv. 152.

(e) The opinion of Watkins, Treat. on Cop. p. 153, and following pages, that there may be an entail of copyholds without a special custom, cannot be maintained.

(f) *Scott v. Nesbit*, 14 Ves. 438.

(g) 1 Ves. 444.

of the court, and known long before the writ of assistance to the sheriff; and his lordship cited several precedents of a similar decree.<sup>(h)</sup>

\*In other cases the court has directed an account of the rents and properties of lands abroad,<sup>(i)</sup> and has ordered an absolute [\*48] sale,<sup>(h)</sup> and foreclosure of a mortgage;<sup>(l)</sup> and has relieved against a fraudulent conveyance of an estate abroad;<sup>(m)</sup> and has prevented a defendant by injunction from taking possession.<sup>(n)</sup>

In *Ex parte Pollard*, a person entitled to lands in Scotland deposited the deeds on a money advance. By the Scotch law the deposit did not create a lien upon the land, though the transaction carried no illegality with it. The bankruptcy judges held, that had the estate been in England the decree would not only have affected the *person*, but have bound the *land*; and as an estate in Scotland could not be affected by the order of the court, specific performance, which was discretionary, would not be decreed.<sup>(o)</sup> However, on appeal, Lord Cottenham overruled this decision, and he observed that though the deposit by the law of Scotland did not create any lien upon the estate, yet he did not find anything in the Scotch law contrary to the well-known rule that obligations to convey perfected *secundum legem domicilii*, are binding against the person: that contracts as to lands in England were enforced here *in personam* and *in rem*, but as to contracts abroad *in personam* only, which did not interfere with the *lex loci rei sitæ*:<sup>(p)</sup> that if the law of the country where the land was situate would not permit or not enable the defendant to do what the court might decree, it would be useless and unjust to direct him to do the act; but where there was no such impediment the courts of this country, in the exercise of the jurisdiction over contracts made here, or in administering equities between parties residing here, acted upon their own rules, and were not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

\*Thus the general rule to be collected is that the power of the court to administer equities or enforce contracts as to lands [\*49] abroad, extends as far as the actual ability of the parties to carry the decree into effect. But should the foreign law present an insuperable obstacle, the court will not make a decree which must be nugatory for want of means to carry it out.

The case of *Waterhouse v. Stansfield*<sup>(q)</sup> will illustrate this distinction. There Moody had contracted to purchase an estate in Demerara, and by an indenture dated the 10th of October, 1846, mortgaged the premises comprised in the contract to the plaintiffs, Waterhouse and Son, to secure 2000*l.* and interest: 1010*l.* was still due for the purchase-money, which

(h) See 1 Ves. 454; and see *Roberdeau v. Rous*, 1 Atk. 543; *Angus v. Angus*, West's Rep. 23.

(i) *Roberdeau v. Rous*, 1 Atk. 543.

(k) *Roberdeau v. Rous*, 1 Atk. 544.

(l) *Toller v. Carteret*, 2 Vern. 494.

(m) *Arglasse v. Muschamp*, 1 Vern. 75.

(n) *Cranstown v. Johnston*, 5 Ves. 278.

(o) *Ex parte Pollard*, 3 Mont. & Ayr. 340.

(p) *Ex parte Pollard*, Mont. & Chitt. 239.

(q) 9 Hare, 234; 10 Hare, 254.



the plaintiffs, with Moody's consent, discharged, and thereupon the vendor authorized his agent in Demerara to pass the estate to Moody or his mortgagees. Before this could be done, Moody, by an indenture of the 15th of January, 1847, mortgaged the same premises to Thompson Hankey and Co., to secure a debt owing to them, who sent instructions to their agent in Demerara to effectuate their mortgage. An interdict was obtained by him from the court of Demerara, to prevent the completion of the plaintiffs' mortgage. On the 12th of May, 1847, Moody became bankrupt, and his assignees sold the premises, and received the purchase-moneys, and the plaintiffs now filed their claim, alleging themselves to be equitable mortgagees of the premises, and to have a lien upon the proceeds. It appeared upon the evidence that a mortgage in Demerara could only be by act of court, and that the intention of passing a mortgage must be advertised for three successive Saturdays in the official Gazette, and that every creditor had a right, by an interdict, to prevent his debtor, solvent or insolvent, from giving a preference by mortgage to any other creditor. The Vice-Chancellor Turner held that the contract, indeed, might bind the bankrupt and the assignees, and yet, by the law of Demerara, might not be capable of being fulfilled; that if it could be decided in favour of the plaintiffs, it must be upon the broad and general ground [ \*50 ] that \*the property having been sold, and the proceeds received by the assignees, the rights of the parties were no longer governed by the law of Demerara, the *lex loci rei sitæ*, but must be governed by the law of this country, the *lex loci contractus*; but the vice-chancellor was of opinion that the interest in the proceeds was in substance and effect an interest in the estate itself, and therefore he could not allow the lien upon the proceeds unless it existed by the law of Demerara; also that the lien alleged by the plaintiffs for the part of the purchase-money paid by them was equally a question of Demerara law; and he therefore directed inquiries whether the plaintiffs had, by the law of Demerara, any lien upon the premises or the proceeds either under their mortgage or by payment of the purchase-money.

To a similar principle may be referred the case of *Carteret v. Petty*.<sup>(r)</sup> The bill was by a tenant in common for a partition of lands in Ireland, and Lord Nottingham allowed a demurrer to the bill, on the ground that when a defendant could, by personal coercion be compelled to perform the act, the court would decree it, as the payment of money, making a conveyance, or the like; but where no obedience of the person imprisoned could execute the decree, it was in vain to entertain the bill, and such was this case, for to a partition in chancery it was necessary to award a commission to some neighbouring justices to divide the lands, and if they refused, an attachment lay against them; but if they executed the commission, the court decreed a conveyance, and the enjoyment of the lands in the interim; and on disobedience followed a sequestration and injunction, and a writ of assistance to the sheriff, none of which could be awarded into Ireland, nor be supplied by the obedience of the person imprisoned here. The distinction between this case and *Penn v. Lord*

(r) 2 Swans. 323. note (a.) and 2 Ch. Ca. 214: but see *Penn v. Lord Baltimore*. 1 Ves. 444, and *Belt's Supplement*, and *Tulloch v. Hartley*, 1 Y. & C. Ch. Ca. 114.



Baltimore, therefore, was, that in the former the court was called upon to make a *partition*, a jurisdiction that could not be exercised, for the reasons stated in the judgment; while in the latter the court compelled the defendant to execute a contract, and do all \*necessary acts [ \*51 ] for that purpose, and if he failed to comply he became liable to a contempt.

*Martin v. Martin(s)* was a singular case, and is frequently cited. Maria Martin, an infant, was entitled to considerable personal estate, and to a moiety of a plantation in Demerara. A suit was instituted for the protection of her estate, and pending the suit, and *during the infancy*, she intermarried, without the consent of the court, with Anthony Martin. An order was made, referring it to the master to approve of a settlement of her real and personal estate, and by an indenture of the 27th of August, 1802, executed with the sanction of the court, Maria Martin assigned her personal estate to trustees upon trust, after raising a certain sum therein mentioned, *to lay out the trust estate in government or real securities* for her separate use during the coverture, and if she survived her husband, upon trust as to one moiety for her absolutely; and as to the other moiety, upon trust for the children of the marriage, and if no children, for her absolutely; but if she died in the life-time of her husband, upon trust, as to one moiety, for the husband for life, and subject thereto, upon trust as to the whole, for the children, and if no children, for the husband for life, and after his death upon trust as the wife should appoint, or for her next of kin. And as to the Demerara estate, the husband covenanted, and the wife agreed, that it should be conveyed to the trustees upon the like trusts as were before declared concerning the trust moneys, and the stocks, funds, and securities in which the same should be invested, and that the plantation should be considered as *personal estate*, and that until the conveyance, the rents should be applied in like manner as if the assurance had been actually made. In 1806, A. Martin, and his wife who had now attained the age of twenty-one, purported to convey the Demerara estate to the trustees of the settlement, in pursuance of the articles. Subsequently, Martin and his wife passed the estate, by an act of court in Demerara, to a mortgagee, for securing advances by him for the benefit of the wife and children, and supplies to the estate. Mrs. Martin afterwards filed her bill to set aside the \*mortgage, and have the articles and settlement established. It [ \*52 ] was found by the master, that by the law of Demerara there was no mode of settling property upon the wife and children; that the conveyance of 1806 was inoperative, inasmuch as lands in Demerara could only be passed by an act of court, and that the legal estate was in the mortgagee; that, by the law of Demerara, there was besides a lien upon the property for moneys allowed to a wife and her children, and for supplies to the estate. For the plaintiff, it was argued that, under the articles, the Demerara estate ought to have been sold, and converted into money, and invested upon the trusts of the settlement, and that the mortgagee, having notice of the settlement, was bound by the equity. However, the court decided

that the plaintiff had no equity against the mortgagee, though he had notice, for, assuming that the plaintiff could compel a sale, it must be subject to the prior lien found by the master for advances to the wife and children, and supplies to the estate. Had the lien not existed, the court thought the plaintiff might have compelled a sale as against the husband, but that such equity attached not to the estate, but to the person only: that after the institution of a suit, the equity would have bound the estate, but until bill filed, the husband could make a good title even to a purchaser with notice; and the court instanced the case of a husband, the apparent owner of two estates of equal value, and that he made a settlement of estate A. under the direction of the court, and that the trustees were afterwards evicted by defect of the husband's title: in that case the court would oblige the husband to make a settlement of B., but that until the bill was on the file the husband remained the owner of estate B., and could effectually sell or charge it.<sup>(t)</sup>

The decree in the above case may be supported on the single ground of the mortgagee's lien for advances and supplies, but the distinction taken by the court that the articles could have been enforced against the husband himself, but did not bind a purchaser from him with full notice, [ \*53 ] appears to be a \*somewhat refined and subtle distinction, and scarcely in harmony with *Ex parte Pollard* and other cases.

A question still remains how far trusts not constructively but properly such can be applied to lands abroad. Should the foreign law itself recognize the distinction between the legal and equitable estates, there could be no objection to the execution of trusts here corresponding to those allowed abroad. Should an equitable estate be not known to the foreign law, still should the lands be capable of settlement there, a trust might be legitimately created here, analogous to the limitations permitted by the foreign code. But should the *lex loci* neither permit an equitable estate, nor successive limitations of the legal estate, it could hardly be contended that an English settlement by way of trust could be ingrafted. The law applicable to lands in England has a local character, and the courts act upon the principle that land universally must be governed by the law of the country where it is situate. How then could a system adapted exclusively to lands in England be transplanted and affixed to lands abroad? Could entails, for instance, be created where none are allowed, and if created, by what machinery could they be barred? It has been seen that in the case of copyholds, when the custom of the manor does not allow entails of the legal estate, none can be created of the equitable, and the same principle will apply to trusts of foreign lands.

The few authorities upon the subject are in accordance with this view. In *Martin v. Martin*,<sup>(u)</sup> cited above, it will be observed that though the court was of opinion that, under the marriage contract, the Demerara estate might have been sold and the trusts attached to the proceeds, it

(t) As to personal equities, see further, *Morse v. Faulkner*, 1 Anst. 11. 3 Sw. 429, note (a); *Averall v. Wade*, Ll. & Co. temp. Sugden. 261; *Johnson v. Holdsworth*, 1 Sim. N. S. 108.

(u) 2 Russ. & Myl. 507

did not occur either to the bar or the bench that the legal estate could be held upon the trusts of the settlement without a conversion.

Again, in *Glover v. Strothoff*,<sup>(v)</sup> a testatrix had taken a heritable bond charged upon lands in Scotland in the names of trustees upon trust for her, and by her will executed according to the Statute of Frauds, she devised the heritable bond, and the question was whether the will was not inoperative. \*The heir insisted that by the law of Scotland a heritable bond was not devisable. Lord Thurlow asked, "Is [<sup>\*54</sup>] not the bond on a trust?" but it was answered that the trust was a scheme to get rid of the *lex loci*, and eventually the court directed an inquiry whether by the *law of Scotland* the heritable bond had passed by the will.

In *Nelson v. Bridport*,<sup>(w)</sup> Viscount Nelson, being entitled to the duchy and estate of Bronte, in Sicily, by his will appointed W. Nelson and W. Hazlewood to succeed to the duchy and estate, and devised the same to them accordingly, upon trust nevertheless to settle and convey the premises to the uses and upon the trusts thereafter mentioned, if the law of Sicily would permit, and if not, then in such manner as in the discretion of his trustees would best correspond with the purposes thereafter mentioned; that was to say, to the use of W. Nelson for life, with remainder to his first and other sons in tail, with remainder to Mrs. Bolton for life, with remainder to her first and other sons in tail, with remainders over, and the testator empowered his trustees, at their *will and pleasure*, to sell the Bronte estate and invest the proceeds in the purchase of lands in England, Ireland, or Wales, to be settled to the like uses, and *if the testator's intention could be better accomplished through the medium of a trust than an actual settlement, he authorized the trustees to retain the legal estate until the trusts could be performed, and to apply the rents accordingly.* It appeared that the duchy had been granted to Viscount Nelson, so that he or the heirs lawfully descending of his body, or from the person whom he should nominate as after mentioned, should be Dukes of Bronte and hold the duchy according to the law of the Franks; and the charter gave him a power to nominate whom he would, whether a relative or not, as a person to whom the like investiture should be granted. On the death of Viscount Nelson, William Nelson, one of the trustees and tenant for life, received investiture as Duke of Bronte, and some years afterwards, a law having passed in Sicily enabling the alienation of entailed estates, William devised the property to his daughter, Lady Bridport, who, on his death, entered upon possession. \*Plaintiff being the person entitled [<sup>\*55</sup>] under the limitations in the will of Viscount Nelson, filed his bill against Lady Bridport for the recovery of the estate. There was great conflict of evidence as to the law of Sicily, but the court came to the conclusion that the trustees could not have settled the estate in strict accordance with the will, and that the investiture of William Nelson, the first tenant for life, was the nearest approach that could be made to the settlement, and that the absolute ownership conferred by the subse-

(v) 2 B. C. C. 33.

(w) 8 Beav. 547.



quent law did not vary the rights of the parties, and, therefore, that William Nelson, having lawfully received investiture in the first instance, could afterwards dispose absolutely of the estate in favour of his daughter. William Nelson was regarded as having acquired the legal estate under the will in execution of the power conferred by the charter, but the court apparently assumed throughout that English trust would have no effect upon a Sicilian estate; and the Master of the Rolls observed, "The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson having accepted this Sicilian estate could deal with it only as the Sicilian law allowed; he had a right to appoint a successor, but no right to modify the estate, interest, or or power of disposition to which the successor was entitled by the law of Sicily."(*x*)

[\*56]

## \*CHAPTER V.

OF THE FORMALITIES REQUIRED FOR THE CREATION OF A TRUST.

UPON this subject we propose to treat, First, Of declarations of trusts at common law. Secondly, Of the Statutes of Frauds. Thirdly, Of the Statutes of Wills. And Fourthly, Of transmutation of possession.

## SECTION I.

OF TRUSTS AT COMMON LAW.

Trusts like uses are of their own nature averrable, *i. e.*, may be declared by word of mouth without writing; (*a*) as, if before the Statute of Frauds an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favour of B., (*b*) and since the statute, though in respect of lands a trust cannot be declared by mere parol, no other formality is requisite than a simple note in writing not under seal. (*c*)

But the court, following the analogy of uses, will not permit the averment of a trust in contradiction to any expression of intention on the face of the instrument itself. (*d*)

(*x*) 8 Beav. 570.

(*a*) See *Fordyce v. Willis*, 3 B. C. C. 587; *Benbow v. Townsend*, 1 M. & K. 506; *Bagley v. Boulcott*, 4 Russ. 347; *Crabb v. Crabb*, 1 M. & K. 511; *Kilpin v. Kilpin*, Id. 520.

(*b*) See *Bellasis v. Compton*, 2 Vern. 294; *Fordyce v. Willis*, 3 B. C. C. 587; *Thurxton v. Attorney-General*, 1 Vern. 341.

(*c*) *Addington v. Cann*, 3 Atk. 151, per Lord Hardwicke; *Boson v. Statham*, 1 Ed. 513, per Lord Keeper Henley.

(*d*) *Lewis v. Lewis*, 2 Ch. Rep. 77; *Finch's case*, 4 Inst. 86; *Fordyce v. Willis*, 3 B. C. C. 587.



Nor is it necessary in order to exclude averment that the beneficial ownership should be conferred upon the grantee of the legal estate *expressly*, for a trust cannot be raised by \*parol, if, from the *nature of the instrument, or any circumstance of evidence* appear- [\*57] ing on the face of it, an intention of making the legal holder the beneficiary also, can be clearly implied. Thus a trust cannot be averred, where a *valuable consideration* is paid; (e) and if a *pension* from the crown be granted to A., a trust cannot be raised by parol in favour of B.; for a pension is conferred upon motives of honour, and the inducements to the bounty are the personal merits of the annuitant. (f)

And it was a principle of uses, that, on a *feoffment*, which could be made by parol, a use might be declared by parol; but where a *deed* was necessary for passing the legal estate, there the use which was ingrafted could not be raised by averment. (g) As trusts have been modelled after the likeness of the use, (h) the distinction at the present day may deserve consideration. It is laid down by Duke expressly, that, where the things given may pass *without deed*, there a charitable use may be averred by witnesses; but, where the things *cannot pass without deed*, there charitable uses cannot be averred without a deed proving the use. (i) And Lord Thurlow, it is probable, alluded to the same distinction when he observed, "I have been accustomed to consider uses as averrable, but perhaps when looked into, the cases may relate to *feoffment*, not to conveyances by bargain and sale, or lease and release." (j) And in *Adlington v. Cann*, (k) where a testator devised the legal estate in lands to A. and B. and their heirs by a will duly executed, and left an unattested paper referring to trusts for a charity, Mr. Wilbraham in the argument observed, "If this were a voluntary *deed*, would a *paper*, even declaring a trust, be sufficient to take it from the grantee? no, certainly;" (l) and it is very observable that Lord Hardwicke, in \*referring to this [ \*58 ] observation, excludes the case of a *deed*, and lays it down that "if the testator had made a *feoffment* to himself and his heirs, and left such a *paper*, this would have been a good declaration of trust." (m)

The averment of a trust was never permitted as against a *devisee*. A devise, as was resolved in *Vernon's case*, implies a consideration, and therefore cannot be averred to the use of another; (n) for *that*, observes Lord Chief Baron Gilbert, were an averment contrary to the design of the will appearing in the words; (o) and accordingly in *Lady Portington's case*, (p) the Court of Queen's Bench refused to admit evidence against the devisees, both from the Statute of Frauds and also *from the nature of the thing*. It is laid down, indeed, by Jenkins, that an averment

(e) See Gilb. on Uses, 51, 57; *Pilkington v. Bayley*, 7 B. P. C. 526.

(f) *Fordyce v. Willis*, 3 B. C. C. 587.

(g) Gilb. on Uses, 270.

(h) See *Fordyce v. Willis*, 3 B. C. C. 587; *Lloyd v. Spillet*, 2 Atk. 150; *Attorney-General v. Lockley*, Append. to Vend. & Purch. No. 16, 11th ed.; *Chaplin v. Chaplin*, 3 P. W. 234; *Attorney-General v. Scott*, Rep. t. Talb. 139; *Burgess v. Wheate*, 1 Ed. 195, 217, 248; *Geary v. Bearcroft*, Sir O. Bridg. 488.

(i) Duke, 141.

(j) *Fordyce v. Willis*, 3 B. C. C. 587.

(k) 3 Atk. 141.

(l) Ib. 145.

(m) 3 Atk. 151.

(n) 4 Rep. 4, a.

(o) Gilb. on Uses, 162.

(p) 1 Salk. 162.

might be at common law upon a will, though it was in writing; but his only authority in support of this position is a case that has evidently been mistaken. "A devise," he says (by the custom of London before the Statute of Wills,) "was to A., B., and C., and that A. should have all the profits during his life. Upon a suit in chancery by the heir of A., the trust of this land was averred to be reposed in the said A., B., and C., to the use of A. and his heirs; and it was so proved. The chancellor made a decree, by the advice of the judges, that A. being dead, his heir should have the land."(g) But the case, as stated by Fitzherbert,(r) from whom it is cited by Jenkins, involved a very different question. A citizen of London had devised to his son and three others, and his will was that one of the three should have the profits for life. The *cestui que trust* for life died, and the heir (viz. of the testator, and not of the *cestui que trust*) filed his bill in chancery as entitled to the resulting interest, and prayed a conveyance. It was argued for the trustees, that in a *feoffment* the use would have resulted; but in a will the devisees were intended to take every beneficial interest, that was not expressly disposed of from them. But the court refused to recognize the distinction, and decreed a resulting trust to the testator's heir.

[\*59] Upon the same principle the averment of a trust was always \*inadmissible as against a *legatee*, and though the law for a long time fluctuated in respect of an *executor* claiming the surplus of the personal estate,(s) it was at length determined that even the executor's beneficial title could not be defeated by parol. Upon the latter point the following distinctions were observed:—1st. Where a person was simply appointed executor, which conferred upon him a legal title to the surplus, averment was not admissible to make him a trustee for the next of kin.(t) 2dly. If from any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the law *presumed* he was *not* intended to take the surplus beneficially, the executor was at liberty to rebut that presumption by the production of parol evidence,(u) and of course the next of kin might then fortify the presumption by opposing parol evidence in contradiction. But, 3dly. Where the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly the *prima facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention.(v)

By the late Act 11 G. 4, & 1 W. 4, c. 40, an executor is *prima facie* a trustee for the next of kin.(w) But where there are *no next of kin* the title of the executor, as against the *crown*, is not affected by the statute, but he may still take beneficially.

(g) Jenk. 3 Cent. Ca. 26.

(r) Fitzherb. Ab. Devise, 22.

(s) See Povey v. Juxon, Nels. 135; Fane v. Fane, 1 Vern. 30.

(t) Langham v. Sandford, 19 Ves. 644, per Lord Eldon; White v. Williams, 3 V. & B. 72; S. C. Coop. 58.

(u) Walton v. Walton, 14 Ves. 322, per Sir W. Grant.

(v) Rachfield v. Careless, 2 P. W. 158; Langham v. Sandford, 17 Ves. 435; S. C. 19 Ves. 641; Golding v. Yapp, 5 Mad. 59; White v. Evans, 4 Ves. 21; Walton v. Walton, 14 Ves. 322, per Sir W. Grant.

(w) See Love v. Gaze, 8 Beav. 472.

The declaration of a *use* by the *king* must have been by letters-patent; (x) and it seems the same doctrine is now applicable to trusts. (y) Nor could a *use* have been declared to the king in the ordinary mode. The king, says Chief Baron Gilbert, "cannot have a feoffee to his use, because he cannot take but by matter of record; but, if the use be *found by office* upon record, then he may take." (z) However, Lord Bacon \*seems to have thought, that the purpose of the inquest was not to *make*, but to *find* the title; for he says, "It behoveth both [\*60] the *declaration of the use*, and the *conveyance itself*, to be matter of record, because the king's title is compounded of both." (a)

## SECTION II.

### OF THE STATUTE OF FRAUDS

By the seventh section of the Statute of Frauds (b) it is enacted, that "all declarations or creations of trusts or confidences of any *lands, tenements, or hereditaments*, shall be *manifested and proved* by some *writing, signed* by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Upon the subject of this enactment we shall first briefly point out what interests are within the act, and, secondly, what formalities are required by it.

#### 1. *Of the interests within the act.*

Copyholds are to be deemed within the operation of the clause, for, as a *trust* is engrafted on the estate of the *copyhold* tenant, the rights of the lord, who claims by title paramount, cannot in any way be injuriously affected. (c) A trust, therefore, cannot be declared by parol so as to make the copyholder a trustee for another.

Mr. Hargrave seems to have thought, that even the *uses of a surrender* were *trusts* within the intention of the act; for, in a note to Coke on Littleton he observes, "A nuncupative will of copyholds was a valid declaration of the uses, where the surrender was silent as to the form, till the 29 Car. 2, required all declarations of trusts to be in writing." (1) But the surrender \*of a copyhold to uses is merely a direction to [\*61] the lord in what manner to regrant the estate, and the surrenderee is a *cestui que use* by misnomer only, and not in fact; and indeed the Court of Queen's Bench has expressly decided that uses of copyholds

(x) Bacon on Uses, 66.

(y) Fordyce v. Willis, 3 B. C. C. 577.

(z) Gilb. on Uses, 44, 204.

(a) Bacon on Uses, 60.

(b) 29 Car. 2, c. 3.

(c) See Withers v. Withers, Amb. 151; Goodright v. Hodges, 1 Watk. on Cop. 227; S. C. Lofft. 230; Acherley v. Acherley, 7 B. P. C. 273; but see Devenish v. Baines, Pr. Ch. 5.

(1) Mr. Watkins argues, and apparently both on principle and authority (see Devenish v. Baines, Pr. Ch. 3,) that a nuncupative will of copyholds was effectual. 1 Wat. Cop. 130. Now by the late Will Act (1 Vict. c. 26,) copyholds have been put on the same footing with other property.



are not within the Statute of Frauds, on the ground that a surrender to uses is not the creation of a trust or confidence apart from the legal estate, but a mode established by custom of transferring the legal estate itself.<sup>(d)</sup>

Chattels *real* are within the purview of the act, and a trust of them must therefore be evidenced by writing as in the case of freeholds.<sup>(e)</sup>

But chattels *personal* are not within the act, and a trust by averment will be supported.<sup>(f)</sup> It has even been held that a sum of money secured upon a mortgage of real estate, is not an interest within the act, and that a parol declaration is good.<sup>(g)</sup> And if a trust be once created by parol declaration, it cannot be affected by any subsequent parol declarations of the settlor.<sup>(h)</sup>

An attempt was formerly made to have a *charitable use* excepted from the statute, but Lord Talbot decreed,<sup>(i)</sup> and Lord Hardwicke affirmed the decision,<sup>(j)</sup> and Lord Northington said every man of sense must subscribe to it,<sup>(k)</sup> that a gift to a charity must be treated on the same footing with any other disposition.

[\*62] \*In Lady Portington's case<sup>(l)</sup> it was held by the Court of Queen's Bench, that the crown was bound by the Statute of Frauds, and therefore was not at liberty to prove a superstitious use by parol; but in the Court of *Exchequer* it was ruled, on the contrary, that the Statute of Frauds did *not* bind the crown, but took place only between party and party. Lord Hardwicke expressed his doubts upon the latter doctrine, that the crown is not bound by a statute unless specially named; but at the same time mentioned a case in which that doctrine had been followed.<sup>(m)</sup>

It seems the statute will not apply to lands situate in a colony planted before the Statute of Frauds was passed.<sup>(n)</sup> Planters carry out with them their own laws as they were subsisting at that time; but subsequent enactments at home will not follow them across the seas, unless it be so specially provided. *A fortiori* the Statute of Frauds will not affect foreign lands not subject to the crown of England.

If a bill be filed to have the benefit of a parol trust of lands, is a defendant, who would rely on the Statute of Frauds as a bar, bound to

(d) *Doe v. Danvers*, 7 East, 299.

(e) *Skett v. Whitmore*, Freem. 280; *Foster v. Hale*, 3 Ves. 696; *Riddle v. Emerson*, 1 Vern. 108; and see *Hutchins v. Lee*, 1 Atk. 447; *Bellasis v. Compton*, 2 Vern. 294.

(f) *Bayley v. Boulcott*, 4 Russ. 347, per Sir J. Leach; *M'Fadden v. Jenkyns*, 1 Hare, 461, per Sir J. Wigram; S. C. 1 Ph. 157, per Lord Lyndhurst; *Thorpe v. Owen*, 5 Beav. 224; *George v. Bank of England*, 7 Price, 646; *Hawkins v. Gardener*, 2 Smale & Gif. 451, per V. C. Stuart; *Fordyce v. Willis*, 3 B. C. C. 587, per Lord Thurlow; *Benbow v. Townsend*, 1 M. & K. 510, per Sir J. Leach; *Fane v. Fane*, 1 Vern. 31, per Lord Nottingham; *Nab v. Nab*, 10 Mod. 404. But this case, as reported 1 Eq. Ca. Ab. 404, appears an authority the other way.

(g) *Benbow v. Townsend*, 1 M. & K. 506; and see *Bellasis v. Compton*, 2 Vern. 294.

(h) *Kilpin v. Kilpin*, 1 M. & K. 520, see 539; *Crabb v. Crabb*, 1 M. & K. 511.

(i) *Loyd v. Spillet*, 3 P. W. 344.

(j) S. C. 2 Atk. 148; S. C. Barn. 384; and see *Adlington v. Cann*, 3 Atk. 150.

(k) *Boson v. Statham*, 1 Ed. 513.

(l) *King v. Portington*, 1 Salk. 162; and see *Adlington v. Cann*, 3 Atk. 146.

(m) *Adlington v. Cann*, 3 Atk. 154.

(n) See 2 P. W. 75; and see *Gardiner v. Fall*, 1 J. & W. 22.



plead it? The analogy of the section of the same statute relating to contracts touching interest in lands, would lead to the inference that to a bill for the execution of a parol trust, the defendant must plead the statute or he will be deemed to waive the bar. The point, however, remains to be decided.(o)

2. *What formalities are required by the statute.*

The principal point to be noticed is, that trusts are not necessarily to be declared in writing, but only to be *manifested and proved by writing*; for, if there be written evidence of the existence of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed.(p) It may be questioned whether the act did not intend that the *\*declaration itself* should be in writing; for the ninth section enacts, that "all grants and assignments of any trust [\* 63] or confidence shall *likewise be in writing*, signed by the party granting or assigning the same, or by such last will or devise;"(q) but, whatever may have been the actual intention of the legislature, the construction put upon the clause in practice is now firmly established.

The statute will be satisfied, if the trust can be manifested by any subsequent acknowledgment of the trustee, as by an express declaration by him,(r) or any memorandum to that effect,(s) or by a letter under his hand,(t) by his answer in chancery,(u) or by a recital in a bond,(v) or deed,(w) &c.; and the trust, however late the proof, takes effect from the creation of the trust. Even where a lease was granted to A., who afterwards became bankrupt, and then executed a declaration of trust in favour of B., a jury having found upon an issue directed from chancery that A.'s name was *bona fide* used in the lease in trust for B., it was held the assignees of A. had no title to the property.(x) In another case, on the marriage of Lord Windsor with Miss Tovey, certain estates of his lordship, called Breedon and Redmarley, were omitted from the settlement with a view of selling them and purchasing others more convenient, which when purchased were to be settled. About the same time Lord Windsor, by Emes, his agent, contracted for the purchase of the manor of Bromsgrove, and Lord Windsor and Emes bound themselves to pay the purchase-money. The conveyance was made to Lord

(o) See *Cottington v. Fletcher*, 2 Atk. 155; *Wood v. Midgley*, 5 De Gex. M. & G. 41.

(p) *Forster v. Hale*, 3 Ves. 707, per Lord Alvanley; S. C. 5 Ves. 315, per Lord Loughborough.

(q) *i. e.* A will executed in conformity with section 5. Note that *Crooke v. Brooking*, 2 Vern. 50, 106, was before the Statute of Frauds.

(r) *Ambrose v. Ambrose*, 1 P. W. 321; *Crop v. Norton*, 9 Mod. 233.

(s) *Bellamy v. Burrow*, Rep. t. Talb. 97.

(t) *Forster v. Hale*, 3 Ves. 696; S. C. 5 Ves. 308; *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67; *Bentley v. Mackay*, 15 Beav. 12; *Smith v. Wilkinson*, cited 3 Ves. 705; *O'Hara v. O'Neill*, 7 B. P. C. 227; and see *Gardner v. Rowe*, 2 S. & S. 354.

(u) *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404; *Cottington v. Fletcher*, 2 Atk. 155; *Ryall v. Ryall*, 1 Atk. 59, per Lord Hardwicke; *Wilson v. Dent*, 3 Sim. 385. A bill differs from an answer, as it is not signed by the party. See, however, *Butler v. Portarlington*, 1 Conn. & Laws. 1.

(v) *Moorcroft v. Dowding*, 2 P. W. 314.

(w) *Deg v. Deg*, 2 P. W. 412.

(x) *Gardner v. Rowe*, 2 S. & S. 346; S. C. affirmed, 5 Russ. 258.

[\*64] Plymouth, who \*paid the purchase-money himself, and raised it by a mortgage of his property. Two years afterwards, Lord Windsor raised the same sum by a mortgage of Breedon and Bromsgrove, and paid it to Lord Plymouth, who signed a receipt for it. Lord Plymouth devised Bromsgrove for payment of his debts, but it was held that a trust for Lord Windsor was sufficiently proved within the Statute of Frauds. Creditors, the court said, are favourites, but we must not pay them out of other men's estates; *nor*, as Justice Twisten was wont to say, *steal leather to make poor men shoes.*(y)

But with regard to letters and loose acknowledgments of that kind, the court expects demonstration that they relate to the subject-matter; (z) nor will the trust be executed if the precise nature of the trust cannot be ascertained; (a) and if the trust be established on the answer of the trustee, the terms of it must be regulated by the whole answer as it stands, and not be taken from one part of the answer to the rejection of another; (b) and the plaintiff, if he read the answer in proof of the trust, must at the same time read from it the particular terms of the trust. (c) When the trust is manifested and proved by letters, parol evidence may be admitted to show the position in which the writer then stood, the circumstances by which he was surrounded, and the degree of weight and credit to be attached to the letters, independently of any question of construction. (d)

It will be observed, that the words of the statute require the writing to be *signed*; (e) and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature; (f) but, as in the analogous case of agreements under the fourth section of the act, (g) the terms of the trust may be collected from a paper not signed, provided [\*65] such paper \*can be clearly connected with and is referred to by, the writing that is signed. (h) The signature must be by the party "who is by law enabled to declare such trust." It has been occasionally contended, that by this description is meant the person seised or possessed of the *legal estate*; but it has been decided that whether the property be real (i) or personal, (k) the person enabled to declare the trust is the owner of the beneficial interest, and who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit-pipe. (l)

(y) Plymouth v. Hickman, 2 Vern. 167.

(z) Forster v. Hale, 3 Ves. 708, per Lord Alvanley.

(a) Forster v. Hale, 3 Ves. 707, per Lord Alvanley; Morton v. Tewart, 2 Y. & C. Ch. Ca. 80, per Sir J. L. K. Bruce.

(b) Hampton v. Spencer, 2 Vern. 288; Nab v. Nab, 10 Mod. 404.

(c) Freeman v. Tatham, 5 Hare, 329.

(d) Morton v. Tewart, 2 Y. & C. Ch. Ca. 67, see 77.

(e) See Denton v. Davis, 18 Ves. 503.

(f) Forster v. Hale, 3 Ves. 707, per Lord Alvanley.

(g) See Vend. & Purch. ch. 3, s. 2.

(h) Forster v. Hale, 3 Ves. 696.

(i) Tierney v. Wood, 19 Beav. 330.

(k) Bridge v. Bridge, 16 Beav. 315; ex parte Pye, 18 Ves. 140, &c.

(l) See Donohoe v. Conrahy, 2 Jones & Lat. 688.

### SECTION III.

#### OF THE STATUTES OF WILLS.

By the fifth section of the Statute of Frauds<sup>(m)</sup> all devises of *lands* are required to be in writing and signed by the testator, or by some person in his presence and by his direction, and to be attested or subscribed in his presence by three witnesses; and by the nineteenth section, all bequests of *personal* estate are required to be in writing, with the exception of certain specified cases in which nuncupative wills are allowed.

To trace the operation of these enactments<sup>(n)</sup> we must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot by an informal instrument affect the equitable, any more than the legal, estate, for the one is a constituent part of the ownership as much as the other. Thus a person cannot but by a will duly signed and attested, give a sum of *money* originally and primarily out of *land*, for the charge is a part of the land, and to be raised out of it by sale or mortgage;<sup>(o)</sup> and if a testator by will duly signed and attested give lands to A. and his heirs \**"upon trust,"* but without specifying the particular trust intended, and then by a paper, not duly signed and attested as a will or codicil, declare a trust in favour of B., the beneficial interest under the will is a part of the original ownership, and cannot be passed by the informal paper, but will descend to the heir-at-law.<sup>(p)</sup> Again, if a legacy be bequeathed by a will, in writing, to A. *"upon trust,"* and the testator, by parol, express an intention that it shall be held by A. upon trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which imposes the necessity of a written will. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and therefore that where the legal estate of a freehold is well devised, a trust may be engrafted upon it by a simple note in writing; and where a chattel personal is well bequeathed, a trust of it, as accepted from the seventh section of the Statute of Frauds, may be raised by a mere parol declaration; the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. "The deed," observed Lord Loughborough, in a similar case, "is built on the will; if the will was destroyed, the deed I should consider absolutely gone; the will without the deed is incomplete, and the deed without the will is a nullity."<sup>(q)</sup> And Mr. Justice Buller observed, "A

(m) 29 Car. 2, c. 3.

(n) The statute now in force is 1 Vict. c. 26, but the cases were decided on the Statute of Frauds.

(o) See *Brudenell v. Boughton*, 2 Atk. 272.

(p) See *Adlington v. Cann*, 3 Atk. 151.

(q) *Habergham v. Vincent*, 2 Ves. jun. 209.



deed must take place upon its execution, or not at all; it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death.”<sup>(r)</sup> We may therefore safely assume, as an established rule, that if the intended disposition be of a testamentary character, and not to take effect in the testator’s lifetime, but ambulatory until his death, such disposition is inoperative unless it be declared in writing in \*strict conformity with the statutory enactments regulating devises and bequests.<sup>(s)</sup>

Lord Northington once enunciated the proposition, that a writing signed by a party who had power to make a trust, declaring the trust upon the will, is good though such writing be not attested by three witnesses according to the solemnities of the Statute of Frauds;<sup>(t)</sup> but this is a solitary dictum, and has been long overruled by the highest authorities.<sup>(u)</sup>

*Inchiquin v. French*<sup>(r)</sup> may be mentioned, as the case has been mistaken. A testator devised all his real estate, charged with debts and legacies, in strict settlement, and gave a legacy of 20,000*l.* to Sir William Wyndham; by a deed poll of even date with his will, the testator declared that the 20,000*l.* was given to Sir William Wyndham upon trust for Lord Clare. “The deed poll,” adds Mr. Cox, the reporter, “does not appear to have been proved as a testamentary paper;” and according to the same report, Lord Hardwicke decreed that the legacy of 20,000*l.* given to Sir William Wyndham, and by the *codicil* declared to be in trust for Lord Clare, was a subsisting legacy. It might be inferred from this statement, that Lord Hardwicke admitted the deed poll as a declaration of trust; but it will be observed that he calls it a *codicil*, and from the report of the same case in *Ambler*<sup>(v)</sup> we learn the facts, viz., that Lord Clare was out of the jurisdiction, and Lord Hardwicke declined to entertain the question as to Lord Clare’s right in his absence; but the counsel, for all parties, desiring his lordship to determine whether, [\*68] assuming the legacy to be valid, it was to be paid out of \*the real or personal estate, his lordship held, that as the will contained a general charge of legacies and the gift by the *codicil*, though not attested by the Statute of Frauds, was a legacy, it was raisable pri-

<sup>(r)</sup> *Habergham v. Vincent*, 2 Ves. jun. 230.

<sup>(s)</sup> In *Metham v. Devon*, 1 P. W. 529, a testator directed his executors to pay 3000*l.* as he should by deed appoint, and subsequently the testator by a deed appointed the 3000*l.* to the children of his son by Mrs. H., and the Court established the gift to the children on the ground that the deed referred to the will, and was part thereof and in the nature of a *codicil*. It does not appear in this case whether the deed had been proved with the will, but undoubtedly it might have been, as, though a deed in form, it was of a testamentary character. If the deed was not proved, or assumed to have been proved, as part of the will, it is difficult to find any principle upon which the case can be supported from the brief statement of it in the report.

<sup>(t)</sup> *Boson v. Statham*, 1 Ed. 514.

<sup>(u)</sup> *Adlington v. Cann*, 3 Atk. 151; *Muckleston v. Brown*, 6 Ves. 67; *Stickland v. Aldridge*, 9 Ves. 519; and see *Puleston v. Puleston*, Finch, 312, Jenk. 3 Cent. Ca. 26.

<sup>(v)</sup> 1 Cox, 1.

<sup>(w)</sup> *Amb.* p. 33.



marily out of the personal estate, and then out of the real estate. This was the only point determined by him.

If a testator, by his will, devise an estate, and the devisee, so far as appears on the face of the will, is intended to take the beneficial interest, and the testator leave a declaration of trust not duly attested, and not communicated to the devisee and assented to by him in the testator's lifetime, the devisee is the party entitled both to the legal and beneficial interest; for the estate was well devised by the will, and the informal declaration of trust is not admissible in evidence.(x) This doctrine, of course, does not interfere with the known rule, that a testator may, *by his will, refer to and incorporate therein*, any document which at the date of the will has an actual existence, and is thus made part of the will.

Should the testator devise the estate in such language that the will passes the legal estate only to the devisee, and manifests an intention of not conferring the equitable, in short, *stamps the devisee with the character of trustee*, and yet does not define the particular trusts upon which he is to hold; in this case, no paper not duly attested (except of course papers existing at the date of the will, and incorporated by reference) will be admissible to prove what were the trusts intended. Nor will the devisee be allowed to retain the beneficial interest himself; but while the legal estate passes to him, the equitable will result to the testator's heir-at-law.(y) And under the present Statute of Wills, the law is the same in reference to a bequest of personal estate.(z)

And if it appear by the will that the devisee was meant to <sup>\*be</sup> a trustee, and not to take the beneficial interest, parol evidence [ \*39 ] cannot be received in support of a contrary intention, for this would be not to rebut an equitable presumption, but to act upon parol testimony in contradiction to a written instrument.(a)

We now proceed to notice two exceptions to the general rule, that a trust cannot be created by devise or bequest, except with the formalities required by the enactments relating to wills.

The first exception existing, however, in the case only of testamentary instruments executed before Jan. 1, 1838,(b) was, that a testator might, by a will duly attested, charge his real estates with debts and legacies; and then a debt subsequently contracted, or a legacy given by a codicil, though not attested, would under the general charge contained in the

(x) *Adlington v. Cann*, 3 Atk. 141; and see *Stickland v. Aldridge*, 9 Ves. 519; and observations of Sir J. L. K. Bruce, in *Briggs v. Penny*, 3 De Gex and Sm. p. 547.

(y) *Muckleston v. Brown*, 6 Ves. 52. *Bishop v. Talbot*, as cited *ib.* 60, was a devise to trustees in trust, but on consulting the Reg. Lib. it appears there was no notice of the trust upon the will, Reg. Lib. 1772, A. fol. 137. In *Boson v. Statham*, 1 Ed. 508, the devisees were described as trustees, but this circumstance was not adverted to by the counsel or the court.

(z) *Johnson v. Ball*, 5 De Gex & Sm. 85.

(a) It should be borne in mind that the point may yet occur in practice in reference as well to testators dying after as those dying before 1838.

(b) See *Langham v. Sandford*, 17 Ves. 442; *S. C.* 19 Ves. 643; *Rachfield v. Careless*, 2 P. W. 158; *Golding v. Yapp*, 5 Madd. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322.

formal instrument, be raisable out of the real estate. The reason is, that debts and legacies being primarily payable out of the personal estate, are a fluctuating charge upon the real estate. The lands only are affected to the extent of the deficiency of the personalty, and the *amount* of the latter must be uncertain up to the time of the testator's death. The testator, by contracting debts or giving legacies by an unattested codicil, exercised the power which the law allowed him of reducing the personal estate; and as regards the Statute of Frauds, it was conceived to be immaterial whether the testator diminished the personal assets in this or any other manner.(c) But the exception does not extend to a will so worded as to amount to a reservation of a power to charge by unattested codicil;(d) nor, it is conceived, to a charge by will of lands with debts and legacies, and a subsequent gift by unattested codicil of legacies to be raised *exclusively out of the real estate*; this last amounting to the devise of a direct interest in land.

[\*70] \*Another exception to the rule, that parol trusts cannot be declared upon a will, is in the case of fraud. The court will never allow a man to take advantage of his own wrong, and therefore if an heir, or devisee, or legatee, or next of kin, contrive to secure to himself the succession of the property through fraud, the person to whom, but for the intervention of fraud, the property would have passed, may affect the conscience of the legal holder, and convert him into a trustee, and compel him to execute the disappointed intention.

Thus if the owner of an estate hold a conversation with the heir, and be led by him to believe that if the estate be suffered to descend, the heir will make a certain provision for the mother, wife, or child of the testator, a court of equity, notwithstanding the Statute of Wills, will oblige the heir to make a provision in conformity with the express or implied engagement; for the heir ought to have informed the testator that he, the heir, would not hold himself bound to give effect to the intention, and then the testator would have had the opportunity of intercepting the right of the heir by making a will.(e)

So if a father devises to his youngest son, who promises that if the estate be given to him he will pay 10,000*l.* to the eldest son, the court, at the instance of the eldest son, will compel the youngest son to disclose what passed between him and the testator, and if he acknowledge the engagement, though he pray the benefit of the statute in bar, he will be a trustee for the eldest son to the extent of 10,000*l.*(f)

And so, generally, if a testator devises an estate to A. *the beneficial owner upon the face of the will*, but upon the understanding between the testator and A. that the devisee will as to a part or even the entirety of the beneficial interest hold upon any trust which is lawful in itself,

(c) *Habergham v. Vincent*, 2 Ves. jun. 236.

(d) *Rose v. Cunninghame*, 12 Ves. 29; *Swift v. Nash*, 2 Keen, 20.

(e) *Sallack v. Harris*, 5 Vin. Ab. 521; *Stickland v. Aldridge*, 9 Ves. 519, per Lord Eldon; *Harris v. Horwell*, Gilb. Eq. Rep. 11. As to the limits of the jurisdiction of courts of equity, in cases of devises or bequests obtained by fraud, see *Hindson v. Weatherill*, 5 De Gex, M. & G. 301, and the cases there collected.

(f) *Stickland v. Aldridge*, 9 Ves. 519.

in favour of B., the court, at the instance of B., will affect the conscience of A., and decree him to execute the testator's intention.(g)

\*It often happens that a proposed devisee enters into an engagement with the testator in his lifetime to execute a secret [\*71] trust of an unlawful character, one which the policy of the law does not allow to be created by will. In this case the court will not suffer the devisee to profit by his fraud, but on proof of the fact raises a resulting trust in favour of the testator's heir-at-law. If, therefore, a testator devise an estate in words carrying upon the face of the will the beneficial interest, and obtain a promise from the devisee that he will hold the estate upon trust for a charitable purpose, the heir-at-law, as entitled to a resulting trust, may file a bill against the devisee, and compel him to answer whether there existed any such understanding between him and the testator; and if the defendant acknowledge it, he will be decreed a trustee for the plaintiff, and to convey the estate to him accordingly.(h) "Surely," said Lord Eldon, "the law will not permit secret engagements to evade what, upon grounds of public policy, is established? Is the court to feel for individuals, and to oblige persons to discover in particular instances, and not feel for the whole of its own system, and compel a discovery of frauds that go to the roots of that system? There is surely a stronger call upon the justice of the court to say, upon a private bargain, between the testator and those who are to take apparently under the will, which is to defeat the whole of the provisions and policy of the law, that they shall be called on to say whether they took the estate, as they legally may not do, for charitable purposes."(i)

In *Bishop v. Talbot*,(j) a testator by will duly attested gave [\*72] his real estate to A. and B. in fee, and by a memorandum signed, but not attested, declared certain *charitable* trusts. A bill was filed by the heir-at-law against the devisees, who by their answer insisted that the devise was not upon any secret trust, nor for other purposes than what appeared on the will, but admitted they had the memorandum in their possession, and *submitted the effect thereof* to the judgment of the court, Sir Thomas Sewell is reported to have said, "He did not think the principal matter would be the validity of the paper writing; the question was, what would be the effect of the answer, supposing

(g) *Kingsman v. Kingsman*, 2 Vern. 559; *Drakeford v. Wilks*, 3 Atk. 539; *Barrow v. Green*, 3 Ves. 152; *Marriot v. Marriot*, 1 Strange, 672, per Cur.; *Seagrave v. Kirwan*, 1 Beatt. 164, per Sir A. Hart; *Leister v. Foxcroft*, cited ib.; *Chamberlaine v. Chamberlaine*, 2 Eq. Ca. Ab. 43; ib. 465; *Thynn v. Thynn*, 1 Vern. 296; *Devenish v. Baines*, Prec. in Ch. p. 3; *Oldham v. Litchford*, 2 Vern. 506; same case, *Freem.* 284; *Reech v. Kennigate*, Amb. 67; S. C. 1 Ves. 123; *Newburgh v. Newburgh*, 5 Madd. 366, per Sir John Leach; *Chamberlain v. Agar*, 2 Ves. & B. 259; *Nab v. Nab*, 10 Mod. Rep. 404; *Strode v. Winchester*, 1 Dick. 397; S. C. stated from Reg. Lib. App. No. 1; and see *Alison's case*, 9 Mod. Rep. 62; *Dixon v. Olmius*, 1 Cox, 414.

(h) *Adlington v. Cann*, Barn. 130; *King v. Lady Portington*, 1 Salk. 162; *Muckleston v. Brown*, 6 Ves. 52; *Stickland v. Aldridge*, 9 Ves. 516; and see *Attorney-General v. Duplessis*, Park. 144; *Russell v. Jackson*, 10 Hare, 204; *Tee v. Ferris*, 2 Kay & J. 357; *Lomax v. Ripley*, 3 Sm. & Gif. 48.

(i) *Muckleston v. Brown*, 6 Ves. 69.

(j) Cited *Muckleston v. Brown*, 6 Ves. 60, 67; Reg. Lib. A. 1772, fol. 137, A. 1773, fol. 686.



there was no paper; admitting there was no trust for charitable purposes except what was mentioned in the answer, this was a sort of disclaimer upon their part, and the question was, who should have it?" And his honor decreed the heir-at-law to be entitled to a resulting trust. "Sir Thomas Sewell," said Lord Eldon, "went a great length in that case. If he had said the law would authorize him to hold the memorandum a sufficient denotation of intention that the devisees should be trustees, the difficulty would be, how he came to read the memorandum. But he took it in another way, that as they set forth the memorandum, they admitted the purpose of the testator, and put it, not upon the effect of the memorandum, *vi suâ*, if I may so express it, but as taken as their admission. I doubt whether that is quite correct reasoning; but though Sir Thomas Sewell might be wrong in the fact that that was an admission, his opinion is an authority in point of law, that if there was an admission he would execute the trust. Then it comes to this, that the doctrine of the court is, that the defendant shall answer in such a case; and if he answers in the affirmative, there is a resulting trust for the heir." (k)

In a recent case (l) the court was much more favourable to the devisees in the construction put upon this act. A testator devised certain freeholds to four persons during the life of A. for their own use and benefit, and three of them at the same time signed and delivered to the testator letters of acknowledgment that, although the estate was expressed to be devised to them beneficially, they would hold the same upon trust for [\*73] \*an alien. A bill was filed, by two of the trustees who had signed the letters, against the two other trustees, the alien and the crown, in the absence of the heir, to have the rights of all parties ascertained and declared. The trustee who had not signed an acknowledgment did not admit any trust, and was held to be clearly entitled to the beneficial interest; and even as to the three devisees who had signed the acknowledgment, the vice-chancellor was of opinion that the devisees had so signed under the impression that the trust for an alien was good, and that, acting under a misapprehension in that respect, they were not bound by the letters as an admission of trust. The court therefore declared that all four devisees was beneficially entitled.

Where a devise is to several persons, as tenants in common, it may be void as to one to whom the testator's unlawful intention was communicated in his lifetime, and good as to the others who were not privies to the intention. (m)

And where no trust is imposed by the will, and no communication was made in the testator's lifetime, the devise will be good, although the devisee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind, to carry out what he believes to have been the testator's wishes. (n)

Another case may occur, as follows;—A devise may be a beneficial one upon the face of a will, but there may have existed an understanding

(k) Muckleston v. Brown, 6 Ves. 68.

(l) Burney v. Macdonald, 15 Sim. 6.

(m) Tee v. Ferris, 2 Kay & J. 357.

(n) Wallgrave v. Tebbis, 2 Kay & J. 313; Lomax v. Ripley, 3 Sm. & Gif. 48.



between the testator in his lifetime and the devisee, that, without any particular part of the estate being specified, such portions of it as the devisee, in the exercise of his discretion, might think proper, should be applied to a charitable purpose. Under such circumstances the heir of the testator would have a right to interrogate the devisee whether he has exercised that discretion, and to call for a conveyance of so much as the devisee may have made subject to the unlawful purpose.(o)

In the above cases it is not a sufficient answer to a bill for the defendant to say that the secret trust is not for the plaintiff, \*for thus the devisee makes himself the judge of the title. The trust may [\*74] be for a charity, and if so, the beneficial interest would result for want of a lawful intention, or the equitable interest may, on some other ground, enure to the heir as undisposed of.(p) If the defendant deny the trust by his answer, the fact in this as in other cases of fraud may be established against him by the production of parol evidence.(q)

It is clear that if a devisee enter into an engagement with the testator to execute an unlawful trust, the heir may file a bill, and claim the beneficial interest; but suppose the devise is a beneficial one upon the face of it, and the testator communicates his will to the devisee, and requests him to be a trustee for such purposes as the testator shall declare, which the devisee undertakes to do, but the testator afterwards dies without having expressed any trust, it seems that in this case also the devisee will not be allowed to take the beneficial interest, but the heir-at-law will be entitled.

Thus in *Muckleston v. Brown*(r) the testator applied to three persons to act as trustees for the execution of certain trusts, which he intended to declare, and upon their undertaking the trust, the testator devised all his real estate to them, subject only to the payment of his debts and legacies. The testator died without having declared any trust as he had proposed. Upon a bill filed by the heir, Lord Eldon was of opinion, though very guardedly expressed, that the devisee was bound to answer. He observed, "I am not quite prepared to say it is clear that if the testator made the devise, meaning, at the time, thereafter duly to declare trusts, and it happened that he did not declare any, that sort of case would not be within the equity of this court, and whether, if they admitted his will was made upon an undertaking that they would execute such trusts, the heir would not have a right to say no trust was duly declared, the purpose therefore failed, and the trust results by law to him, not upon the intention, but upon the ground that there is no intention, and he is entitled to avail himself of that."

\*Another case, distinct from all the preceding, is where a testator *devises an estate to persons as trustees*, but no trusts are declared by the will, so that the equitable interest would, upon the face of the instrument, result to the heir-at-law, and the testator *informs the* [\*75]

(o) *Muckleston v. Brown*, 6 Ves. 69.

(p) *Newton v. Pelham*, cited *Boson v. Statham*, 1 Ed. 514.

(q) *Kingsman v. Kingsman*, 2 Ver. 599; *Pring v. Pring*, 2 Ver. 99.

(r) 6 Ves. 52. See too the observations of V. C. (now L. J.) Turner, in *Russell v. Jackson*, 10 Hare, p. 214.

*Devisees* that his intention in making the devise was, that they should hold the estate *in trust for certain persons*, which the devisees undertake to do. Will the court, under such circumstances, compel the devisee to *execute the parol intention*, or will the equitable interest result to the *heir*? In favour of the parol trust, it will be argued that the testator left his will in the form in which it appears, under the impression that his object, verbally communicated, would be carried out, and that the trust can therefore be supported, on the ground of mistake in himself, or fraud in the devisee in not apprising the testator that the trust could not be executed. To this the answer is, that, upon the face of the will, the equitable interest results to the heir-at law, and that, if the testator had not disposed of the equitable interest, as required by the statute, the court cannot make a will for him, on the plea of mistake or fraud :<sup>(s)</sup> that the court has interfered in the case of fraud in those instances only where the *devisee*, taking the beneficial interest under the will, was the contriver of the fraud, and, as no man may take advantage of his own wrong, the court compelled the devisee to execute the intention fraudulently intercepted; but in the case supposed, the *legal estate* only is in the *devisee*, while the beneficial interest is in the heir-at-law, who is wholly disconnected from the fraud. What jurisdiction, therefore, has the court to act upon the conscience of the heir, to deprive him of that estate which has not been devised away according to the Statute of Wills? and how can the trustees for the heir be held to be trustees for another in the absence of all fraud on the part of the heir? It would seem, upon principle, that where a trust results upon the face of the will, the circumstance of an express or implied promise on the part of the devisee to execute a certain trust is not a sufficient ground for authorizing the court to execute the trust [ \*76 ] as against the heir-at-law. \*The point might have arisen in each of the four following cases, but except in the latest of the four, it does not appear to have been taken.

In *Pring v. Pring*,<sup>(t)</sup> a man by his will appointed A., B., and C. his executors *in trust*, and gave them a legacy of 20*l.* apiece: the wife brought her bill against the executors, alleging that the defendants had been made executors in trust for her. Two of the defendants admitted the trust; but the third denied it, and insisted that at all events, if the will stamped them as trustees, it must be taken to be a trust not only for the wife but also for *the next of kin*. The will declaring that the executors were only in trust, and not declaring for whom, the court held that the person might be averred; and two of the executors having, by their answer, confessed the trust, and it being likewise fully proved that it was the intent of the testator, and that he declared it a trust for his wife, the court decreed the trust for the plaintiff, with costs against the adversary defendant. It is presumed that in this case a communication had passed between the testator and the executors, and that if a trust had not resulted upon the face of the will, the court, on the ground of fraud, might have compelled the executors to give the beneficial interest which they took under the will, to the person to whom they had promised

(s) *Newburgh v. Newburgh*, 5 Madd. 364.

(t) 2 Vern. 99.

it in the testator's lifetime. Whether the court was right, as a trust appeared upon the will, in giving away the beneficial interest, not of the fraudulent executors, but of the innocent next of kin, appears open to question.

In *Crooke v. Brooking*,<sup>(u)</sup> a testator by his will gave to his brothers Simon and Joseph, 1500*l.* *for such uses* as he had declared to them, and by them not to be disclosed; charging them that they would perform the same, as they would answer it at God's tribunal. The money was paid to Simon and Joseph; and Simon, in a letter to Joseph, acknowledged the trusts to have been for Ann Crew for life and then for her sister's children. Joseph died, and one of the children filed his bill against Simon for an execution of the trust, which the court decreed; but the question argued appears to have been \*not between the plaintiff and the next of kin whether a valid trust was created, [ \*77 ] but as the money had been actually paid to the trustees, what class of children were the *cestuis que trust*, on the assumption that the trust itself was valid. And besides, this was a case before the Statute of Frauds.

In the more recent case of *Smith v. Attersoll*<sup>(v)</sup> a testator by his will gave fifty commercial dock shares to his two sons, Joseph and John, who were also his executors, *in trust for certain purposes* which the will stated had been fully explained to them. On the same day on which the will was executed, Joseph and John signed an acknowledgment that they would hold the shares upon trust for the testator's six natural children. The acknowledgment was not proved as a testamentary paper. The bill was filed by one of the six children to have the trusts of the dock shares, as expressed in the acknowledgment, carried into execution. The executors by their answer admitted the trust. *It does not appear that the testator's next of kin were made parties.* Lord Gifford decreed the execution of the trusts on the ground that the paper writing, though not testamentary, was an admission of the trust by the executors; but the observation occurs that the executors had not the beneficial interest in themselves, and therefore no admission by them could give a title to another. Several cases were cited by the court in support of the decision, but all of them, except *Crooke v. Brooking*, mentioned above, are distinguishable.<sup>(w)</sup> It is a very material circumstance that the question was litigated between the executors and a *cestui que trust* only in the absence of the next of kin, to whom, in fact, the equitable interest had resulted.

In *Podmore v. Gunning*,<sup>(x)</sup> the principal question litigated was whether the testator had in fact stamped the devisee with \*the [ \*78 ] character of a trustee, so that the equitable interest upon the face of the instrument resulted; and, in the event of the court being of

(u) 2 Vern. 50 and 107.

(v) 1 Russ. 266.

(w) As *Jones v. Habbs*, Gilb. Eq. Rep. 146, but there the money passed, and the parol trust was declared in the life-time of the testator. *Inchiquin v. French*. 1 Cox, 1, but this case was mistaken, see *Ambler's Rep.* p. 33, and the observations, ante, p. 67. *Metham v. Devon*, 1 P. W. 529, but the court treated the deed as testamentary and in the nature of a codicil; and no doubt it might have been proved as such, even if it had not been proved already.

(x) 7 Sim. 644.



that opinion, a contest would have arisen between the heir and next of kin on the one hand, and the secret *cestuis que trust* on the other.

In the case under consideration, Sir Thomas Staines devised his residuary estate to his wife, her heirs, administrators, and assigns, "having a perfect confidence that she would act up to the views which he had communicated to her in the ultimate disposal of his property after his decease."<sup>(y)</sup> A bill was filed by the two natural daughters of Sir Thomas, alleging that Sir Thomas, at the time of making his will had expressed to Lady Staines his desire of providing for the plaintiffs, and that Lady Staines had promised that if the residuary estate were devised to her she would execute his intention in the plaintiffs' favour. The vice-chancellor was of opinion that the language of the will did not declare Lady Staines to be a trustee; that the words "having a perfect confidence that she would act up to the views which he had communicated to her," did not necessarily imply that any *absolute* direction had been given to her as to the disposition of the property, but were consistent with the testator having given to his wife either as *absolute discretion*, or, a *general recommendation* leaving it to her *discretion* to act upon it or not in such manner as she might think fit; but the vice-chancellor admitted that if the plaintiffs had proved that Lady Staines had undertaken to dispose of the estate in a given manner, she would have been bound by the engagement. The plaintiffs, therefore, failed in converting Lady Staines into a trustee for themselves, and as Lady Staines was not distinctly invested with the character of trustee upon the face of the will, no equitable interest resulted.

We have stated the rule that if a testator make a devise carrying the beneficial interest on the face of the will, but it appears from the admission of a devisee or by evidence that the devisee was pledged to the testator to execute a charitable trust, the court will not allow the execution of such a trust, but will give the estate to the heir-at-law. The question [<sup>\*79</sup>] here suggests \*itself, whether the Statute of Mortmain,<sup>(z)</sup> which declares a devise "in trust or for the benefit of" a charity to be absolutely void, applies to such a case, so as not only to defeat the equitable interest admitted or proved to have been intended for a charity, but also to make void the devise of the legal estate itself, so that by the effect of the statute, when the fact has been established, the devisee takes no interest either at law or in equity.

Lord Hardwicke determined in *Adlington v. Cann*,<sup>(a)</sup> that the Statute of Mortmain did not extend to trusts by parol. "I am of opinion," he said, "that the Statute of Mortmain has not abrogated the Statute of Frauds, which, being made for the public good, ought *normam imponere futuris*. It is true the Statute of Frauds cannot govern the particular provisions of the Statute of Mortmain, but it must govern the construction of subsequent acts; for they must be construed by rules of law, and by what is laid down in precedent acts. If it should be admitted that the Statute of Mortmain took all these cases out of the Statute of Frauds, and was intended to introduce parol evidence, it would do more mischief,

<sup>(y)</sup> Compare *Briggs v. Penny*. 3 De Gex & Sm. 525; 3 Mac. & Gord. 546.

<sup>(z)</sup> 9 G. 2, c. 36.

<sup>(a)</sup> 3 Atk. 141.



by laying the foundation of a great deal of perjury, than it can possibly do good in any other respect whatsoever. (b) Besides, very little inconvenience can arise from my determination to this effect, for the instances of trustees abusing a trust for charity are so frequent, that they are a sufficient warning to reasonable men not to leave their estates under such uncertainty, as to put them absolutely under a person's power, and then trust to his generosity for the disposing of them in charity. (c)" Thus, in Lord Hardwicke's view of the subject, a parol trust in mortmain, where the devisee entered into no engagement with the testator, could not be established against the devisee to deprive him of the beneficial interest; (d) and where the devisee did enter into such an engagement, and the fact was either admitted by the defendant, or established against him by evidence, the trust only was void upon principles of equity, and not the devise of the legal estate by force of the Statute of Mortmain.

\*Lord Northington, on the contrary, thought that secret trusts were within the letter of the Statute of Mortmain; and he there- [ \*80 ] fore decided, that whether the testator had held communication with the devisee (e) or not, (f) the intention of creating an honorary trust would, if established, avoid the devise of the legal estate itself. "What," he says, "stands in my way? One objection is, that the beneficial devise to the trustees and their heirs by the will is not to be revoked or controlled by the second instrument, it not being executed according to the Statute of Frauds, and therefore it only can be taken as an honorary trust, and as such is not within the Statute of Mortmain. This is as much as to say, that, being a fraud within both acts, it is not within either. And the objection is, that it will be more inconvenient to let in fraud and perjury by opening the Statute of Frauds, than to let in devises to charities by opening the Statute of Mortmain. My opinion is, that the Statute of Mortmain meant to prevent honorary trusts or devises for charities *quacunque arte vel ingenio*; and the honorary trust infects the will, as much as if it were declared in the most solemn manner." (g) Sir Thomas Sewell, in the case of *Bishop v. Talbot*, before stated, where the fact of the trust was established on the admission of the devisee, considered the heir as entitled to a resulting trust. His honor therefore was apparently of opinion with Lord Hardwicke, (as appears the more correct view) that, in the case of a trust in mortmain not declared with the formalities required for a will, the devise of the legal estate was good, as not affected by the Statute of Mortmain, though equity where there was any *mala fides* in the devisee would set it aside on the ground of fraud upon public policy.

The provisions of the Statute of Frauds relating to wills have now been repealed, and the distinction which before existed between devises of real and bequests of personal estate has been abolished. (h) The principles, however, established by the foregoing cases with reference to the

(b) 3 Atk. 150.

(c) Id. 153.

(d) And this is now settled law. *Walgrave v. Tebbs*, 2 Kay & J. 313; and cases cited *suprà*.

(e) *Edwards v. Pike*, 1 Ed. 267.

(f) *Boson v. Statham*, 1 Edw. 508.

(g) *Boson v. Statham*, 1 Ed. 512, 514. (h) 1 Vict. c. 26.

Statute of Frauds still apply *mutatis mutandis* to the enactments of the statute at present in force.

[\*81]

## \*SECTION IV.

## OF TRANSMUTATION OF POSSESSION

Where *there is valuable consideration*, and a trust is intended to be created, formalities are of minor importance, since if the transaction cannot take effect by way of trust executed it may be enforced by a court of equity as a contract for value. Where *there is no valuable consideration*, it has been not unfrequently supposed that, in order to give the court jurisdiction, there must be a transmutation of possession, *i. e.*, the legal interest must be divested from the settlor, and transferred to some third person. But upon a careful examination of the authorities the principle appears to be, that whether there was transmutation of possession or not, the trust will be supported—provided it was in the first instance *perfectly created*.<sup>(i)</sup>

To elucidate this subject it may be convenient to marshal the cases under the following heads.

First. It is evident that a trust is *not perfectly created* where there is a mere *intention* or voluntary agreement to establish a trust, the settlor himself contemplating some further act for the purpose of giving it completion.

Thus in *Cotteen v. Missing*,<sup>(k)</sup> Ann Lee Missing was entitled to a residuary personal estate in the hands of the executors, and Charlotte Missing being in destitute circumstances, the executors applied to Ann Lee to make her some allowance. Ann Lee wrote in reply, "As to the money to be allowed to Charlotte, when you ascertain what the property is, whatever you and Mr. Missing think right that I should give, I shall abide by." The executors answered, that they thought 500*l.*

[\*82] <sup>\*</sup>would be a proper sum; and Ann Lee then replied. "With respect to Charlotte, as you and Mr. Missing say she ought to be allowed 500*l.*, I will readily consent to it. I am willing to do anything that is right." Under these circumstances Sir T. Plumer thought that the gift was still *in fieri*. "To make a complete gift there must not only be a clear intention, but the intention must be executed and carried into effect. At the date of the first letter to the executors the gift was inchoate, the quantum of property not having been ascertained. The second letter amounted to a declaration of the propriety of giving her 500*l.*, and shows her approval of a gift to that amount, but does not give

(i) See *Ellison v. Ellison*, 6 Ves. 662; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Sloane v. Cadogan*, Vend. & P. Append. No. 24; *Edwards v. Jones*, 1 M. & Cr. 226; *Wheatley v. Purr*, 1 Keen, 551; *Garrard v. Lauderdale*, 2 R. & M. 453; *Collinson v. Patrick*, 2 Keen, 123; *Dillon v. Coppin*, 4 M. & Cr. 647; *Meek v. Kettlewell*, 1 Hare, 469; *Fletcher v. Fletcher*, 4 Hare, 74; *Price v. Price*, 14 Beav. 598; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Donaldson v. Donaldson*, 1 Kay, 711; *Scales v. Maude*, 6 De Gex, M. & G. 43; *Airey v. Hall*, 2 Jur. N. S. 658.

(k) 1 Mad. 176.

effect to the gift and carry it into execution. Nothing is said as to who is to pay the money, or when it is to be paid. The executors were not warranted in paying it out of the money in their hands. If they had done so, Mrs. Missing might have said, I meant to give the money on terms and conditions as to marriage and age. Nothing is said as to what part of her property this money was to be raised out of, whether out of the money in the funds, or out of the estate. Nothing is to be found in the letters but an intention to give, and therefore this case widely differs from the cases alluded to, where acts were done carrying the gift into execution. Here the gift was not completed. Supposing it were anything like an authority to an agent, the subsequent marriage of Mrs. Missing was a revocation of such authority, as was likewise her death. This was a mere inchoate imperfect gift not carried into execution, and which has therefore failed."

Secondly. If the settlor propose to *convert himself* into a trustee, then the trust is *perfectly created* so soon as the settlor has executed an express declaration of trust, intending to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable.

Thus in *Ex parte Pye*, or *Ex parte Dubost*,<sup>(l)</sup> J. M. had authorised C. D. to purchase an annuity for M. G. G. for life. \*The annuity [\*83] was purchased, but *in the name of J. M.*, who thereupon sent over a power of attorney to transfer the annuity into the name of M. G. G. Before the commission could be executed J. M. died, but Lord Eldon determined that a valid trust had been created. "The question," he said, "involves the point, whether the power of attorney amounts here to a declaration of trust. It is clear, that this court will not assist a volunteer; yet *if the act is completed*, though voluntary, the court will act upon it. It has been decided that, upon an *agreement* to transfer stock, this court will not interpose; but *if the party has declared himself to be the trustee of the stock*, it becomes the property of the *cestui que trust* without more, and the court will act upon it. From the documents before me it does appear, that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant." In this case it will be observed, that the gift was perfected as soon as the agent had laid out the money in the purchase of the annuity. Had the purchase been made in the name of J. M. as beneficial owner, the execution of the power of attorney, as it failed to transfer the possession, would not have been a valid declaration of trust; but the purchase was made in the name of J. M. as *trustee* for the annuitant, and the power of attorney and other documents were read, not as instruments originating the trust, but as proofs of the trust which had been previously created.

(l) 18 Ves. 140; and see *Thorpe v. Owen*, 5 Beav. 224; *Stapleton v. Stapleton*, 14 Sim. 186; *Searle v. Law*, 15 Sim. 99; *Drosier v. Brereton*, 15 Beav. 221; *Bentley v. Mackay*, 15 Beav. 12; *Bridge v. Bridge*, 16 Beav. 315; *Gray v. Gray*, 2 Sim. N. S. 273; *Wilcocks v. Hannington*. 5 Ir. Ch. Re. 38; *Dipple v. Corles*, 11 Hare, 183.



In a late case<sup>(m)</sup> Sir J. Wigram expressed himself more cautiously than was necessary, as to the jurisdiction of the court in enforcing a trust against the settlor himself, and suggested several accompanying circumstances as material to the establishment of such a trust. "In the case," he said, "of a formal declaration by the legal or even beneficial owner of property, declaring himself in terms the trustee of that [\*84] property, \*for a volunteer the court might not be bound to look beyond the mere declaration. If the owner of property having the legal interest in himself, were to execute an instrument by which he declared himself a trustee for another, and had *disclosed that instrument* to the *cestui qui trust*, and afterwards *acted upon it*, that might perhaps be sufficient; for a court of equity, advertent to what Lord Eldon said in *Ex parte Dubost*, might not be bound to inquire further into an equitable title so established in evidence."

Thirdly. Where the settlor purposes to make a *stranger* the trustee, then to ascertain whether a trust has been *perfectly created* or not, we must take the following distinctions:—

1. If the subject of the trust be a *legal interest*, and one *capable of legal transmutation*, as land or chattels which pass by conveyance, assignment, or delivery, or stock which passes by transfer, in this case the trust is not perfectly created unless the legal interest be actually vested in the trustee: it is not enough that the settlor executed a deed affecting to pass it, and that he believed nothing to be wanting to give effect to the transaction: the intention of divesting himself of the legal property must in fact have been executed, or the court will not recognize the trust.<sup>(n)</sup> "I take the distinction," said Lord Eldon, "to be, that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, &c.: if it rests in covenant and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court."<sup>(o)</sup>

[\*85] In *Colman v. Sarel*,<sup>(p)</sup> George Davy having 1000*l.* Bank Annuities standing in his name, assigned that sum by deed upon trust for Joan Sarel for life, with remainder to her children, and covenanted to pay the dividends accordingly, but no actual transfer of the stock was ever made. The children filed a bill for the execution of the trust, and Lord Thurlow, in dismissing the bill, observed, "When a deed is not sufficient in truth to pass the estate out of the hands of the settlor, but the party must come into equity, the court has never yet

(m) *Meek v. Kettlewell*, 1 Hare, 470; and see *Hughes v. Stubbs*, 1 Hare, 478.

(n) See *Garrard v. Lauderdale*, 2 Russ. & M. 452; *Meek v. Kettlewell*, 1 Hare, 469; *Dillon v. Coppin*, 4 M. & Cr. 647; *Coningham v. Plunkett*, 2 Y. & C. Ch. Ca. 245; *Searle v. Law*, 15 Sim. 95; *Price v. Price*, 14 Beav. 598; *Bridge v. Bridge*, 16 Beav. 315; *Weale v. Ollive*, 17 Beav. 252; *Beech v. Keep*, 18 Beav. 285; *Airey v. Hall*, 2 Jur. N. S. 658; and *Kiddill v. Farnell*, 5 Weekly Rep. 324.

(o) *Ellison v. Ellison*, 6 Ves. 662; and see *Pulvertoft v. Pulvertoft*, 18 Ves. 89.

(p) 1 Ves. jun. 50; S. C. 3 B. C. C. 12.



executed a voluntary agreement. To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed, and there is no case where a court of equity has ever done that."

In *Antrobus v. Smith*,<sup>(q)</sup> a Mr. Crawford being entitled to ten shares of the Forth and Clyde Navigation, wrote, upon the receipt for one of the subscriptions, and signed the following indorsement, "I do hereby assign to my daughter, A. Crawford, all my right, title, and interest of and in the enclosed call, and all other calls of my subscription in the Clyde and Forth Navigation." After Mr. Crawford's death, the representative of A. Crawford filed a bill to have the shares transferred. Sir W. Grant dismissed the bill, and observed, "This instrument, of itself, was not capable of conveying the property. It is said to amount to a declaration of trust. Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift, by making an assignment? There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect."

2. If the subject of the trust be a *legal interest*, but *not one capable of legal transfer*, as a bond or other *chose en action*, which cannot be assigned at law, then whether we look to \*principle or authority, there is considerable difficulty. On the one hand, it may be [\*86] argued that as the settlor *cannot* divest himself of the legal interest, to say that he shall not constitute another a trustee without passing the legal interest would be debarring him from the creation of a trust in the hands of another at all, and that the rule therefore should be that if the settlor make all the assignment of the property in his power and perfect the transaction as far as the law permits, the court in such a case should recognise the act, and support the validity of the trust. On the other hand, it may be urged, that in equity the universal rule is that a court will not enforce a voluntary agreement in favour of a volunteer; and as by the supposition the legal interest remains in the settlor (who therefore at law retains the full benefit,) a court of equity will not in the absence of any consideration deprive him of that interest which he has not actually parted with.

Some judges have adopted the one view of the question, and some the other.

In *Fortescue v. Barnett*,<sup>(r)</sup> A. assigned a *policy* to trustees, but retained possession of it, and afterwards received a bonus upon it, and then surrendered it to the insurance office. The surviving trustee filed a bill against the settlor himself for an account of the proceeds. The counsel for the defendant, the settlor, argued that there was no difference between an attempted assignment of *stock*, and of a *bond* or *policy*, and

(q) 12 Ves. 39.

(r) 3 M. & K. 36.

therefore that no trust was created; but Sir J. Leach ruled otherwise, and said, "In the case of a voluntary assignment of a bond, where the bond is not delivered but kept in the possession of the assignor, this court would undoubtedly, in the administration of the assets of the assignor, consider the bond as a debt to the assignee. There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a *bond*. In the former case, the material act remains to be done by the grantor, and nothing is in fact done which will entitle the assignee to the aid of this court until the stock is transferred; whereas the court will admit the assignee of the *bond* as a creditor. In the present \*case the gift of the policy [ \*87 ] appears to me to have been perfectly complete without delivery; nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a *legal* and an *equitable* title, but simply upon whether any act remained to be done by the grantor, which, to assist a volunteer, this court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment, but their omission to give notice cannot affect the *cestuis que trust*."

And in *Roberts v. Lloyd*,<sup>(s)</sup> where Mrs. Roberts assigned a *bond* to a trustee with a power of attorney, and both trustee and *cestuis que trust* had notice of it, and after the death of the settlor, a bill was filed by one of the *cestuis que trust* against the trustee and the obligor, on the ground that the trustee had by his agent received and misapplied the money, and that the obligor with a knowledge of the settlement had been a party to the misapplication, Lord Langdale said, "I think Mrs. Roberts did everything incumbent on her to make the trust complete and valid, and that the plaintiff is entitled to have the benefit of it;" and both trustee and obligor were held liable.

So in *Blakely v. Brady*,<sup>(t)</sup> A. had a promissory note to pay the sum of 1620*l.* on a certain notice, and interest in the mean time, and assigned it to B. by deed, and gave him a power of attorney, and then A. died, and B. filed his bill against his administrator to have the benefit of the trust, Lord Plunket decreed the money to the plaintiff. "The doctrine," he said, "that a *chose en action* is not legally assignable, does not appear to me to be one that a court of equity is called on to extend beyond the exact limits to which it has been already carried by distinct authority. If the transaction is not in itself illegal, and if no act remains to be done by the grantor, why is it not to be acted on as a valid and complete transaction between the parties?"<sup>(u)</sup>

[ \*88 ] \*On the other hand in *Edwards v. Jones*,<sup>(v)</sup> Mary Custance being entitled to a *bond* wrote and signed the following indorsement upon it, "I, Mary Custance, of, &c., do hereby assign and transfer the within bond, &c., unto and to the use of my niece, E. Edwards, of, &c., with full power and authority for the said E. Edwards to sue for

(s) 2 Beav. 376.

(u) *Ib.* 326.

(t) 2 Drur. & Walsh. 311.

(v) 1 M. & Cr. 226.

and recover the amount thereof, &c.," and delivered the bond to the assignee. On the death of Mary Custance, her niece E. Edwards filed a bill against the executor for an assignment of the bond. The vice-chancellor of England dismissed the bill with costs, and on appeal to the lord chancellor the decision was affirmed. In the course of his judgment, Lord Cottenham referred to the case of *Fortescue v. Barnett*, and endeavoured to distinguish it from the case before him, but it is evident that Sir J. Leach's decision did not meet with his approbation.

Again, in *Ward v. Audland*,<sup>(w)</sup> where A. assigned to trustees a *policy*, *mortgages*, and other *choses in action*, to trustees, and the *cestuis que trust* filed a bill against the executors of A. for the establishment of the trust, the vice-chancellor of England dismissed the bill with costs, and said, "There was no equity for the court to interfere, but what the plaintiffs got by their deed they might maintain by their deed." The case was carried on appeal to the lord chancellor, who dismissed the bill, from error in the form of the pleadings, and without prejudice to the institution of another suit; but apparently he adhered to the doctrine laid down in *Edwards v. Jones*.<sup>(x)</sup> A suit was subsequently instituted at the Rolls, and his lordship dismissed the bill on the same grounds on which the vice-chancellor had refused relief in the former suit.<sup>(y)</sup>

The opinion of Sir J. Wigram in the late case of *Meek v. Kettlewell*<sup>(z)</sup> was strongly expressed in support of the view taken by the vice-chancellor of England and Lord Cottenham. However, in a more recent case<sup>(a)</sup> Lord Justice K. Bruce observed, "It is upon legal and equitable principle, we apprehend, \*clear that a person *sui juris* acting [ \*89 ] freely, fairly, and with sufficient knowledge, ought to have *and* *has it in his power* to make in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced*," and it is conceived that this principle will for the future prevail.

3. If the subject of the trust be an *equitable* interest, then a trust is *perfectly created* when the settlor has executed an assignment of it to a new trustee; for an equitable interest is capable of transmission from one to another; and here the court finds the relation of trustee and *cestui que trust* established without the necessity of calling on the settlor to join in any act for giving it completion.

This was decided by Sir W. Grant in the case of *Sloane v. Cadogan*.<sup>(b)</sup> W. B. Cadogan was entitled, subject to his father Lord Cadogan's life interest therein, to one quarter share of a sum of 20,000*l.*, invested in bank annuities in the names of the trustees of Lord Cadogan's marriage-

(w) 8 Sim. 571.

(x) Cooper's Ca. 1837-8, p. 146.

(y) 8 Beav. 201.

(z) 1 Hare, 464; and see *Scales v. Maude*, 6 De Gex, M. & G. 43.

(a) *Kekewich v. Manning*, 1 De Gex, Mac. & Gord. 187, 188.

(b) Append. to Vend. & Purch. Quære, also, if the same point was not ruled in *Ellison v. Ellison*, 6 Ves. 656; for though the facts are very imperfectly stated, it would seem from some expressions that at the date of settlement the legal estate was not in the settlor; and see *Reed v. O'Brien*, 7 Beav. 32; *Bridge v. Bridge*, 16 Beav. 315; *Gannon v. White*, 2 Ir. Eq. Re. 207.



settlement, and this reversionary interest he assigned to four trustees upon trust as to 1000*l.* for himself, his appointees or assigns, and as to the residue upon trust for himself for life, with remainder to Jane his wife for life, with remainder to their issue as they should jointly appoint, and in default of issue as W. B. Cadogan should by deed or will appoint, and in default of such appointment upon trust for Lord Cadogan, the father, his executors, administrators, and assigns. W. B. Cadogan by will appointed Jane his wife sole executrix, and gave her "all his estate and effects." There was no issue, and on the death of W. B. Cadogan Jane his widow filed a bill against the executors of Lord Cadogan (who were in possession of the trust fund, but in what character does not appear,) to have her right to the whole one quarter share of the 20,000*l.*

[ \*90 ] \*established. Her claim was advanced upon two grounds, 1. That supposing the assignment by W. B. Cadogan to be valid, the plaintiff took as appointee under the will in execution of the power. 2. That if the assignment were invalid, then the plaintiff took as executrix of W. B. Cadogan. The defendants, the executors of Lord Cadogan, insisted that the assignment was valid, but that the will was not an execution of the power, and, therefore, that the ultimate limitation to Lord Cadogan (subject to the plaintiff's life interest) took effect; and so it was decided. In the course of the argument, Sir W. Grant remarked. "The assignment was as good an assignment as could be made of this reversionary interest; you may be a trustee for a volunteer;" and in his judgment he observed, "It was said that the gift to Lord Cadogan was merely voluntary, and Lord Cadogan could not have had any assistance from this court, that the question is the same as if the representatives (of Lord Cadogan) were *seeking relief*, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But as against *the party himself and his representatives* a voluntary settlement is binding. The court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees. W. B. Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the court will execute it though voluntary."

"If," said Sir J. Wigram, "the equitable owner of property, the legal interest of which is in a trustee, should execute a voluntary assignment and authorize the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the interest and dividends of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property \*was not perfect in equity.(c) The vice-chancellor here [ \*91 ] enumerates all the safeguards and confirmatory acts of which the



transaction was capable, but it must not be inferred that if some of these were wanting the trust would not be supported.

In one case<sup>(d)</sup> the late vice-chancellor of England questioned the principle of *Sloane v. Cadogan*. But in *Kekewick v. Manning*,<sup>(e)</sup> Lord Justice K. Bruce observed, "Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life interest for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A. to make an effectual gift of C.'s interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary that notice should be given to A., but upon that we express no opinion."

These principles have since been acted upon in *Voyle v. Hughes*,<sup>(f)</sup> and *Sloane v. Cadogan* may now be regarded as established law. It had before been contended that the assignment operated by way of *contract*, and as there was no consideration the court could not enforce it; but the rule now is, that the assignment passes the equitable *estate*, and even if notice be not given to the trustees of the fund, the assignment is good as against the assignor.<sup>(g)</sup>

In other cases a party entitled to an equitable interest, instead of assigning it to new trustees, has directed the old trustees to stand possessed of it upon the new trust,<sup>(h)</sup> and, of course, it has been considered quite immaterial whether the settlor selected new trustees or was content with the original trustees.

In other cases the owner of an equitable interest has simply assigned it to a stranger for the stranger's own benefit,<sup>(i)</sup> \*which also in principle is the same as *Sloane v. Cadogan*, for there can be no [ \*92 ] difference between the gift of an equitable interest to A. and the gift of it to B. in trust for A.

In a late case<sup>(k)</sup> it was decided by Sir J. Wigram, that a voluntary assignment of a mere *expectancy* (as of an heir or next of kin) in an equitable interest, and *not communicated to the trustees*, did not amount to the creation of a trust. This was the only point actually decided, and perhaps a distinction may be said to exist between the settlement of an *actual interest* and an *expectancy*, for a trust to be enforced must be *perfectly created*, whereas any dealing with what a person *has not*, but only *expects to have*, must necessarily in some sense be *in fieri*. However, in the course of his argument the learned judge denied that any distinction existed between settlements of a *legal* interest, as in *Edwards v. Jones*, and of an *equitable* interest, as in *Sloane v. Cadogan*, two cases which it is submitted, both on principle and authority, ought not to be confounded. Great importance was also attached by his honor to the circumstance that *notice of the assignment* was not given to the trustees.

(d) *Beatson v. Beatson*, 12 Sim. 281.

(e) 1 De Gex, Mac. & Gord. p. 188.

(f) 2 Sm. & Gif. 18.

(g) *Donaldson v. Donaldson*, 1 Kay, 711.

(h) *Rycroft v. Christy*, 3 Beav. 238; *M'Fadden v. Jenkins*, 1 Hare, 458, 1 Phill. 153.

(i) *Cotteen v. Missing*, 1 Mad. 176; *Collinson v. Patrick*, 2 Keen, 123; and see *Godsall v. Webb*, 2 Keen, 99.

(k) *Meek v. Kettlewell*, 1 Hare, 464.

But notice in these cases is not indispensable. As against the *settlor*, an equitable interest is perfectly transferred without notice. It is only as between *purchasers* that the service of notice on the trustee, or the want of it, has a material effect upon the transfer.<sup>(l)</sup> *Meek v. Kettlewell* was afterwards heard on appeal before Lord Lyndhurst, who affirmed the decision.<sup>(m)</sup>

If a complete voluntary settlement be once executed it cannot be revoked by a subsequent voluntary settlement;<sup>(n)</sup> but a *voluntary settlement of land* by way of trust, perfectly created is liable, under the 27 Eliz. cap. 4, like a settlement of the legal estate, to be defeated by a subsequent sale to a purchaser, even with notice. And the *cestui que trust* can neither obtain an injunction against the sale, though the settlement was [ \*93 ] founded on meritorious consideration, as a provision for a wife \*or child,<sup>(o)</sup> nor can follow the estate into the hands of the purchaser,<sup>(p)</sup> nor charge him with misapplication of the purchase-money, if, with notice of the voluntary settlement, he paid it to the vendor,<sup>(q)</sup> nor can come upon the settlor himself to compensate the *cestuis que trust* for their loss.<sup>(r)</sup> However, the trust will be executed by the court until the estate be actually sold;<sup>(s)</sup> and the author of the settlement, if he contract for the sale, cannot himself file a bill to enforce the specific performance,<sup>(t)</sup> though the purchaser may do so,<sup>(u)</sup> and though the settlor himself may defeat the trust by a subsequent sale, the heir or devisee of the settlor has no such power;<sup>(v)</sup> but chattels personal (in which respect they differ from chattels real<sup>(w)</sup>) are not within the statute of 27 Eliz. c. 4, relating to *purchasers*, and therefore a voluntary settlement of chattels personal cannot be defeated by a subsequent sale.<sup>(x)</sup>

Again, a voluntary settlement either of real or personal estate by one virtually insolvent or largely indebted at the time, will by the 13 Eliz. c. 5, be void as against *creditors*.<sup>(y)</sup>

As every *agreement under hand and seal* carries a consideration upon

(l) See *Burn v. Carvalho*, 4 M. & Cr. 690; *Donaldson v. Donaldson*, 1 Kay. 711.  
(m) 1 Phill. 342.

(n) *Newton v. Askew*, 11 Beav. 145; *Rycroft v. Christy*, 3 Beav. 238.

(o) *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(p) *Williamson v. Williamson*, 1 Ves. 516, per Lord Hardwicke.

(q) *Evelyn v. Templar*, 2 B. C. C. 148; and see *Pulvertoft v. Pulvertoft*, 18 Ves. 91, 93; *Buckle v. Mitchell*, 18 Ves. 112; but compare *Leach v. Dean*, (1 Ch. Re. 146,) with *Pulvertoft v. Pulvertoft*, 18 Ves. 91; and see 18 Ves. 92, note (b).

(r) *Williamson v. Codrington*, 1 Ves. 516, per Lord Hardwicke; but see *Leach v. Dean*, 1 Ch. Re. 146; *S. C.* cited *Pulvertoft v. Pulvertoft*, 18 Ves. 91.

(s) *Pulvertoft v. Pulvertoft*, 18 Ves. 94.

(t) *Johnson v. Legard*, Turn. & Russ. 294; *Smith v. Garland*, 2 Mer. 123.

(u) *Willats v. Busby*, 5 Beav. 193.

(v) *Doe v. Rusham*, 17 Q. B. Rep. 723; *Lewis v. Rees*, 3 K. & J. 132.

(w) *Saunders v. Dehew*, 2 Vern. 272, second note.

(x) *Bill v. Cureton*, 2 M. & K. 503; *McDonel v. Hesilrige*, 16 Beav. 346; *Jones v. Croucher*, 1 Sim. & Stu. 315, (this case cites also the authority of Sir. W. Grant in *Sloane v. Cadogan*, Append. to Vend. & Purch., but the *dictum* does not appear: ) *Meek v. Kettlewell*, 1 Hare, 473, per Sir J. Wigram.

(y) *Fletcher v. Sidley*, 2 Vern. 490; *Taylor v. Jones*, 2 Atk. 600; *Townsend v. Westacott*, 2 Beav. 340; *Skarff v. Soulby*, 1 Mac. & Gor. 364; *Re Magawley's Trust*, 5 De Gex & Sm. 1; *Jenkyn v. Vaughan*, 3 Drewry. 419; *Holmes v. Penney*, 3 K. & J. 99.

the face of it, and will support an action at law, the inference has not unfrequently been drawn, that equity in such \*a case, though [ \*94 ] the trust has not been perfectly created, will specifically execute the contract in favour of volunteers. But the doctrine is at once contradicted by the circumstance that equity never enforced a covenant to stand seised to the use of a *stranger in blood*; and, if we examine the authorities, we shall find there is very little ground in support of the position. In *Wiseman v. Roper*(z) the covenant was entered into for the purpose of reconciling family differences—a consideration always held to be good.(a) *Beard v. Nuttall*(b) was the case of a bond from a husband to the wife, which is not an agreement to do a future act, but the perfect creation of a present debt. In *Husband v. Pollard*,(c) a lease was assigned to a volunteer, with a covenant to renew, and a court of equity compelled the execution of the covenant as incidental to the lease. In other cases the covenant has been enforced in order to avoid circuitry, inasmuch as the trustees, with whom the covenant was entered into, might have recovered at law, not merely nominal damages, but the full value of the estate.(d) At all events, it is well settled at the present day, that a voluntary covenant, notwithstanding the solemnity of the seal, will *not* be specifically executed.(e)

It has also been sometimes supposed that where the trust is \*imperfectly created, the court, without proof of *valuable con-* [ \*95 ] sideration, will act upon *meritorious* consideration, as payment of debts, or provision for a wife or child.(f)

The *covenant to stand seised to uses*, and the jurisdiction of the court in *supplying surrenders*, and *aiding the defective execution of powers*, have generally been referred to as establishing, or at least countenancing, this doctrine.

As regards the *covenant to stand seised to uses*, it is evident that mere meritorious consideration was not a sufficient ground to attract the juris-

(z) 1 Ch. Re. 158.

(a) See *Persse v. Persse*, 7 Cl. & Fin. 279; *Heap v. Tonge*, 9 Hare, 90; *Dimsdale v. Dimsdale*, 3 Drew, 556.

(b) 1 Vern. 427.

(c) Cited *Randal v. Randal*, 2 P. W. 467; and see *Williamson v. Codrington*, 1 Ves. 511; *Harvey v. Audland*, 14 Sim. 531.

(d) *Vernon v. Vernon*, 2 P. W. 594; *Goring v. Nash*, 3 Atk. 186; 2nd ground; S. C. cited 1 Ves. 513; *Stephens v. Trueman*, 1 Ves. 73.

(e) *Hale v. Lambe*, 2 Ed. 294, per Lord Northington; *Fursaker v. Robinson*, Pr. Ch. 475; *Evelyn v. Templar*, 2 B. C. C. 148; *Colman v. Sarel*, 3 B. C. C. 12; *Jeffreys v. Jeffreys*, Cr. & Phil. 138; *Meek v. Kettlewell*, 1 Hare, 474, per Sir J. Wigram; *Fletcher v. Fletcher*, 4 Hare, 74, *per eundem*; *Newton v. Askew*, 11 Beav. 145; *Dillon v. Coppin*, 4 Cr. & M. 647; *Kekewich v. Manning*, 1 De G. M. allowed to create a debt in favour of B.; *Fletcher v. Fletcher*, 4 Hare, 67; and see & G. 188. But a voluntary covenant to pay a sum to A. in trust for B. has been *Bridge v. Bridge*, 16 Beav. 315. But as the ground of this is, that the covenant is perfect at law and the covenantee could recover upon it, it seems to follow that where only *nominal* damages would be given at law, a court of equity would not allow proof of the whole sum. See *Pulvertoft v. Pulvertoft*, 18 Ves. 93; *Holloway v. Headington*, 8 Sim. 324; *Cox v. Barnard*, 8 Hare, 310; *Denning v. Ware*, 22 Beav. 184.

(f) A child may plead meritorious consideration as against the parent, but of course a parent cannot plead it as against the child; *Downing v. Townsend*. Amb. 592.



diction of the court ; for no use would have arisen in favour of a wife or child, unless there had been a *covenant*. "There are several ways in the law," said Lord Chief Justice Holt, "for declaring of uses, whether upon transmutation of possession or without it. If a use be declared upon transmutation of possession, as in a fine or feoffment, it is sufficient for the party on the transmutation to declare that the use shall be to such a party, and of such an estate ; but if a use arise without transmutation of possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which must be founded on some consideration ; for a use, having its foundation generally on grounds of equity, could not be relieved in chancery without transmutation of possession, or an agreement founded on a consideration ; and, therefore, if bargain and sale were made of a man's lands, on the payment of the money the use would have arisen without deed by parol ; *but, if the use was in consideration of blood, then it could not arise by parol agreement without a deed, because that agreement was not an obliging agreement—it wanted a consideration, and therefore, to make it an obliging agreement, there was necessity of a deed.*"(g) Thus, if equity be governed by the strict analogy of uses, the court cannot act upon meritorious consideration where the contract is by parol ; and though, where the agreement is under seal, the argument of analogy applies, yet it follows not [ \*96 ] that equity will now raise a \*trust, because formerly it would have created a use: a bargain and sale for 5s. consideration still operates by way of conveyance to transfer the estate: but, should the bargain and sale be void as such for want of an indenture, or an indenture duly inrolled, it could not be argued that the agreement at the present day would be specifically executed upon the basis of a trust. It may further be remarked, that, if the covenant to stand seised to uses were now to regulate the administration of trusts, there would still be no ground for extending the relief to *creditors*, who, however, it is admitted on all hands, are equally entitled to the benefit of meritorious consideration. And the covenant to stand seised to uses extended, we must remember, not only to a wife and child, but also to *brothers, nephews, and cousins* ; but no one, at the present day, would think of admitting the same latitude in the execution of a trust.

With respect to the jurisdiction of the court in *supplying surrenders* of copyholds, the principle upon which the relief is founded appears to be this, that as the heir was never meant by the law to take otherwise than in default of the ancestor's will, if the ancestor manifest any intention in favour of a meritorious object, the court will not suffer the mere want of form to carry a benefit to the representative. "I have looked," said Lord Alvanley, "at all the cases I can find, upon what principle this court goes in supplying a defect. It is this—Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligation shows an intention to execute such power, the court will operate upon the conscience of the *heir* to



make him perfect this intention. This is not to be confounded with the case of the heir's being disinherited by a will of freeholds not duly executed : there is no will at all : the court cannot see there is such an instrument : but whenever there is such a power, it has been executed."(*h*)

The ground, upon which the court *aids the defective execution of powers*, will be found upon examination to be precisely that upon \*which it supplies the surrenders of copyholds. The power, to [\*97] the extent to which it may be exercised, is regarded in equity as part of the dominion—as a portion of the actual estate ; and the donee of it is *pro tanto* the *bona fide* owner of the property, and the person taking in default of the donee's disposition is a *quasi* heir.(*i*) The only distinction between an actual heir and the person taking in default of the power, is this, that the former is so constituted by course of law, while the latter is a *quasi* heir specially appointed by the settlor. Thus, in aiding the defective execution of powers, the court, says, as in supplying surrenders,—the donee of the power, who is the owner of the property to the extent of that power, has indicated an intention of providing for a meritorious object ; and the person taking in default of the power, who is a kind of heir, shall not, through want of form, run away with the estate from those who are much better entitled.

The authorities upon the subject of meritorious consideration are somewhat conflicting, but the results appear to be these :(*k*)—

It is clear that an agreement founded on meritorious consideration will not be executed as against the settlor himself.(*l*)

Indeed, relief in such a case would offend against the security of property ; for if a man will improvidently bind himself by a complete alienation, the court will not unloose the fetters he hath put upon himself, but he must lie down under his own folly ;(*m*) but if the court interpose where the act is left incomplete, what is it but to wrest property from a person who has not legally parted with it ? Another observation that suggests itself is, that during the life of the settlor the ground of the meritorious consideration scarcely seems to apply ; for can it \*be [\*98] thought to be the duty of a husband to endow his wife, during the coverture, with a separate and independent provision ? or is a parent bound by any natural or moral obligation to impoverish himself (for such a case may be supposed) for the purpose of enriching a child ? or has a court of equity the jurisdiction to appropriate a specific fund to creditors,

(*h*) *Chapman v. Gibson*, 3 B. C. C. 230 ; and see *Ellis v. Nimmo*, *Lloyd & Goold*, t. Sugden, 341, 348.

(*i*) See *Holmes v. Coghill*, 12 Ves. 213 ; *Coventry v. Coventry*, at the end of *Francis's Maxims of Equity*.

(*k*) See *Bonham v. Newcomb*, 2 Vent. 365 ; *Leech v. Leech*, 1 Ch. Ca. 249 ; *Fothergill v. Fothergill*, Freem. 256 ; *Sear v. Ashwell*, cited *Gordon v. Gordon*, 3 Sw. 411, note ; *Watts v. Bullas*, 1 P. W. 60 ; *Bolton v. Bolton*, Serjt. Hill's MSS. 77 ; S. C. 3 Sw. 414, note ; *Goring v. Nash*, 3 Atk. 186 ; *Darley v. Darley*, 3 Atk. 399 ; *Hale v. Lamb*, 2 Ed. 292 ; *Evelyn v. Templar*, 2 B. C. C. 148 ; *Colman v. Sarell*, 1 Ves. jun. 50 ; S. C. 3 B. C. C. 12 ; *Antrobus v. Smith*, 12 Ves. 39 ; *Rodgers v. Marshall*, 17 Ves. 294 ; *Ellis v. Nimmo*, *Lloyd & Goold*, 333 ; see cases discussed, App. No. III.

(*l*) *Antrobus v. Smith*, 12 Ves. 39.

(*m*) *Villers v. Beaumont*, 1 Vern. 101, per Cur.

when, the debtor still living, the presumption of law is, that the creditor can obtain satisfaction of his debt by the usual legal process? It is after the *decease* of the settlor that meritorious consideration becomes such a powerful plea in a court of equity. The wife and the children have then lost the personal support of the husband and parent, and who can then have a juster claim to the inheritance of his property? The creditor is then barred by the act of God of his remedy against the debtor, and, should the assets prove insufficient, how but by the assistance of equity can he hope to be satisfied his demand? Another objection to the execution of a voluntary contract against the settlor himself, at least in respect of land, is the principle expressed by Lord Cowper, that equity, like nature, will do nothing in vain; <sup>(n)</sup> as if money be directed to be converted into land, or land into money, the devisee or legatee may elect to take the property in its original state, for, should the court direct an actual conversion, the devisee or legatee might immediately annul the order by resorting to a re-conversion. And so, should the court decree the specific performance of a contract regarding realty for meritorious consideration, the property the next moment might be disposed of to a *bona fide* purchaser, and the settlement become perfectly nugatory. Again, if the imperfect gift can be enforced against the settlor himself, then the equitable right must form a *lien* upon the property, and, upon the death of the settlor, his heir would, *in all events*, be bound to convey; but, even in aiding the defective execution of powers and supplying surrenders of copyholds, a previous inquiry by the master is invariably directed, whether the heir of the settlor has any other adequate provision.

[\*99] But will a contract founded on meritorious consideration \*though void as against the settlor himself, be enforced *as between parties claiming under the settlor*? It seems to have been always admitted, that if the settlor sell the estate or become indebted, the equity of the *cestui que trust* claiming on the ground of meritorious consideration, will not bind a purchaser or creditors.<sup>(o)</sup> But if he subsequently make a voluntary settlement, or die without disposing of the estate by act *inter vivos*, will the equity attach as against the volunteers under the settlement,<sup>(p)</sup> or a devisee,<sup>(q)</sup> or the heir at law?<sup>(r)</sup> The old cases would rather lead to the conclusion that the agreement would be specifically executed, with however the saving clause, that the court would not have enforced it even as against these classes of persons, where they too could plead meritorious consideration (as if they were the children of the settlor,) without a previous inquiry by the master, whether they had any adequate provision independently of the estate.<sup>(s)</sup>

(n) Seeley v. Jago, 1 P. W. 389; and see Bellingham v. Lowther, 1 Ch. Ca. 243; but see Pulvertoft v. Pulvertoft, 18 Ves. 99.

(o) Bolton v. Bolton, 3 Serjt. Hill's MSS. 77; S. C. 3 Sw. 414, note; Goring v. Nash, 3 Atk. 186; Finch v. Earl of Winchelsea, 1 P. W. 277; and see Garrard v. Lauderdale, 2 R. & M. 453, 454.

(p) Bolton v. Bolton, *ubi supra*.

(q) *Ib.*

(r) Watts v. Bullas, 1 P. W. 60; Goring v. Nash, 3 Atk. 186; Rodgers v. Marshall, 17 Ves. 294.

(s) See Goring v. Nash; Rodgers v. Marshall, *ubi supra*.

At the present day, however, it seems to be established that even as against volunteers claiming under the settlor, whether with or without any provision *aliunde*, a voluntary agreement whether under seal or not, whether coupled with a valid trust of other property settled at the same time or not, cannot be enforced on the mere ground of meritorious consideration.<sup>(t)</sup>

We have laid down the rule that the trust will be enforced when it has been perfectly created, whether there was transmutation of possession or not. It is equally clear that a trust once *perfectly created*, whether by transmutation of possession or not, cannot be defeated by the subsequent act of the settlor, and that the circumstance of the legal interest becoming revested in the settlor is immaterial.<sup>(u)</sup>

\*Again, in every case of the creation of a trust, it is the *intention* that governs; and if upon a consideration of all the circumstances the court is of opinion that the settlor did not mean to create a trust, then, whether there was transmutation of possession or not, the court will not raise up a trust where none in fact was contemplated. [\*100]

Thus where a person wrote a letter to his bankers, and directed them to transfer certain sums into the names of himself and three others, as trustees for his wife during her life, and after her death for his son during his minority, and the transfers were effected accordingly, but it appeared in evidence that the settlor never communicated the facts to the other trustees, and that he gave the directions under the impression that he could thus avoid the legacy duty, it was held that the fund had never been placed out of the settlor's power, but he might at any time have revoked the directions, and therefore the money was to be considered as still part of his personal estate.<sup>(v)</sup>

And in another case,<sup>(w)</sup> where a testatrix gave a legacy of 100*l.* to A. and after making her will drew a cheque for 150*l.* in favour of B.; and at the same time gave him verbal directions, when the legacy was paid, to make up to the legatee the difference for the 100*l.* and the price of a share in the London and Birmingham Railway Company, and the sum of 150*l.* was transferred by the bankers, in the testatrix's lifetime, from her account to the account of B.; the court held that it was a private arrangement between the testatrix and B., and meant to be revocable like the will; and therefore, that B. was merely A.'s agent, and that no trust was created.

Again, where a person directed his agents to invest a sum in the purchase of 4000*l.* stock in the names of himself and his wife in trust for his son; and the agents wrote that they had purchased the stock, but that it could not be done as he desired, as the bank did not admit notice of any trust upon their books, and the settlor thereafter treated the

(t) *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Antrobus v. Smith*, 12 Ves. 39; *Evelyn v. Templar*, 2 B. C. C. 148; *Holloway v. Headington*, 8 Sim. 325. The high authority, however, of Lord St. Leonards is in the opposite scale; *Ellis v. Nimmo*. Lloyd & Goold, t. Sugd. 333.

(u) *Ellison v. Ellison*, 6 Ves. 656; *Smith v. Lyne*, 2 Y. & C. Ch. Ca. 345; *Paterson v. Murphy*, 11 Hare, 88.

(v) *Gaskell v. Gaskell*, 2 Y. & J. 502.

(w) *Hughes v. Stubbs*, 1 Hare, 476.



stock as his own by receiving the dividends; the court held, [\*101] \*that as the intention had not been carried out, no trust was created.(x)

Again, where a person, having deposited in a savings bank as much money in his own name as the rules allowed, deposited a further sum in his name as trustee for his sister, but without making any communication to her; and it appeared that he made such deposit with a view of evading the rules of the bank and not to benefit his sister; and by the act of parliament he retained the control of the fund; the court held that no trust was created.(y)

So a trust for payment of debts, created without the concurrence of the creditors, is construed, though there be transmutation of possession, not as conferring an interest which the creditors could enforce in equity, but as an arrangement between the settlor and his trustees for his own private convenience, and revocable at pleasure.(z)

Upon a similar principle, it has been held that a grant from the crown of prizes taken in war, to trustees upon trust to distribute in a particular manner amongst the captors, gives them no right which they can enforce in equity; but the crown may, at any time before the final distribution, recall its directions and substitute others.(a)

So an ostensible, but not actual *cestui que trust*, exists where the trustees are directed to pay out of the estate the *costs and charges* of the management and administration of the trust; for the persons employed by the trustees have, notwithstanding that declaration, no lien upon the trust fund, but only a remedy against the trustees upon the ground of the contract.(b) However, if there be a *positive direction* to the trustees to employ A. as auditor or receiver, and allow him a proper salary, it has [\*102] been held to constitute a trust in favour of A.(c) But if a testator \*merely *recommend or express a desire* that his trustees should employ A. as receiver, the question is, whether the words used amount to a trust, or only to an expression of opinion and advice: and to discover the meaning, the court examines the provisions of the will, and if it finds that, to consider the words as a trust would be inconsistent with the general character of the will, which assumes that the administration of the estate is to be unfettered by such a trust in favour of A., the court comes to the conclusion that the words were meant only by way of suggestion and advice.(d)

(x) *Smith v. Ward*, 15 Sim. 56.

(y) *Field v. Lonsdale*, 13 Beav. 78.

(z) *Wallwyn v. Coutts*, 3 Mer. 707; *S. C.* 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 R. & M. 451. This subject will be treated of under the head of Trusts for the payment of debts.

(a) *Alexander v. Duke of Wellington*, 2 R. & M. 35.

(b) *Worrall v. Harford*, 8 Ves. 4; *Hall v. Laver*, 1 Hare, 571.

(c) *Williams v. Corbett*, 8 Sim. 349; *Hibbert v. Hibbert*, 3 Mer. 681; *Consett v. Bell*, 1 Y. & C. Ch. Ca. 569.

(d) *Shaw v. Lawless*, 1 L. & G. t. Sugd. 154; reversed 1 Dr. & Walsh, 512; 5 Cl. & F. 129; *Ll. & G. t. Plunk.* 559; *Finden v. Stephens*, 2 Phill. 142; *Knott v. Cottee*, 2 Phill. 192.



## \*CHAPTER VI.

[\*103]

## OF THE OBJECT PROPOSED BY THE TRUST.

TRUSTS, with reference to their *object*, may be distributed into *Lawful* and *Unlawful*; the former, such as are directed to some legitimate purpose; the latter, such as are in contravention of the policy of the law. It is almost unnecessary to observe, that, in creating a trust, care must be taken to confine it within allowable bounds.

## SECTION I.

## OF LAWFUL TRUSTS.

As a general rule, the intention of the settlor, whatever it may be, shall be carried into effect.(a)

And if the object of the trust do not contravene the policy of the law, the mere circumstance that the same end cannot be effectuated by moulding the legal estate, is no argument that it cannot be accomplished through the medium of the equitable. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present day does not apply; but a trust is a thing *sui generis*, and, where public policy is not disturbed, will be executed by the court agreeably to the settlor's intention.

In legal estates a fee cannot, except by executory devise, be limited upon a fee; but this modification of property was allowable in uses, and by the statute of Hen. 8, has gained admittance \*into legal [\*104] estates, and is now matter of daily occurrence in settlements by way of trust.(b)

At law, except in executory devises, a freehold contingent limitation must be supported by a freehold particular estate, and if the contingent limitation do not vest at the determination of the particular estate it is extinguished; but to trusts the rule is held not to be applicable, or, as the doctrine is expressed, the legal estate in the trustees is sufficient to support all the equitable interests.(c)

At law a chattel real can by *will* only, and not by *deed*, and a chattel personal can neither by *will* nor *deed*, be limited to one person for life, with remainder to another; but in trusts a chattel interest, whether real or personal, can be subjected to any number of limitations, provided there be no perpetuity. "It is objected," said Lord Nottingham, "that a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of the estate. Now, as to this point,

(a) Attorney-General v. Sands, Hard. 494, per Lord Hale; Pawlett v. Attorney-General, Ib. 469; Bacon on Uses, 79; Burgess v. Wheate, 1 Ed. 195, per Sir T. Clarke.

(b) Duke of Norfolk's case, 3 Ch. Ca. 35.

(c) Chapman v. Blisset, Cas. t. Talb. 145; Hopkins v. Hopkins, Ib. 43.

the difference between a chattel and an inheritance is a difference only in words, but not in substance or reason, or in the nature of the thing; for the owner of a lease has as absolute a power over his lease, as he that hath an inheritance hath over that; and therefore, when no perpetuity is introduced, nor any inconveniency doth appear, there no rule of law is broken. It hath happened sometimes, and doth frequently, that men have no estates at all, but what consist in leases for years; now, it were, not only very severe, but, under favour, very absurd to say, that he who has no other estate, but what consists in leases for years, shall be incapable to provide for the contingencies of his own family.”(d)

A testator had devised to one that served the cure of a church, and to all that should serve the cure after him, all the tithes, profits, &c.; but, as the successive curates were not a body corporate, they were incapable of taking the legal estate: however, equity carried the intention into effect, and decreed the devisee and his heirs to be trustees for the persons [\*105] intended to be benefited.(e) So on the erection of a chapel, the benefit of the endowment cannot, without an act of parliament, be transmitted at law to the successive preachers and their congregations, but the ordinary mode of accomplishing the object is by vesting the legal estate of the property in trustees (with a power of renewing their number on vacancies by death, &c.) upon trust to permit the preacher and congregation for the time being to have the use and enjoyment of the chapel.

The limitation of an estate to the *poor of a parish*, would at law be void,(f) because the rules of pleading require the claimants to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name; but by way of trust they are capable of purchasing, for they assert no title in themselves, but call upon the trustees to observe the dictates of good conscience.(g) What persons are designated by the description of “poor of a parish” was at one time matter of considerable doubt. Lord Eldon thought, that the fund should be administered without reference to parochial relief; for assistance might be given to a pauper without exonerating the rich from their usual contribution to the rates—to the relief, which the law had provided, further relief might be added, which the parish was not bound to afford.(h) Besides, the appropriation of the fund to the poor not in receipt of parochial relief might still have the effect of conferring a benefit on the rich; for persons who could not otherwise have maintained themselves might, by means of the charity, be prevented from seeking assistance from the rate.(i) However, it has been determined in several cases, and seems, therefore to be now settled, that the charity must be confined to those not in the receipt of parochial relief.(k)

(d) See Duke of Norfolk's case, 3 Ch. Ca. 32.

(e) Anon. case, 2 Vent. 349.

(f) Co. Lit. 3, a.

(g) Gilb. on Uses, 44.

(h) Attorney-General v. Corporation of Exeter, 2 Russ. 51-54.

(i) See S. C. 3 Russ. 397.

(k) Attorney-General v. Corporation of Exeter, 2 Russ. 47; S. C. 3 Russ. 395; Attorney-General v. Wilkinson, 1 Beav. 372; Attorney-General v. Bovill, M. R. 1 July, 1839. But see Attorney-General v. Bovill, 1 Phill. 768, where Lord Cot-

\*By the 59 Geo. 3, c. 12, s. 17, it is enacted, "That all buildings, lands, and hereditaments which shall be purchased, [\*106] hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority or for any of the purposes of that act, shall be conveyed, demised and assured to the churchwardens and overseers of the poor of every such parish respectively and their successors, in trust for the parish; and such churchwardens, and overseers, and their successors, shall and may, and they are hereby empowered, to accept, take, and hold in the nature of a body corporate, for and on behalf of the said parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish."

By virtue of this enactment, all hereditaments belonging to the parish at the time of the act, or subsequently acquired, whether for a chattel(l) or freehold interest; and though originally conveyed to express trustees for parish purposes, if it be unknown or uncertain in whom the legal estate is now vested;(m) or generally where it is unascertained in whom the legal estate is outstanding, but the parish have exercised all the rights of ownership, and the property belongs to them in the popular sense;(n) are now transferred to the churchwardens and overseers of the parish, not indeed as a corporation and having a common seal,(o) but as persons taking, by parliamentary succession, in the nature of a corporation.(p)

The act does not extend to copyholds,(q) nor to freeholds of which the trusts are not exclusively for the parish, but also embrace other objects;(r) nor to lands vested in existing trustees, and who are actually in discharge of their duties in that \*character.(s) However, though all the [\*107] trusts must be for the parish, they may be directed to some special trust, if exclusively parochial, as a trust for aiding the church-rates,(t) or furnishing a poor-house,(u) or for the relief of the poor of the parish, whether the objects of the charity be or not held to include those in the receipt of parochial relief; for if non-recipients only of parochial relief are to be admitted, the parish is still benefited by keeping that class of poor, by means of the charity, off the parish books.(v)

tenham is reported to have said, "I am inclined to think that the right course is, to administer the charity, and leave to chance to what extent it may operate to the relief of the poor-rates." The decree, however, seems in the main to be in accordance with the previous decisions; and see Attorney-General v. Blizard, 21 Beav. 233.

(l) Alderman v. Neate, 4 Mees. & Wel. 704.

(m) Doe v. Hiley, 10 B. & Cr. 885; and see Churchwardens of Deptford v. Sketchley, 8 Q. B. Rep. 394.

(n) Doe v. Terry, 4 Ad. & Ell. 274; Doe v. Cockell, Ib. 478.

(o) Ex parte Annesley, 2 Y. & C. 350.

(p) Smith v. Adkins, 8 Mees. & Wel. 362.

(q) Attorney-General v. Lewin, 8 Sim. 366; In re Paddington Charities, Ib. 629.

(r) Allason v. Spark, 9 Ad. & Ell. 255; Attorney-General v. Lewin, 8 Sim. 366;

In re Paddington Charities, Ib. 629.

(s) Churchwardens of Deptford v. Sketchley, 8 Q. B. Rep. 394, overruling Rumball v. Munt, Ib. 382; and see Gouldsworth v. Knight, 11 M. & W. 337.

(t) Doe v. Hiley, 10 B. & Cr. 885; Doe v. Terry, 4 Ad. & Ell. 274; and see Allason v. Stark, 9 Ad. & Ell. 266, 267; Doe v. Cockell, 4 Ad. & Ell. 478.

(u) Alderman v. Neate, 4 Mees. & Wel. 704.

(v) Ex parte Annesley, 2 Y. & C. 350; Churchwardens of Deptford v. Sketchley, 8 Q. B. Rep. 394.



Again, an *advowson* may be vested in trustees, upon trust for the "*parishioners and inhabitants*," that is, the parishioners, being inhabitants(*w*) of a parish.

A trust of this kind is not considered a charity, but is administered on the footing of any ordinary trust, and application must be made to the court not by way of information, but by bill.(*x*)

From the infinite mischiefs arising from popular election,(*y*) the court, where the settlement does not expressly give the election to the parishioners, or usage has not put such a construction upon the instrument, will infer the donor's intention to have been, that the trustees should themselves exercise their discretion in the election of a clerk for the benefit of the [*\*108*] parish ;(*z*) but if the language of the instrument, or the \*evidence of common usage, prevent such a construction, then the parishioners, as the *cestuis que trust* and beneficial owners of the advowson, will be entitled to elect, and the trustees will be bound to present the person upon whom the choice of the electors shall fall.(*u*) Had the point been unprejudiced by decision, Lord Eldon doubted whether the court could execute such a trust, at least otherwise than *cy pres* ;(*b*) but, as authority has now clearly settled that the court must undertake the trust notwithstanding the difficulties attending it, the only subject for inquiry is, *in what manner* a trust of this kind shall be executed.

The expression "*parishioners and inhabitants*" is in itself extremely vague, and has never acquired any very exact and definite meaning ;(*c*) but, this doubt removed, another question to be asked is, are women, children, and servants, who are parishioners and inhabitants, to be allowed to vote ? It seems the extent of the terms must be taken *secundum subjectam materiam*, with reference to the nature of the privilege the *cestuis que trust* are to exercise,(*d*) and, if so, none should be admitted to vote, who, from poverty, infancy, or coverture, are presumed not to have a will of their own.(*e*) In a case, where the election was given to "*the inhabitants and parishioners, or the major part of the chiefest, and discreetest of them*," it was held that, by *chiefest*, was to be understood those who paid the church and poor rates, and by *discreet-*

(*w*) *Fearon v. Webb*, 14 Ves. 24, per Chief Baron McDonald : *Ib.* 26, per Baron Graham; *Wainwright v. Bagshaw*, Rep. t. Hardwicke, by Ridg. 56, per Lord Hardwicke.

(*x*) *Attorney-General v. Forster*, 10 Ves. 344 ; *Attorney-General v. Newcombe*, 14 Ves. 1 ; *Fearon v. Webb*, *Ib.* 19.

(*y*) See, in addition to the cases cited in the next note, the observations of Vice-Chancellor Knight Bruce, *Attorney-General v. Cuming*, 2 Y. & C. Ch. Ca. 158, and 19 & 20 Vict. cap. 50, authorizing the sale of advowsons held upon trust for parishioners.

(*z*) See *Edenborough v. Archbishop of Canterbury*, 2 Russ. 106, 109 ; *Attorney-General v. Scott*, 1 Ves. 413 ; *Attorney-General v. Foley*, cited *Ib.* 418.

(*a*) *Attorney-General v. Parker*, 3 Atk. 577, per Lord Hardwicke ; *Attorney-General v. Forster*, 10 Ves. 338, 341, per Lord Eldon ; *Attorney-General v. Newcombe*, 14 Ves. 6, 7, *per eundem*.

(*b*) *Attorney-General v. Forster*, 10 Ves. 340, 342.

(*c*) See *Attorney-General v. Parker*, 3 Atk. 577 ; *Attorney-General v. Forster*, 10 Ves. 339, 342 ; see further as to the Clerkenwell case, *Carter v. Cropley*, 26 L. J. N. S. (Ch.) 246.

(*d*) See *Attorney-General v. Forster*, 10 Ves. 339.

(*e*) See *Fearon v. Webb*, 14 Ves. 27.



*est*, those who had attained the age of twenty-one; (*f*) But Lord Hardwicke said, that, even where "parishioners and inhabitants" stood *without any restriction at all*, it was a reasonable limitation to confine the meaning to those who paid scot and lot, that is, who paid to church and poor; (*g*) and so, in a previous case, it seems \*his lordship had actually determined. (*h*) The Court of Exchequer adopted [\*109] a similar construction in the *Clerkenwell case*, (*i*) though it does not appear how far the court was guided in its judgment by the evidence of the common usage; (*k*) and Lord Eldon, in a subsequent case, restricted the election to the same class, (*l*) but his lordship's decree was possibly founded on the circumstance, that those only who paid scot and lot were admitted to the *vestry*; (*m*) (not that, for the purpose of election, the vestry is the representative of the parish, (*n*) but in one of the oldest documents the trust was said to be for "the parishioners of the said parish at a vestry or vestries to be from time to time holden for the said parish." (*o*)) But, where the instrument creating the trust contains merely the words "parishioners and inhabitants," the court will not confine the privilege of voting to those paying scot and lot, if it appears from constant usage that the terms are to be taken in a wider and more extensive signification, to include, for instance, all *housekeepers*, whether paying to the church and poor or not. (*p*) By persons *paying* to the church and poor must be understood persons *liable to pay*, though they may not have actually paid; (*q*) but it seems to be a necessary qualification that they should have been *rated*, (*r*) unless, perhaps, the name has been omitted by mistake, (*s*) or there is the taint of fraud. (*t*)

With respect to the *mode* in which the votes are to be taken, it is clear that the election cannot be conducted by ballot, not only on the general principle that the ballot is a form of proceeding unknown to the common law of England, (*u*) but also \*on the ground, that the trustees have a right to be satisfied, that the person they present to the [\*110] bishop has been the successful competitor; whereas in election by ballot there are no means of ascertaining for whom each particular elector voted. (*v*) The choice of the candidate must therefore be determined by one of the modes known to the common law, viz. either by poll or a show of hands. (*w*) However, the *cestuis que trust* may expressly agree among

(*f*) Fearon v. Webb, 14 Ves. 13.

(*g*) Attorney-General v. Parker, 3 Atk. 577; S. C. 1 Ves. 43.

(*h*) Attorney-General v. Davy, cited *Ib.*; S. C. 2 Atk. 213.

(*i*) Attorney-General v. Rutter, stated 2 Russ. 101, note.

(*k*) See Attorney-General v. Forster, 10 Ves. 345.

(*l*) Edenborough v. Archbishop of Canterbury, 2 Russ. 93.

(*m*) See *Ib.* 110.

(*n*) Attorney-General v. Parker, 3 Atk. 578, per Lord Hardwicke; Attorney-General v. Forster, 10 Ves. 340, 344, per Lord Eldon.

(*o*) See Edenborough v. Archbishop of Canterbury, 2 Russ. 94.

(*p*) Attorney-General v. Parker, 3 Atk. 576; S. C. 1 Ves. 43.

(*q*) See Attorney-General v. Forster, 10 Ves. 339, 346.

(*r*) Edenborough v. Archbishop of Canterbury, 2 Russ. 110.

(*s*) Edenborough v. Archbishop of Canterbury, 2 Russ. 110.

(*t*) S. C. *Ib.* 111.

(*u*) Faulkner v. Elger, 4 Barn. & Cress. 449.

(*v*) Edenborough v. Archbishop of Canterbury, 2 Russ. 105, 108, 109, per Lord Eldon.

(*w*) See *Ib.* 106, 110.

themselves that they will abide by the declaration of the result of the ballot, and will ask no questions how the individual votes were given; or such a contract may be *inferred* from long and clear antecedent usage.<sup>(x)</sup> But it is said an agreement of this kind can apply only to each particular election as it occurs, for any one parishioner has a right to insist that the coming election shall be conducted on a different principle; it would be a bold thing to say, that the parish of to-day could bind the parish of to-morrow to deviate from the original and legitimate mode.<sup>(y)</sup> A contract between the *cestuis que trust* in favour of the ballot is also open to the objection, that the right of voting in the election of a clerk is a privilege coupled with a *public duty*, and it may be doubtful whether a court of equity would enforce the result of an election, where it cannot be ascertained whether the voters, in the exercise of their right, have fairly and honestly discharged that duty.<sup>(z)</sup>

Again, upon principles founded on the Law of Tenure, the freehold *in presenti* must be vested in some person *in esse*; but under the system of trusts, which are wholly independent of feudal rules, a settlor may direct the accumulation of rents and profits, and it does not vitiate the trust that there is no ascertained owner of the equitable freehold in possession.<sup>(a)</sup>

But trusts for accumulation must be confined within the limits established against perpetuities. A settlor is permitted (by analogy to the duration of a regular entail under a common law conveyance) to fetter [\*111] the *alienation* of property for a life or *\*lives* in being and twenty-one years; and the power of preventing the *enjoyment* of property, by directing the accumulation of the annual proceeds, is restricted to the same period. If the trust exceed this boundary, it is void *in toto*, and cannot be cut down to the legitimate extent.<sup>(b)</sup> Thus, where an estate was limited to trustees for a term of 1000 years, and subject thereto in strict settlement, and the trusts of the term were, as often as any tenant for life or in tail should be a minor, to accumulate the rents, and apply them in discharge of incumbrances, and to pay the surplus to the first tenant for life, or in tail, who should attain twenty-one, the trust was declared void *ab initio*, as the minorities of the successive tenants for life and in tail might travel through a century.<sup>(c)</sup>

But there is no accumulation, and therefore no danger of a perpetuity, where the rents are applicable as a vested interest *de anno in annum*. Thus, where a testatrix devised a term which had 33 years to run, upon trust, from time to time, to lay out the profits in the purchase of lands to be settled on A. for life, remainder to B. in tail, remainders over, inasmuch as the *cestuis que trust* could at any time call for the investment of the rents in land; and when B. attained his age, and could suffer a

(x) See *supra*, note (v), 105, 106, 108, 109.

(y) See *Ib.* 106.

(z) See *Ib.* 109.

(a) See *Fearne's C. R.* by Butler, 537, note (x).

(b) *Marshall v. Holloway*, 2 Sw. 432; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Curtis v. Lukin*, 5 Beav. 147; *Boughton v. James*, 1 Coll. 26; *S. C.* on appeal, 1 House of Lords Cases, p. 406; *Browne v. Stoughton*, 14 Sim. 369; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcome*, 3 K. & J. 16.

(c) *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54.

recovery, A. and B. were entitled to call for the assignment of the lease ; it was held the trust was good.<sup>(d)</sup> And, in another case, where the rents were directed to be accumulated, at compound interest, until they amounted to a sufficient sum to discharge two incumbrances on the estate, amounting to 2500*l.* each ; and then to be further accumulated until they amounted to a sufficient sum to discharge two other incumbrances of 4000*l.* and 2000*l.* ; Baron Graham observed, “there was no accumulation for the purpose of suspension.”<sup>(e)</sup> In \*this case however, [\*112] there seems to have been strictly and substantially an accumulation. It is possible that the amount of the annual rents being ascertained, and the incumbrances known, it was found that the time required for discharging the incumbrances would not exceed the proper limits.

In *Curtis v. Lukin*(*f*) a testator gave to the trustees certain leaseholds in Church-street, which had more than 60 years to run, upon trust for A. for life, with remainder to her children, and in default of children to B. He then gave other leaseholds to the same trustees upon trust to *accumulate* the rents until the lease in Church-street *should be nearly expired*, and then to apply a competent sum in the renewal of that lease for the benefit of the parties entitled thereto under the will, and the residue of the accumulations he gave to A., B., and C. The lessor of the premises in Church-street was under no obligation to renew, and therefore the sum to be paid if a renewal could be obtained was uncertain. It was argued, that all interests must be vested within a life in being and 21 years, so that there was no perpetuity ; but it was answered, that the amounts of the respective interests were uncertain until the renewal was effected ; and if all the parties could not agree in the distribution of the fund, the accumulation must proceed, and the court was of opinion that the trust was void.

The 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act, or Lord Loughborough's Act, has now further restricted the period of accumulation, by declaring that “no person shall, by deed, surrender, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so as that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer period than the *life or lives of any such grantor or grantors, settlor or settlors ; OR the term of 21 years from the death of any such grantor, settlor, devisor, or testator ; OR during the minority, or respective minorities, of any person or persons who shall be living, or in ventre sa mere, at \*the time* [\*113] *of the death of such grantor, devisor, or testator ; OR during the minority, or respective minorities, of any person or persons who under the uses or trusts of the deed, surrender, will, codicil, or other assurance directing such accumulations, would, for the time being, if of full age,*

(*d*) *Phipps v. Kelynge*, 2 V. & B. 57, note (*b*).

(*e*) *Bacon v. Proctor*, 1 T. & R. 31 ; and see *Bateman v. Hotchkin*, 10 Beav. 426, where the trust was supported on the ground that there was no perpetuity, but that on the eldest son attaining twenty-one, he could dispose of the estate, and stop the accumulation ; and see *Briggs v. Earl of Oxford*, 1 De Gex, M. & G. 363.

(*f*) 5 Beav. 147.



*be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated."*

The following points have been resolved upon the construction of this act:—1. The statute embraces *simple* as well as *compound* accumulation. By the former is meant the collection of a principal sum by the mere addition of the annual proceeds, while the interest upon the accumulating fund either results undisposed of to the settlor or his representative, or passes to the residuary devisee or legatee. Compound accumulation is, where not only the rents are added together, but the fund is further increased by the interest upon the rents. 2. The act applies, though the accumulating fund be from the first a vested interest, so that not the *right to the enjoyment*, but only the *actual enjoyment*, is suspended; as where a settlor directs the rents to be accumulated for a life in being and twenty-one years, for raising a certain sum for A., to be paid to him on the completion of the accumulation; so that A. has a vested interest in the rents as they arise, but the settlor having directed simple accumulation only, the interest, on the rents is applicable to other purposes, and A. cannot call for the transfer till the rents have amounted to the requisite sum. 3. An accumulation can be directed for one only of the periods allowed by the statute, and not for two of the periods combined.<sup>(g)</sup> 4. The accumulation, though directed to commence not at the testator's death, but at some subsequent period, must still, terminate at the expiration of twenty-one years from the testator's death,<sup>(h)</sup> and the term of twenty-one years is to be reckoned exclusive of the day on which the testator died.<sup>(i)</sup> 5. If the trust exceeds the limits prescribed [\*114] by the statute, but not the limits allowed \*by the common law, the accumulation will be established to the extent permitted by the act, and will be void for the excess only.<sup>(k)</sup>

A leading case upon this subject is *Shaw v. Rhodes*.<sup>(l)</sup> A testator, having three children, devised all his estates to trustees upon trust to pay them certain annuities, and subject thereto, 1, upon trusts to accumulate the rents for the benefit of his grandchildren, born or to be born, until the youngest should attain twenty-one, at which time the accumulations should be distributed amongst the grandchildren then living; 2, and in case any of his three children should be living at the time the youngest grandchild attained twenty-one, he directed the rents to be further accumulated till the death of the survivor of the children, the accumulation to be divided between the grandchildren then living; 3, and after the decease of the survivor of the children, that his estates "should stand charged for twenty years with the payment (out of two-third parts of the rents) of so much money as would in fifteen years make 30,000*l.*; the said sum, and the interest and produce thereof, to be divided amongst his grandchildren who should live to attain twenty-one;"

(g) *Wilson v. Wilson*, 1 Sim. 288, N. S.

(h) *Attorney-General v. Poulten*, 3 Hare, 555.

(i) *Gorst v. Lowndes*, 11 Sim. 434.

(k) *Griffiths v. Vere*, 9 Ves. 127; *Longdon v. Simson*, 12 Ves. 295; *Haley v. Bannister*, 4 Mad. 275; *Shaw v. Rhodes*, 1 M. & C. 135; *Crawley v. Crawley*, 7 Sim. 427; *Attorney-General v. Poulten*, 3 Hare, 555.

(l) 1 M. & C. 135; S. C., as *Evans v. Hellier*, 5 Cl. & Fin. 114.



and, subject thereto, he devised the estates to his eldest son in tail, with remainder over. The testator died in 1812. The youngest grandchild attained his age in 1830. The surviving child died in 1831. The first accumulation, which expired in 1830, and the second accumulation, which expired in 1831, were both established, as falling within twenty-one years from the testator's decease. With respect to the third accumulation, the clause was construed to mean that 1500*l.* per annum (if two-thirds of the rents would yield so much) should be laid by for fifteen years, and if the 30,000*l.* were not then raised, the like accumulation should be made for five years more, till the 30,000*l.* should be completed; that the proceeds arising out of the rents, until the 30,000*l.* should be raised, were not meant to fall into the accumulating \*fund, and increase the capital, but should pass to the residuary devisee of the estates. It was urged that the act con- [\*115] templated a compound accumulation only, and not, as this was, a simple accumulation; and that here the *right* to the rents was not suspended, but each instalment, as it was paid, became a vested interest: but the court held, that allowing the annual instalments to be vested interests, yet, as the produce of the fund, till the 30,000*l.* should be completed, would belong to other parties, the rents until that time were not actually recoverable by the legatees, and must therefore be considered as accumulated within the act. The trust, therefore, was supported up to 1833, the expiration of twenty-one years from the testator's death, and for the residue was declared void.

In another case a testator gave his general personal estate to trustees in trust for *all* the children of A. and B. (who both outlived twenty-one years from the testator's death,) to be a vested interest in the children, being sons, at their ages of twenty-one years, or, being daughters, at those ages, or on their days of marriage, with a clause of survivorship; but the shares were not to be paid until the death of the survivor of A. and B., and the testator appointed C. residuary legatee. An accumulation was thus *implied* until the death of the survivor of A. and B., as up to that time it could not be ascertained how many children would be born; but at the expiration of twenty-one years from the testator's death the accumulation would be void, unless it fell under some exception in the statute. At the testator's death, A. and B. had no children, but B. afterwards had children. It was argued, that as the shares vested at twenty-one or marriage, the accumulation of each child's share during the minority of such child was good, it being within the exception of the act which allows an accumulation "during the minority of a person who would, for the time being, *if of full age*, be entitled to the annual produce." It was further argued, that the accumulation of each child's share, *after* his interest vested, was good, as the Thellusson Act had no application where the right was vested, and only the enjoyment suspended; but the court overruled both grounds, and held all accumulations after twenty-one years from the \*testator's death to be void, and to pass with the residue.(1) It will be observed that in this [\*116]

(1) *Ellis v. Maxwell*, M. S., and 3 Beav. 587.

instance the accumulation was not *expressly directed* but *implied* in the nature of the bequest, and it has been held in other cases that the statute applies to such a gift.<sup>(m)</sup> The late vice-chancellor of England, however, observed that the statute was meant only to put an end to accumulations *expressly* directed;<sup>(n)</sup> and in a subsequent case before him decided in accordance with this view.<sup>(o)</sup> And in a more recent case, where a sum was given to the eldest daughter of A., and if there should be none such, then to the eldest daughter of B., and A. had no daughter, and twenty-one years from the testator's death elapsed in the lifetime of A., it was held that the fund must go on accumulating until a recipient of the legacy could be ascertained, and that the case was not within the statute, and as A. died afterwards without issue, the master of the rolls held that the eldest daughter of B. was entitled to the legacy and the accumulations.<sup>(p)</sup> And the same principle was again applied by the master of the rolls in the case of *Tench v. Cheese*.<sup>(q)</sup> The latter case was reversed on appeal by the lord chancellor and lords justices, but upon the ground that as the will was worded, an accumulation was *expressly* directed.<sup>(r)</sup> The lord chancellor, however, took occasion to observe that the distinction taken by the master of the rolls between an accumulation *expressed* and an accumulation *implied* was unsound and impossible; and he justly remarked as to the case of infancy, that if of age, the infant, instead of spending, might accumulate the rents, and the court did no more than exercise a discretion for the infant, which was a very different thing from creating a suspense fund to go to somebody who had no title during the accumulation.

The statute proceeds to declare, that "the produce of the property, so long as the same shall be directed to be accumulated contrary to the [\*117] provisions of the act, shall go to and be \*received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

In a case before Lord Eldon, a testatrix had directed her trustees to pay an annuity to A., and the rest of the interest to B. and C. equally for their lives, and the whole to the survivor for her life, provided that the interest due to B. during the life of her husband should not be paid to her, but should, during his life, be accumulated; the fund on his decease to be paid to B., if living, or, if dead, to D. The accumulation was established for twenty-one years from the testator's death; but in case B. and her husband survived that period, to whom was the excess during the residue of the husband's life to belong? Was the gift to B. to stand alone, and the subsequent proviso for accumulation to be struck out; or were the gift and the accumulation to be coupled together, and *both* to be void, so that the excess of interest should result? It was not necessary to decide the question, and Lord Eldon merely observed, "it was not clear upon the will that there was a gift *in presenti*, if the

(m) *McDonald v. Bryce*, 2 Keen, 276; *Morgan v. Morgan*, 4 De Gex & Sm. 170.

(n) *Elborne v. Goode*, 14 Sim. 165.

(o) *Corporation of Bridgenorth v. Collins*, 15 Sim. 538.

(p) *Bryan v. Collins*, 16 Beav. 14.

(q) *Tench v. Cheese*, 19 Beav. 3; now reported, 6 De Gex, M. & G. 453.

(r) 1 Jur. N. S. 689.

declaration for accumulation were struck out, for the whole must be taken together.(s)

In a subsequent case, where a fund was given upon trust for the testator's daughter for life with remainders over, and the testator directed that if the income exceeded 200*l.* per annum, the surplus should be accumulated, but the period of accumulation was not limited to twenty-one years, the master of the rolls held that the testator's daughter was entitled to the excess beyond 200*l.* per annum from the expiration of the twenty-one years, but in what character the daughter was so entitled does not appear. Probably the daughter was the testator's heiress-at-law, so that it was immaterial to consider whether the heiress-at-law or the tenant-for-life was entitled.(t)

In another case,(u) a testator directed accumulations, and then devised the estates, charged and chargeable as aforesaid, to Thomas, the eldest son of the testator's son, James Shaw, in tail, with remainder over, and it appears that Thomas took the \*benefit of the void accumulations. But the question, who was entitled to the accumulations, [\*118] supposing them to be void, was not argued in the court below, and only glanced at on the appeal.(v) James Shaw, who was probably the testator's heir, had died before the institution of the suit, and his eldest son Thomas may have been also the heir-at-law of the testator.

If there be a series of limitations, and one of them be upon trust to accumulate the rents beyond the limits allowed by the act, the subsequent limitations are not accelerated, but the interim limitation, which is void under the act, will result for the benefit of the heir-at-law,(w) and if the resulting trust be a *chattel interest*, it will devolve, on the death of the heir, on his personal representative;(x) and if the resulting interest be an estate *pur autre vie*, it is the better opinion that it also goes to the heir's personal representative.(y) If the heir of the heir be entitled to an estate *pur autre vie*, under the words of the Thellusson Act, why not also to a chattel interest? But under the late Wills Act, 1 V. c. 26, s. 25, if the will contains a residuary devise, and there be no evidence of a contrary intention on the face of the will, the void accumulations will go to the residuary devisee. In personal estate, if there be a residuary legatee, the excess beyond the allowed period of accumulation will fall into the residue,(z) and where the residue is settled on A. for life, remainder to B., will form part of the capital.(a) And if the

(s) Griffiths v. Vere, 9 Ves. 127, see 135.

(t) Trickey v. Trickey, 3 M. & K. 560.

(u) Shaw v. Rhodes, 1 M. & Cr. 135; S. C. by the name of Evans v. Hellier, 5 Clarke & Fin. 114.

(v) See 5 Cl. & Fin. 127.

(w) Eyre v. Marsden, 2 Keen, 564; Nettleton v. Stephenson, 3 De Gex & Sm. 366; Edwards v. Tuck, 3 De Gex, Mac. & Gord. 40; Re Drakeley's Trust, 19 Beav. 395.

(x) Sewell v. Denny, 10 Beav. 315.

(y) Barrett v. Buck, 12 Jur. 771; see Halford v. Stains, 16 Sim. 488, contra.

(z) Haley v. Bannister, 4 Mad. 275; O'Neill v. Lucas, 2 Keen, 313; Webb v. Webb, 2 Beav. 493; Attorney-General v. Poulton, 3 Hare. 555; Jones v. Maggs, 9 Hare, 605; Re Drakeley's Trust, 19 Beav. 395.

(a) Crawley v. Crawley, 7 Sim. 427.



subject of the accumulation be the income of the residue itself, the void accumulations will, according to the nature of the residue, *i. e. real or personal*, result to the heir-at-law or to the next of kin.<sup>(b)</sup>

[\*119] \*Lastly, the statute provides, that “nothing in the act contained shall extend to any provision for *payment of debts*(*c*) of any grantor, settlor, or devisee, or other person or persons,<sup>(d)</sup> or for *raising portions* for any child of the settlor or devisee, or any person *taking an interest* under the settlement or devise, or to any direction touching the produce of *timber or wood*.” By children must, of course, be exclusively understood legitimate children;<sup>(e)</sup> and by the words *taking an interest*, the act has been construed to mean taking a *substantial* interest. A small annuity, for instance, to the parent, would not justify an accumulation of the residue of the rents beyond the limits of the act for raising portions for the children.<sup>(f)</sup> And the accumulation to be protected by the clause must be a provision for raising portions out of the *corpus*, not an accumulation of the *corpus* itself, for the purpose of making a gift of the aggregate fund,<sup>(g)</sup> and must be a provision for children certain, and not a chance limitation in favour of any child that may happen to survive certain persons not necessarily standing in the relation of parent and child, but uncles or aunts, &c.<sup>(h)</sup> And by “taking an interest under the devise” it was once considered that not any interests in a large sense under the *will* were meant, but under the particular gift, devise, or bequest, which contains the provision for accumulation.<sup>(i)</sup> But this view has been since overruled, so that now, if the person take a substantial interest in any property, under the will, it is sufficient.<sup>(k)</sup> [\*120] \*The portions intended by the act are not necessarily portions created by the deed or will directing the accumulation, but may be portions pre-existing.<sup>(l)</sup>

Scotland is expressly excepted from the act; and, as the statute was passed a short time before the union with Ireland, it is presumed that freeholds in that country are also unaffected by it.

Another modification of property, unknown to the common law, but

(b) *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; *Pride v. Fooks*, 2 Beav. 430; *Elborne v. Goode*, 14 Sim. 165; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Edwards v. Tuck*, 3 De Gex, Mac. & Gord. 40.

(c) *Bateman v. Hotchkin*, 10 Beav. 426.

(d) The words “any other person or persons” mean the debts of any stranger whomsoever; see *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 497; 10 Hare, 415.

(e) *Shaw v. Rhodes*, 1 M. & C. 135, see 159.

(f) S. C. see 159; and see *Bourne v. Buckton*, 2 Sim. N. S. 91; but see *Evans v. Hellier*, 5 Cl. & Fin. 127; *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 500; *Edwards v. Tuck*, 3 De Gex, Mac. & Gord. 63.

(g) *Eyre v. Marsden*, 2 Keen, 564; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Tuck v. Edwards*, 3 De Gex, Mac. & Gord. 40; *Jones v. Maggs*, 9 Hare, 605; *Wildes v. Davies*, 1 Sm. & Gif. 475; and see *Beech v. St. Vincent*, 3 De Gex & Smale, 678. In *Burt v. Sturt*, 10 Hare, 427, this was said to be “a shadowy distinction.”

(h) *Burt v. Sturt*, 10 Hare, 415.

(i) *Bourne v. Buckton*, 2 Sim. N. S. 91, see 101; *Morgan v. Morgan*, 4 De Gex & Smale, 164.

(k) *Barrington v. Liddell*, 10 Hare, 415, 2 De Gex, Mac. & Gord. 500; *Edwards v. Tuck*, 3 De Gex, Mac. & Gord. 40; *Burt v. Sturt*, 10 Hare, 415.

(l) *Halford v. Stains*, 16 Sim. 488; *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 498; *Middleton v. Losh*, 1 Sm. & Gif. 61; and see *Burt v. Sturt*, 10 Hare, 415.



which has been admitted into trusts, is, where property, real or personal, is settled to the *separate use* of a *feme covert*, so as to exclude the control of her husband. The principle at common law is, that, as the husband undertakes the debts and liabilities of the wife, he is entitled, absolutely or partially, according to the circumstances of the case, to the enjoyment of her property; but in equity a *feme* is allowed to contract with the husband before marriage, for the exclusive enjoyment of any specific property;(m) or a person may make a gift to the wife during the coverture, and shut out the husband's interference by clearly expressing such an intention. Where the separate estate is the result of a special agreement between the parties, the policy of the law can scarcely be said to be transgressed, for the old rule was established for the benefit and protection of the husband, and *quisque renuntiare potest juri pro se instituto*; but that equity should have allowed a stranger to vest property in the wife independently of the husband during the coverture, appears a more questionable doctrine; though it may be said, that even in this case, there is no violation of the marital rights, for the property never vested in the *feme* herself, and the donor may limit any estate which the law does not refuse to recognize. The court has also permitted the further anomaly of a restriction upon the *feme's* anticipation (where such an intention has been expressed) of the growing proceeds of the separate estate; but this indulgence appears not a distinct inroad upon the common law incidents of property, but rather an \*appendage to the separate use for the purpose of more effectually excluding the [\*121] influence of the husband. If the wife were not debarred from anticipating the proceeds, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at the husband's disposal. Where the clause against anticipation has once attached, even a court of equity cannot discharge it, though it were for the *feme's* own advantage.(n)

At the first introduction of the settlement to the separate use it was doubted, whether, to accomplish the object, the interposition of an express trustee was not necessary;(o) but it has since been determined that this precaution may be dispensed with, for, rather than the intention shall be disappointed, the husband himself shall be construed a trustee for the wife.(p) But, whether a trustee be expressly appointed or not, the intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; for, as the husband is bound to maintain the wife, and bears the burden of her incumbrances, he has *prima facie* a right to her property;(q) but, provided the meaning be certain,

(m) See *Parkes v. White*, 11 Ves. 228.

(n) *Robinson v. Wheelwright*, 21 Beav. 214.

(o) *Harvey v. Harvey*, 1 P. W. 125; *Burton v. Pierpoint*, 2 P. W. 78.

(p) *Bennet v. Davis*, 2 P. W. 316; *Parker v. Brooke*, 9 Ves. 583; *Rollfe v. Budder*, Bunb. 187; *Prichard v. Ames*, 1 Turn. & Russ. 222; *Newlands v. Paynter*, 10 Sim. 377; 4 M. & Cr. 408; *Turnley v. Kelly*, Wallis's Rep. by Lyne, 311; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

(q) Ex parte Ray, 1 Mad. 207, per Sir T. Plumer; *Wills v. Sayers*, 4 Mad. 409. per eundem; *Massey v. Parker*, 2 M. & K. 181, per Sir C. Pepys; *Kensington v. Dollond*, 2 M. & K. 188, per Sir J. Leach.

the court will execute the intention, though the settlor may not have expressed himself in technical language.<sup>(r)</sup>

The marital claims will be defeated if the gift be to the wife for her [ \*122 ] "sole and separate use,"<sup>(s)</sup> or "her sole use,"<sup>(t)</sup> (which \*is construed as separate use,) or "solely for her own use,"<sup>(u)</sup> or for "her livelihood,"<sup>(v)</sup> or "that she may receive and enjoy the profits,"<sup>(w)</sup> or "to be at her disposal,"<sup>(x)</sup> or "to be by her laid out in what she shall think fit,"<sup>(y)</sup> or "for her own use, independent of her husband,"<sup>(z)</sup> or "not subject to his control,"<sup>(a)</sup> or "for her own use and benefit, independent of any *other person*;"<sup>(b)</sup> for such expressions as these are clearly inconsistent with the notion of any interference on the part of the husband. So, if the gift be accompanied with such expressions as "her receipt to be a sufficient discharge,"<sup>(c)</sup> or "to be delivered to her on demand;"<sup>(d)</sup> for in these cases the check put upon the husband's legal right to receive could only have been with the intention of giving the wife a particular benefit.

But if the trust be merely "to pay to her," or "to her and her assigns,"<sup>(e)</sup> or the gift be "to her use,"<sup>(f)</sup> or "her own use,"<sup>(g)</sup> or "her own absolute use,"<sup>(h)</sup> or "to pay into her own proper hands for her own use,"<sup>(i)</sup> or "to pay to her to be applied for the maintenance of [ \*123 ] herself and such child or \*children as the testator might happen to leave at his death,"<sup>(k)</sup> there is no such unequivocal evidence of an intention to exclude the husband.

Where property was vested in the *husband jointly with another*, as

(*r*) *Darley v. Darley*, 3 Atk. 399, per Lord Hardwicke; *Stanton v. Hall*, 2 R. & M. 180, per Lord Brougham.

(*s*) *Parker v. Brooke*, 9 Ves. 583; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

(*t*) *Adamson v. Armitage*, 19 Ves. 416; *S. C. Coop.* 283; *Ex parte Ray*, 1 Mad. 199; *Ex parte Killick*, 3 Mont. D. & D. 480; *Davis v. Proud*, 7 Beav. 288; *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511; *Lindsell v. Thacker*, 12 Sim. 178, (the marginal note in the last case is altogether erroneous); and see *Massey v. Parker*, 2 M. & K. 181; — *v. Lyne*, *Younge*, 562; but the latter seems not to have been correctly reported. The facts are stated from the registrar's book in *Tullett v. Armstrong*, 4 M. & Cr. 403.

(*u*) *Inglefield v. Coghlan*, 2 Coll. 247.

(*v*) *Darley v. Darley*, 3 Atk. 399; and see *Cape v. Cape*, 2 Y. & C. 543; *Ex parte Ray*, 1 Mad. 208; but see *Lee v. Prieaux*, 3 B. C. C. 383; *Wardle v. Claxton*, 9 Sim. 524.

(*w*) *Tyrrell v. Hope*, 2 Atk. 558.

(*x*) *Prichard v. Ames*, 1 Turn. & Russ. 222; *Kirk v. Paulin*, 7 Vin. 96.

(*y*) *Atcherley v. Vernon*, 10 Mod. 531.

(*z*) *Wagstaff v. Smith*, 9 Ves. 520.

(*a*) *Bain v. Lescher*, 11 Sim. 397.

(*b*) *Margetts v. Barringer*, 7 Sim. 482.

(*c*) *Lee v. Prieaux*, 3 B. C. C. 381; *Woodman v. Horsley*, cited *Ib.* 383; and see *Stanton v. Hall*, 2 R. & M. 180.

(*d*) *Dixon v. Olmius*, 2 Cox, 414.

(*e*) *Dakins v. Berisford*, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 517.

(*f*) *Jacobs v. Amyatt*, 1 Mad. 376, n; *Wills v. Sayers*, 4 Mad. 411, per Sir T. Plumer; *Anon. case*, cited 7 Vin. 96.

(*g*) *Johnes v. Lockhart*, in note to *Lee v. Prieaux*; 3 B. C. C. 383, ed. by Belt. (this case is erroneously cited as an authority to the contrary in *Lumb v. Milnes*, 5 Ves. 520, and *Ex parte Ray*, 1 Mad. 207); *Wills v. Sayers*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Beales v. Spencer*, 2 Y. & C. Ch. Ca. 651.

(*h*) *Rycroft v. Christy*, 3 Beav. 238.

(*i*) *Tyler v. Lake*, 2 R. & M. 183; *Kensington v. Dollond*, 2 M. & K. 184; *Blacklow v. Laws*, 2 Hare. 48; but *Hartley v. Hurle*, 5 Ves. 545. *contra*.

(*k*) *Wardle v. Claxton*, 9 Sim. 524.

general trustees of the will, upon trust (*inter alia*,) for the wife, it was held not to be a gift to her separate use.<sup>(l)</sup> Had the husband *alone* been appointed a trustee for the wife, the decision might have been different.<sup>(m)</sup>

The clause against the *feme's* anticipation is of comparatively modern growth. In *Hulme v. Tenant*<sup>(n)</sup> it was held that a limitation to the separate use simply did not prevent the *feme* from aliening. In *Pybus v. Smith*<sup>(o)</sup> great pains had been taken in framing the separate use, and the income was made payable as the *feme* should by writing *under her proper hand from time to time appoint*, but it was again decided that the *feme* could even then dispose of her interest. After this, Lord Thurlow happened to be nominated a trustee of Miss Watson's settlement, and he directed the insertion of the words "*and not by anticipation*,"<sup>(p)</sup> from which time this has been the usual formulary, and the effect of it for the purpose of excluding the power of disposition has never been questioned.

But although these words are now almost universally employed they are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument it is sufficient,<sup>(q)</sup> as if there be a direction to pay the income to such persons as *the feme shall after it is become due appoint*,<sup>(r)</sup> but, as we have seen, if the limitation be merely to the sole and separate use, or to pay from to time upon her receipt under her own proper hand,<sup>(s)</sup> or if the trust be to pay to her upon her personal \*appearance,<sup>(t)</sup> the *feme* is left at liberty [\*124] to part with her interest, for such expressions are, as Lord Eldon observed, "only an unfolding of all that is implied in a gift to the separate use."<sup>(u)</sup>

Of late years the doctrine of the separate use has given rise to the following questions :—first, Whether a fund given in trust for the separate use of a *feme sole without power of anticipation* may be disposed of by her at any time previously to marriage? secondly, Whether a fund given merely for her separate use, without words in restraint of anticipation, will, in default of any previous disposition by her, vest by the marriage in the husband, or the trust for the separate use of the wife will be supported against his legal rights? and, thirdly, Where words in restraint of anticipation are added, whether, supposing the separate use to be good in the event of marriage, the clause against anticipation will also operate?

1. With reference to the first of these questions, it is now clearly established, that a *feme sole* may, before marriage, dispose absolutely of a gift

(l) *Ex parte Beilby*, 1 Glyn & J. 167; and see *Kensington v. Dollond*, 2 M. & K. 184.

(m) *Ex parte Beilby*, ubi supra; and see *Darley v. Darley*, 3 Atk. 399.

(n) 1 B. C. C. 16. (o) 3 B. C. C. 340.

(p) See *Jackson v. Hobhouse*, 2 Mer. 487; *Parkes v. White*, 11 Ves. 221.

(q) See *Re Ross's Trust*, 1 Sim. N.S. per V. C. Kindersley, p. 199.

(r) *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 2 Jur. N.S. 98.

(s) *Ellis v. Atkinson*, 3 B. C. C. 565; *Clarke v. Pistor*, cited *Ib.* 568; *Brown v. Like*, 14 Ves. 302; *Acton v. White*, 1 S. & S. 429; *Witts v. Dawkins*, 12 Ves. 501; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp*, 13 Ves. 190; and see *Scott v. Davis*, 4 M. & Cr. 87, *Quære*; *Hovey v. Blakeman*, cited 9 Ves. 524.

(t) *Re Ross's Trust*, 1 Sim. N.S. 196. (u) *Parkes v. White*, 11 Ves. 222.



to her separate use, though coupled with words restrictive of anticipation; <sup>(v)</sup> and the principle is briefly this—that *wherever a person possessing an interest, however remote a possibility, is sui juris, that person cannot be prevented by any intention of the donor from exercising the ordinary rights of proprietorship.* The fund may be limited “in trust for the separate use of the *feme*,” or “in trust for her, and, in the event of her marriage to her separate use,” or “in trust for her separate use in the event of her marriage,” without the gift of any estate independently of that contingency; but in all these cases the interest, whether *vested* or *contingent*, is in favour of one who is now *sui juris*, and who therefore cannot be restrained from disposing of property to which she either now is, or may eventually become, entitled.

[\*125] 2. Upon the subject of the second question, there are \*difficulties upon principle in the way of holding the trust for the separate use to arise upon the marriage. Thus, it cannot be said there is any *necessity* for such a doctrine with the view of protecting the *feme* in the due enjoyment of her property; for, having an absolute power of disposition over the interest before her marriage, she may settle it in whatever manner she pleases by express contract; and, if she marry without such special agreement, the legal presumption ought to be, that she intended the marriage itself to operate as a gift of it to the husband. It may be thought *hard* perhaps that a father should not be allowed to tie up the property of his daughter against the effects of a future coverture; <sup>(w)</sup> but is it not equally hard that he should not be allowed to fetter the ownership of a weak and extravagant son? In fact, the law must proceed upon *general* principles; and the rule is, that every person, whether *male* or *female*, who is *sui juris*, has a legal capacity, and therefore cannot be restrained in the exercise of the rights of property, even at the will of a parent. Besides, if the father were allowed to tie up the property of his daughter, his will should be *imperative*; whereas it is now on all hands agreed, that the *feme*, while sole, may dispose of the property at pleasure by an *express assignment*, whether in favour of her intended husband or any other person. But the principal objection is, that the exclusion of the marital rights would be a repugnancy to the estate itself; for when the *feme* is so absolutely the owner of the fund that it may be paid into her own hands by the trustees, or may be assigned by her to a mere volunteer, or may become vested by bankruptcy or insolvency in her assignees, it is surely inconsistent to say that the marriage shall not be a transfer of it to the husband, a purchaser for valuable consideration.

[\*126] However, Lord Cottenham, in the cases of *Tullett v. Armstrong*, and *Scarborough v. Borman*, <sup>(x)</sup> anxious to prevent \*the

<sup>(v)</sup> *Jones v. Salter*, 2 R. & M. 208; *Woodmeston v. Walker*, 2 R. & M. 197; *Brown v. Pocock*, *Ib.* 210; S. C. 2 M. & K. 189; and see *Massey v. Parker*, 2 M. & K. 174.

<sup>(w)</sup> See *Benson v. Benson*, 6 Sim. 130.

<sup>(x)</sup> 4 M. & C. 377; and see *Newlands v. Paynter*, *Ib.* 408; *Russell v. Dickson*, 2 Drur. & War. 138; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478, where a bequest of chattels real was to the testator's daughter, who was then sole and without the intervention of any trustee, and on her marriage the husband was deemed a trustee for her.



consequences that would have flowed from a different decision, and not finding any other safe ground upon which to base his judgment, asserted an inherent power in the court of chancery to modify estates of its own creation, and in virtue of that jurisdiction established the validity of the separate use to its fullest extent. "It is said," he observed, "to have been very generally understood in the profession, that the separate estate would continue to operate during a subsequent coverture, and that conveyancers have acted so extensively upon that supposition, that very many families are interested in the decision of this question. That circumstance ought to have great attention paid to it. For the *future* it would not probably be found difficult to obtain the desired security for the future wife by other means consistent with the well-established rules of property, but the *existing arrangements* must depend upon the decision of this case. I have over and over again considered this subject with a great anxiety to find some principle of property consistent with the existing decisions upon which the preservation of the separate estate during a subsequent coverture could be supported. I have been anxious to find means of preserving it, not only to maintain those existing arrangements which have proceeded on the ground of its validity, but because I think it desirable that the rule should, if possible, be established for the future, believing, as I do, that when a marriage takes place, the wife having property settled to her separate use, all the parties in general suppose that it will so continue during the coverture. To permit the husband therefore to break through such a settlement, and himself to receive the fund, would, in general, be contrary to the intention of the parties, and unjust towards the wife. This view of the case has led to a suggestion which has often been made in argument, by which the object might be attained without violating any rule of property, viz. by supposing the husband marrying a woman with a property so settled, tacitly to assent to such settlement, or, at least, to be bound by an equity not to dispute it. I was for some time much disposed to adopt this view of the subject, and in all cases in which the husband was cognizant of the fact, there would be much of equitable principle to support the gift or \*settlement against him; but putting the title of the wife upon such [\*127] assent of the husband, assumes that but for such assent it would not exist. It abandons the idea of the old separate estate continuing through the subsequent coverture, and supposes a new separate estate to arise from the act of the husband. If the title of the wife were to rest upon that supposition, I fear that the remedy would be very inadequate, and that questions would constantly arise as to how far the circumstances of each case would afford evidence of assent, or raise this equity against the husband. After the most anxious consideration, I have come to the conclusion that the jurisdiction which this court has assumed in similar cases justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it, throughout a subsequent coverture, and that resting it upon such jurisdiction is the broadest foundation, and that the interests of society require that this should be done.(1)

(1) Yet the lord chancellor, in a subsequent case, is made to say, "The principle of my decision was, that a person marrying a woman with property so cir-

When this court first established the separate estate, it violated the laws of property as between husband and wife, but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate, and it was found as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation. In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have [\*128] been <sup>so</sup> established will be lost. Why then should not equity in this case also interfere, and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so invented for her benefit? It is, no doubt, doing violence to the rules of property to say, that property, which being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it; but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to maintain the prohibition against alienation."

3. With reference to the third question, viz., whether not only the separate use, but also the clause against anticipation, shall operate upon the marriage, it was formerly held by Sir L. Shadwell, V. C. E., that while the *separate use* was good, (y) the clause against anticipation was nugatory. (z) Lord Langdale, M. R., with more consistency, supported both the *separate use* and also the *clause against anticipation*. (a) The case of *Tullett v. Armstrong* (b) has now decided the validity of the clause against anticipation as well as of the separate use. "If," said the court, "the case be of a separate estate, without power of anticipation, it must exist with that qualification or fetter, if it exist at all, and there is no principle upon which it can be held that the separate estate operates during a coverture subsequent to the gift, but that the provisions against anticipation with which the gift was qualified does not. It is obvious that such a rule would in practice defeat the intention of the donor, and, in many cases, render the provision which he had made for the protection of the object of his bounty the means and instrument of depriving

(y) *Davis v. Thornycroft*, 6 Sim. 420.

(z) *Brown v. Pocock*, 5 Sim. 663; *Johnson v. Freeth*, 6 Sim. 423.

(a) *Tullett v. Armstrong*, 1 Beav. 1.

(b) 4 M. & C. 390.

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cumstanced is considered as adopting the property in the state in which he finds it, and bound by equity not to disturb it. That is the only principle which I could find upon which to support limitations to the separate use under such circumstances." *Newlands v. Paynter*, 4 M. & Cr. 417. There appears evidently to have been a struggle in the mind of the court, between the wish to support the separate use (from a fear of the consequences in a different decision), and the difficulty of finding a principle upon which to maintain it.

her of it. When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole*, as to bring with it all \*the incidents of property, and that she might therefore dispose of it as a *feme sole* might do, it was found that to [\*129] secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority not now to be questioned, but which could only have been founded upon the power of this court to model and qualify an interest in property, which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases. If any rule, therefore, were now to be adopted by which the separate estate should, in any case, be divested of the protection of the clause against anticipation, it would in such cases, defeat the object of the power so assumed. A *feme covert* with separate estate not protected by a clause against anticipation, is, in most cases, in a less secure situation than if the property had been held for her simply upon trust. In the latter case this court, with the assistance of her trustees, can effectually protect her; in the other, her sole dependence must be upon her husband not exercising that influence or control, which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate, with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this court should subject her to it, and by so doing defeat his purpose, and completely alter the character and security of his gift? The separate estate, and the prohibition of anticipation, are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together."

It was held in a case(c) before the late vice-chancellor of England, that if a fund be vested in trustees upon trust to pay the proceeds to such persons and for such purposes as a *feme covert* shall, when and as they become due, appoint, but so as not to *charge or anticipate* the same, and in default of \*appointment to pay the same into the hands of [\*130] the *feme* for her *separate use* (without the addition of any words to restrain her *power of anticipation*), if the *feme covert* assign the life estate limited to her *in default of appointment*, it destroys the power, and the restriction upon the anticipation annexed to it is nugatory. Such a doctrine would have led to great inconvenience, as the precedents of the most approved conveyancers were known to have been frequently expressed in that form, and the decision after failing to secure the assent of other judges(d) was ultimately reversed on appeal.(e) The substantial intention was taken to be, that the *payment* into her hands, as well as the *power* to appoint, was not to operate until the annual proceeds had become actually due.

(c) Brown v. Bamford, 11 Sim. 127.

(d) Moore v. Moore, 1 Collyer, 54; Harrop v. Howard, 3 Hare, 624; Harnett v. Macdougall, 8 Beav. 187.

(e) 1 Phill. 620.



In another case the trust was to pay to such person or persons as the *feme* should appoint, and in default into her own proper hands, the receipts of the *feme* or her appointee to be sufficient discharges, and that the trustees should be at liberty to require from the *feme* a separate receipt for each quarterly payment, "it being the testator's intention that the annual interest and proceeds should not be sold, charged, or otherwise disposed of;" and the vice-chancellor of England held that the testator having previously given a general power of disposition, the concluding words were inconsistent with such a gift, and therefore nugatory.<sup>(f)</sup> This, however, was before his honor's decision in *Brown v. Bamford* had been overruled by the lord chancellor, and the decision it is conceived could not be supported.

If a fund be settled to the separate use of a *feme*, which is meant to be confined to that particular marriage, and the husband afterwards die, and the widow marry again, the second husband shall not be excluded from his ordinary marital rights.<sup>(g)</sup> The question simply is, What was the intention of the settlement? for *Tullett v. Armstrong* has now decided, that if the exclusion of any future husband was also in [\*131] contemplation, \*it shall be carried into effect,<sup>(h)</sup> and if the separate use extend to any marriage, present or future, even the arrears due to the *feme* at the time of the subsequent marriage are protected from the after-taken husband.<sup>(i)</sup>

## SECTION II.

### OF UNLAWFUL TRUSTS.

The court will not permit the system of trusts to be directed to any object that contravenes the *policy* of the law.<sup>(j)</sup> Thus, if the trust of a *chattel* be limited to A. and *his heirs*, it will nevertheless be personal estate, and vest in the executors,<sup>(k)</sup> for to hold the contrary would shake the first principles of law and confound the great landmarks of property. So the trust of a *chattel* cannot be entailed, as if it be limited to A. and the heirs of his body, with remainder to B., the absolute interest vests in A., and the remainder to B. is a nullity.<sup>(l)</sup> But trusts of terms attendant upon the inheritance were always excepted from the rule; for these, partly to protect the estate from secret incumbrances, and partly to keep the property in the right channel,<sup>(m)</sup> were made to follow, as shadows, the devolution of the freehold.<sup>(n)</sup>

(f) *Medley v. Horton*, 14 Sim. 222.

(g) *Barton v. Briscoe*, Jac. 603; *Benson v. Benson*, 6 Sim. 126; *Knight v. Knight*, Ib. 121; *Jones v. Salter*, 2 R. & M. 208.

(h) *Ashton v. McDougall*, 5 Beav. 56; *Re Gaffee*, 7 Hare, 101; 1 Mac. & Gord. 541.

(i) *Ashton v. McDougall*, 5 Beav. 56; and see *Newlands v. Paynter*, 4 M. & Cr. 418; *England v. Downs*, 6 Beav. 269.

(j) See *Attorney-General v. Pearson*, 3 Mer. 399; *Hamilton v. Mainwaring*, 2 Bligh, 209; *Earl of Kingston v. Lady Pierrepont*, 1 Vern. 5.

(k) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; S. C., 1 Vern. 164, per Lord Guildford; *Hunt v. Baker*, 2 Freem. 62; *Attorney-General v. Sands*, Nels. 133.

(l) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *Hunt v. Baker*, 2 Freem. 62.

(m) See *Willoughby v. Willoughby*, 1 T. R. 765.

(n) For the law upon this subject, see *Vend. & Purch. Ch.* 15.



Again, a person cannot settle property upon trust for illegitimate children *to be thereafter born*, but the declaration of trust is void, and the beneficial interest results to the settlor.<sup>(o)</sup>

So a trust of real estate cannot be declared in favour of a *corporation* without a license from the crown.<sup>(p)</sup>

\*And a trust of real estate declared in favour of an *alien* will vest in the crown without the form of a previous inquisition.<sup>(q)</sup> [\*132]

So, neither lands nor property savouring of the realty can be conveyed upon trust for a charity, unless the requirements of the 9 G. 2, c. 36, as respects execution and enrolment,<sup>(r)</sup> and absence of any reservation for the benefit of the grantor,<sup>(s)</sup> be complied with. And where lands were conveyed to trustees for a charity by a deed duly enrolled, and without any reservation upon the face of it to the grantor, but upon a secret trust that the deed should not operate until after the settlor's death, the deed was, upon bill filed, declared void, and decreed to be set aside.<sup>(t)</sup>

A perpetuity will no more be tolerated when it is covered with a trust, than when it displays itself undisguised in a settlement of the legal estate.<sup>(u)</sup> "A perpetuity," said Lord Guildford, "is a thing odious in law, and destructive to the commonwealth. It would put a stop to commerce, and prevent the circulation of the riches of the kingdom, and therefore is not to be countenanced in equity. If in equity you could come nearer to a perpetuity, than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth."<sup>(v)</sup>

So trusts cannot be created with a proviso, that the interest of the *cestui que trust* shall not be aliened,<sup>(w)</sup> or shall not be made subject to the claims of creditors.<sup>(x)</sup> If it can only be ascertained that the *cestui que trust* was intended to take a vestest interest, the *mode* in which, or the *time* when, the *cestui que trust* was to reap the benefit, is perfectly immaterial—the \*entire interest may either be disposed of by the act of the *cestui que trust*, or may become vested in his assignees by operation of law on his bankruptcy or insolvency. Thus, if the trust be to pay the interest of a fund to a person for life "at such times and in such manner as the trustees shall think proper,"<sup>(y)</sup> or

(o) *Wilkinson v. Wilkinson*, 1 Y. & C. Ch. Ca. 657; *Pratt v. Mathew*, 22 Beav. 339.

(p) See *Sheph. Touch.* 509; *Sand. on Uses*, 339, note E. 15 Ric. 2, c. 5.

(q) See *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92; *Vin. Ab. Alien*, A, 8; *Godfrey v. Dixon*, *Godb.* 275; *Br. Feff. al. Uses*, 389; *King v. Holland*, *Al.* 16, *Styl.* 21; *Burney v. Macdonald*, 15 *Sim.* 6.

(r) *Doe v. Hawthorn*, 2 B. & Ald. 96; *Doe v. Munro*, 12 M. & W. 845.

(s) *Limbrey v. Gurr*, 6 Mad.; *Attorney-General v. Munby*, 1 Mer. 327.

(t) *Way v. East*, 2 Drewry, 44.

(u) See *Duke of Norfolk's case*, 3 Ch. Ca. 20, 28, 35, 48.

(v) S. C. 1 Vern. 164.

(w) *Snowdon v. Dales*, 6 *Sim.* 524; *Green v. Spicer*, 1 R. & M. 395; *Graves v. Dolphin*, 1 *Sim.* 66; *Brandon v. Robinson*, 18 Ves. 429.

(x) *Graves v. Dolphin*, *Snowdon v. Dales*, *Brandon v. Robinson*, *ubi supra*; *Bird v. Johnson*, 18 Jur. 976.

(y) *Green v. Spicer*, *ubi supra*.

from time to time as and when it shall become due and payable,"(z) or "in such smaller or larger portions, at such times immediate or remote, and in such way and manner as the trustees shall think best,"(a) the discretion of the trustees is determined by the bankruptcy or insolvency of the *cestui que trust*, and the entirety of the life estate becomes vested in the assignees. Even where the trustees were directed to pay the interest of a sum "to A. for life or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, and so that A. should not have any right, title, claim, or demand other than the trustees should think proper;" and after A.'s decease, to pay the interest to his widow for her life, and after her decease to assign the principal and "all *savings or accumulations* of interest, if any," to the children, the court thought, that, taking the whole instrument together, the trustees, had no power to withhold and accumulate any portion of the interest during the life of A., and therefore, on his bankruptcy, the assignees became absolutely entitled.(b)

However, where a fund was given to trustees upon trust to apply the whole or *such part* of the interest as they should think fit during the life of A., for his *support and maintenance*, and for no other purpose, it was held by the vice-chancellor of England that nothing passed to the assignees.(c) And where a residuary estate was given to the testator's son for life, but if he did any act whereby the interest vested in him would become forfeited to others, the trustees were to apply the annual produce "for the *maintenance and support* of the son, *any wife and child or children* he might have, as the trustees should in their discretion think fit," and the son became bankrupt, having a wife and [\*134] children, \*the vice-chancellor of England said, "It did not follow from the gift that anything was of necessity to be *paid*, but the property was to be *applied*; and there might be a maintenance of the son, and of the wife and children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and children with all that was necessary for maintenance, and if so the assignees were not entitled to anything."(d) But where property was vested in trustees upon trust for A. for life, until his bankruptcy, &c., and on his bankruptcy, &c., upon trust to apply the proceeds "in such manner and to such persons for the *board, lodging, and subsistence* of himself and his *family* as the trustees should think proper," and A. became bankrupt, having lost his wife, and having *three* children, it was held by the master of the rolls that the assignees were entitled to one-fourth part for the life of A.(e) And in another case, where real and personal estate was vested by a marriage-settlement in trustees upon trust to apply the annual produce thereof "for the *maintenance and support* of A. B., his *wife and chil-*

(z) *Graves v. Dolphin*, 1 Sim. 66.

(a) *Piercy v. Roberts*, 1 M. & K. 4.

(b) *Snowdon v. Dales*, 6 Sim. 524.

(c) *Twopeny v. Peyton*, 10 Sim. 487.

(d) *Godden v. Crowhurst*, 10 Sim. 642. If this case can be supported at all, it must be on the ground that the trustees were not obliged to apply more than an illusory part for the benefit of the husband. Compare *Youngehusband v. Gisborne*, 1 Collyer, 400.

(e) *Rippon v. Norton*, 2 Beav. 63.

*dren*, if any, or otherwise, if they thought proper, to permit the same to be received by A. B., for his life," and A. B. became bankrupt, leaving a wife but no children, the master of the rolls said, "There could be no doubt of the intention of the settlement, that the wife should be supported out of the property, and he was of opinion that so long as the wife and children were maintained by A. B., the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained; that the assignees took everything, subject to what was proper to be allowed for the maintenance of the wife and children, and that it must be referred to the master to settle a proper allowance."(*f*) In a subsequent case, freehold and leasehold property was vested in trustees upon trust for A. B. for life, but if \*he became bankrupt or insolvent, the trustees were, during his life, to apply the annual produce "in and towards the main- [\*135] *tenance, clothing, lodging, and support* of A. B. and his then present or any future wife and his children, or any of them as the trustees should in their discretion think proper." A. B. became insolvent, having a wife and children, and it was argued that the power in the trustees was destroyed by the insolvency, and that the life estate vested in the assignee; but Vice-Chancellor Knight Bruce held that the trustees had a right under the power to appoint in favour of the insolvent, his wife and children, or any of them in exclusion of any other of them, but that any benefit which the insolvent might take would belong to the assignee.(*g*) And the same doctrine has been held in the more recent case of *Kearsley v. Woodcock*.(*h*) The question to be asked in these cases is, on the decease of the *cestui que trust* would his executor have a right to call upon the trustees retrospectively to account for the arrears? If he would, then the assignees are prospectively entitled to the payments *in futuro*.

But though a person cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon A. *until* alienation, bankruptcy, or insolvency, with a limitation over to B. on the happening of either of those events; or he may give the fund to A. for life, or absolutely in the first instance, with a *proviso* that on alienation, bankruptcy, or insolvency, the estate shall shift over to be B.(*i*) But a clause divesting the property on "alienation" will extend only to a disposition by the act of the party, and not to a transfer by operation of law, as *bankruptcy*,(*k*) unless it can be collected \*from [\*136]

(*f*) *Page v. Way*, 3 Beav. 20.

(*g*) *Lord v. Bunn*, 2 Y. & C. Ch. Ca. 98; *Holmes v. Penney*, 3 K. & J. 90.

(*h*) 3 Hare, 185.

(*i*) *Shee v. Hale*, 13 Ves. 404; *Cooper v. Wyatt*, 5 Mad. 482; *Yarnold v. Moorhouse*, 1 R. & M. 364; *Lockyer v. Savage*, 2 Stra. 947; *Stephens v. James*, 4 Sim. 499; *Ex parte Hinton*, 14 Ves. 598; *Lewes v. Lewes*, 6 Sim. 304; *Ex parte Oxley*, 1 B. & B. 257; *Stanton v. Hall*, 2 R. & M. 175; and see *Rochford v. Hackman*, 9 Hare, 475; *Sharp v. Cossent*, 20 Beav. 470.

(*k*) *Lear v. Legget*, 2 Sim. 479; *S. C.* 1 R. & M. 690; *Whitfield v. Prickett*, 2 Keen, 608; *Wilkinson v. Wilkinson*, Sir Geo. Coop. R. 259; and see *S. C.* 3 Sw. 528. Where the clause was against "anticipating or otherwise assigning or incumbering" the annual proceeds, and the *cestui que trust* assigned, so far as he lawfully could without a forfeiture, the arrears already accrued, but not the future



the context that the term was intended by the settlor to have so wide a signification.<sup>(l)</sup> *Insolvency* is not a process *in invitum*, but the act of the insolvent himself (except it be on the petition of a creditor under the late statute,)<sup>(m)</sup> and therefore comes within the meaning of a restraint against "alienation."<sup>(n)</sup> However, a person cannot settle *his own property on himself*, with a limitation over in the event of his own alienation,<sup>(o)</sup> or on his own bankruptcy or insolvency.<sup>(p)</sup> But if on his marriage he receive a portion with his wife, he may settle a fund of his own to the extent of the wife's fortune, for, though apparently a settlement by the husband, it is in fact a settlement of the money advanced by the wife.<sup>(q)</sup>

It is not unusual to find a clause in a *will* directory to trustees to purchase a presentation in favour of some particular object; but, it seems, if the purchase be made with the *intention* of presenting the *cestui que trust*, though the patron himself was ignorant of the purpose in view,<sup>(r)</sup> it falls within the statutes enacted for the prevention of simony.<sup>(s)</sup> A patron is forbidden to present for money, either *directly* or *indirectly*; and, the object being determined upon at the time of the purchase, the construction put upon the transaction by the court is, that the patron presents *indirectly* by selling to a person who purchases with the sole intention of presenting.

It has been ruled that the statute relating to insurances on [\*137] \*lives does not prohibit an insurance on the life of A. in the name of B., *upon trust for A.*, when both names appear upon the policy.<sup>(t)</sup>

Fictitious, fraudulent, or collusive conveyances, for the purpose of splitting votes for members of parliament, as when the conveyances are in form only, and there is a private arrangement between the parties that no interest shall pass, are null and void; but if A. *bona fide* and without any secret understanding in derogation of the deed, though for the purpose of multiplying votes, convey to B. in trust for a number of persons as tenants in common, that they may thereby acquire a qualification, the deed is unimpeachable.<sup>(u)</sup>

income, it was held the assignment being confined to the arrears was valid; *Re Stulz's Trusts*, 4 De Gex, Mac. & Gord. 404.

(l) *Dommett v. Bedford*, 6 T. R. 684; *Cooper v. Wyatt*, 5 Mad. 482.

(m) 1 & 2 Vict. c. 110, s. 36; see *Pym v. Lockyer*, 12 Sim. 394.

(n) *Shee v. Hale*, 13 Ves. 404; *Brandon v. Aston*, 2 Y. & C. Ch. Ca. 24; *Churchill v. Marks*, 1 Colls. 441; *Martin v. Margham*, 14 Sim. 230.

(o) *Phipps v. Lord Ennismore*, 4 Russ. 131.

(p) *Higginbotham v. Holme*, 19 Ves. 88; *Ex parte Hill*, 1 Cooke's Bank. Law, 291; *Ex parte Bennet*, Ib. 293; *In re Murphy*, 1 Sch. & Lef. 44; *In re Meaghan*, Ib. 179; *Ex parte Hodgson*, 19 Ves. 206; *Re Casey's Trust*, 3 Ir. Ch. Rep. 419; 4 Ir. Ch. Rep. 247.

(q) *Ex parte Cooke*, 8 Ves. 353; *Higginson v. Kelly*, 1 B. & B. 252; *Ex parte Verner*, Ib. 260; *In re Meaghan*, 1 Sch. & Lef. 179; *Ex parte Hodgson*, 19 Ves. 206; but see *Ex parte Hill*, 1 Cooke's Bank. Law, 291, and compare *Ex parte Hodgson*, 19 Ves. 208.

(r) *King v. Trussel*, 1 Sid. 329.

(s) *Kitchen v. Calvert*, Lane, 102, per Baron Snig; *Whinchcombe v. Pulleston*, Noy, 25, per Lord Hobart; *Godbolt*, 390; and see *Fearne's P. W.* 404; but see *Fox v. Bishop of Chester*, 6 Bing. 1.

(t) *Collett v. Morrison*, 9 Hare, 162.

(u) *Thornley v. Aspland*, 2 Com. B. Rep. 160; *Alexander v. Newman*, 2 Com. B. Rep. 122.



Where a trust is created for an unlawful and fraudulent purpose, the court will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settlor to recover the estate.

Thus in *Cottington v. Fletcher*,<sup>(v)</sup> before Lord Hardwicke, a papist had assigned an advowson to A. B. for a term of ninety-nine years, for the purpose of evading the statutes which vested in the two universities presentations of livings in the gift of papists. The grantor afterwards conformed to the protestant religion, and filed a bill against A. B., praying a discovery of the secret trust. The defendant pleaded the Statute of Frauds, by which all declarations of trust are required to be in writing, but admitted by his answer for what purposes the assignment had been made. Lord Hardwicke held, that, if the plea had stood by itself, it might have been good enough, but, coupled with the answer which was a full admission of the facts, it ought to be overruled; but his lordship added, "If the defendant had *demurred* to the bill, it might have been of a different consideration; for, as the assignment was done in fraud of the law, he doubted at the hearing, whether the plaintiff could be relieved, such fraudulent conveyances being made absolute against the grantor." The opinions of Lord Eldon are expressed in the following remarks upon this case:—"Lord Hardwicke," [\*138] he observed, "is made to say, that, upon the admission of the trust by the defendant, he would act. I do not know whether he *did* act upon it, but it is questionable whether he *should*, for there is a great difference between the case of an *heir* coming to be relieved against the act of his ancestor in fraud of the law, and of a man coming upon *his own act* under such circumstances. It is said it might be different, if it had come on upon demurrer. Lord Hardwicke means to say, that, if the defendant admits the trust, though against the policy of the law, he would relieve; but if he does not admit the trust, then, the plaintiff stating he had been guilty of a fraud upon the law to evade the provision of the legislature to which he was bound to submit, and coming to equity to be relieved against his own act, and the defence also being dishonest, the court, between the two species of dishonesty, would not act, but would say, "let the estate lie where it falls."<sup>(w)</sup>

The distinction here taken by Lord Eldon between a bill filed by the author of the fraud himself, and by a person taking through him but not a party to the fraud, is supported by other authority,<sup>(x)</sup> and may be illustrated by the two following cases, both arising out of the same transaction, the one before Lord Redesdale, and the other before Lord Manners:—

John Brown, a trader in partnership with his brothers William and Thomas, resolved on commencing business as a banker; and, for the purpose of avoiding the penalties of the statute against a banker's trading,

<sup>(v)</sup> 2 Atk. 155.

<sup>(w)</sup> *Muckleston v. Brown*, 6 Ves. 68; and see *Chaplin v. Chaplin*, 3 P. W. 233; *Hamilton v. Ball*, 2 Ir. Eq. Rep. 191; *Groves v. Groves*, 3 Y. & Jer. 163.

<sup>(x)</sup> *Matthew v. Hanbury*, 2 Vern. 187; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Miles v. Durnford*, 2 Mac. & Gord. 643; and see *Phillpotts v. Phillpotts*, 10 Com. B. Rep. 85; *Groves v. Groves*, 3 Y. & Jer. 163. See a classification of the cases in reference to cohabitation bonds, 3 Mac. & Gor. note (c), page 100; *Childers v. Childers*, 3 Kay & Johns. 310; under appeal at the date of publication.

he assigned all his interest in the mercantile concern to his brother William in trust for himself; and William executed a declaration of trust accordingly. Shortly afterwards, William also, intending to enter [\*139] into a banking-house, prevailed on Thomas to become trustee \*both for himself and John, for their respective shares in the partnership. William Brown died, and Thomas Brown, the trustee, became bankrupt. The legatees of William filed a bill against the assignees and others to have the benefit of the secret trust, and Lord Redesdale said, "I will not enter into the question, whether William might not have compelled Thomas to account with him as trustee, if he had brought a bill in his lifetime; but, as between the creditors and legatees of William (on the one side) and Thomas (on the other,) there is no doubt, in point of conscience, Thomas was bound to consider this a trust for them; and accordingly he does, after the death of William, acknowledge himself to be a trustee. I remember a case, where a person, who was executor to a smuggler, on being called on to account for the estate of the testator, endeavoured to avoid a considerable part of the amount, by saying that they were smuggling transactions, on which the courts would not allow any action to be maintained. The answer was, all that died with the smuggler; he could not have himself sued, but his executor shall not set up that as a defence against his creditors and legatees." (y)

Afterwards, John Brown himself filed a bill in chancery to have the benefit of the trust; but Lord Manners said, "The bill in this case is brought by John Brown himself, and I am quite clear that he cannot recover; and, as he has endeavoured to make this court ancillary to his plan for evading the provisions of a positive law, I must dismiss the bill with costs." (z)

Where, however, the trust, though unlawful, and therefore inoperative, is not tainted with fraud, the court may grant relief even to the settlor. Thus, A. settled personal property upon B. and C., and such other illegitimate children of D. as should be thereafter born, if they respectively attained the age of 25. B. and C. died under 25, but other children were born, and then A. filed a bill for the retransfer of the fund, and there being no fraud on the part of the settlor it was so directed. (a)

[\*140]

## \*CHAPTER VII.

## IN WHAT LANGUAGE A TRUST MAY BE DECLARED.

A PERSON may declare a trust either directly or indirectly: the former, by creating a trust *eo nomine* in the form and terms of a trust; the latter, without affecting to create a trust in words, by evincing an inten-

(y) Joy v. Campbell, 1 Sch. & Lef. 328, see 335, 339.

(z) Otley v. Browne, 1 B. & B. 360.

(a) Wilkinson v. Wilkinson, 1 Y. & C. Ch. Ca. 657.

tion, which the court will effectuate through the medium of an implied trust.(1)

## SECTION I.

### OF DIRECT OR EXPRESS DECLARATIONS OF TRUST.

In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates: an equitable fee may be created without the \*word "heirs," and an equitable entail [\*141] without the words "heirs of the body;"(b) provided words [141] which though not technical are yet popularly equivalent be used, or the intention otherwise sufficiently appear upon the face of the instrument.

And if an estate be devised unto and to the use of A. and *his heirs*, upon trust for B., without any words of limitation, B. takes the equitable fee; for the whole estate passed to the trustees, and whatever interest they took was given in trust for B.(c) But if an estate be conveyed by *deed* unto and to the use of a trustee, and *his heirs*, in trust for the settlor for life, and after her death upon trust for her children, simply without the word *heirs*, the children by analogy to legal limitations take an estate for life only.(d)

But though technical terms be not absolutely necessary, yet no rule is better established than that where technical terms are employed, they shall be taken in their legal and technical sense.(e)

Lord Hardwicke indeed said that, in limitations of a trust either of real or personal estate to be determined in that court, the construction ought to be the same as in limitations of the legal estate, with this distinction,

(b) See Shep. Touch. by Preston, 106.

(c) *More v. Cleghorn*, 10 Beav. 423: affirmed on appeal, 12 Juris. 591; *Knight v. Selby*, 3 Man. & Gran. 92; *Doe v. Cafe*, 7 Exch. Rep. 675.

(d) *Holliday v. Overton*, 14 Beav. 467, 15 Beav. 480.

(e) *Wright v. Pearson*, 1 Ed. 125, per Lord Henley; *Austen v. Taylor*, 1 Ed. 367, per *eundem*; *Syngre v. Hales*, 2 B. & B. 507, per Lord Manners; *Jervoise v. Duke of Northumberland*, 1 J. & W. 571, per Lord Eldon; *Lord Glenorchy v. Bosville*, Cas. t. Talb. 19, per Lord Talbot; *Bale v. Coleman*, 8 Vin. 268, per Lord Harcourt.

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(1) The terms *Implied Trusts*, *Trusts by Operation of Law*, and *Constructive Trusts*, appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate, will be observed:—1. An *implied* trust is one declared by a party not directly, but only by implication; as where a testator devises an estate to A. and his heirs, *not doubting* that he will thereout pay an annuity of 20*l.* per annum to B. for his life, in which case A. is a trustee for B. to the extent of the annuity. 2. *Trusts by operation of law* are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity; as where an estate is devised to A. and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest results to the testator's heir. 3. *Constructive trusts* (which form one branch of trusts by operation of law, while resulting trusts constitute the other) are such trusts as the court elicits by a construction put upon certain *acts* of parties, as where a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease.



*unless the intention of the testator or author of the trust plainly appeared to the contrary.*(*f*) But this position has since been repeatedly and expressly overruled. "I am of opinion," said Lord Henley, "that a limitation in a trust, perfected and declared by a testator, must have the same construction as the devise of a legal estate executed; and to hold the contrary would make property very precarious and uncertain; the testator would mean one thing in this court, and the direct contrary on the other side of the hall."(*g*) And on another occasion he observed, [\*142] "I am very clear that this \*court cannot make a different construction in the limitation of a trust, than courts of law could make on a limitation in a will, for in *both* cases the intention shall take place."(*h*)

As the rule in Shelley's case is not one of construction, that is, of intention, but of law, and was established to remedy certain mischiefs, which, if heirs were allowed to take as purchasers, would be introduced into feudal tenures; it may be thought, that, as trusts are wholly independent of tenure, they ought not to be affected by the operation of the rule; and the cases of Withers v. Allgood, (*i*) and Bagshaw v. Spencer, (*k*) seem to lend some countenance to the doctrine. But not to mention that Lord Hardwicke himself appears in Garth v. Baldwin (*l*) to have doubted the position advanced by him in Bagshaw v. Spencer, other subsequent authorities have now perfectly established the principle, that although the rule may not be equally *applicable* to trusts, it shall be equally *applied*.(*m*)

In a recent case, (*n*) a testator by his will devised an estate to his eldest son, George Henry Arnold, for 99 years if he so long lived, and subject to the term to Henry Hoare and Thomas Gilbert, and their heirs, during the life of the termor to preserve contingent remainders, and after the determination of the said estates to the *heirs of the body* of the said G. H. Arnold. Had the testator left the devise in this form, it is clear that the heirs of the body of G. H. Arnold would have taken as purchasers. The testator afterwards, by a codicil, confirmed the will, but devised all his estates to the use of H. J. Arnold, H. Peters, H. Hoare, and E. Morrison, and their heirs, upon trust to convey such parts thereof as they should think fit for securing a jointure of 1200*l.* to his wife, the said H. J. Arnold. Thus, by the codicil, the *legal fee simple* became vested in [\*143] the four trustees, and the limitations of the will \*became *equitable*, and it was contended that as the equitable estate for the life of G. H. Arnold resulted to him as the heir-at-law, it united with the limitation to the heirs of his body by the operation of the rule in Shelley's case, and that G. H. Arnold consequently became tenant in

(*f*) Garth v. Baldwin, 2 Ves. 655.

(*g*) Wright v. Pearson, 1 Ed. 125.

(*h*) Austen v. Taylor, 1 Ed. 367; and see Philips v. Brydges, 3 Ves. jun. 125; Jervoise v. Duke of Northumberland, 1 J. & W. 571.

(*i*) Cited in Bagshaw v. Spencer, 1 Ves. 150; 1 Coll. Jur. 403.

(*k*) 1 Ves. 142; 1 Coll. Jur. 378.

(*l*) 2 Ves. 646.

(*m*) Wright v. Pearson, 1 Ed. 128; Brydges v. Brydges, 3 Ves. 120; Jones v. Morgan, 1 B. C. C. 206; Webb v. Earl of Shaftesbury, 3 M. & K. 599; Roberts v. Dixwell, 1 Atk. 610, West, 536; Britton v. Twining, 3 Mer. 176.

(*n*) Coape v. Arnold, 2 Sm. & Gif. 311.



tail. It was decided, however, that under the circumstances the heirs of the body of G. H. Arnold took as *purchasers*. The cases of *Adams v. Savage*, 2 Salk. 679; and *Rawley v. Holland*, 22 Vin. Ab. 189, Pl. 11, (in which it was held that where a *term of years* is expressly limited to the grantor, with a use after his death to the heirs of his body, no resulting use to the grantor for his life can be implied, as it would be repugnant to the term expressly limited to him, and in fact destroy it,) were adverted to in the judgment of the vice-chancellor with seeming approbation; though the decision was not rested upon them. The authority of these cases, however, has been much disputed, the question being one, not of implied intention but of legal operation.<sup>(o)</sup> And with reference to the decision itself it may be observed that the equitable freehold could not during the life of G. H. Arnold be in suspense, and could be vested in no one but G. H. Arnold, the heir-at-law; and if so, the life-estate to G. H. Arnold, and the limitation to the heirs of his body, ought, according to the general acceptance of the rule in *Shelley's case*, as one not of intention but of legal operation, to have united and formed an estate tail. The true ground to which the decision should be referred appears to be this: the codicil was made for a particular purpose, viz., for securing the jointure, and as it confirmed the will in all other respects, the testator's intention evidently was, that after securing the jointure, the trustees of the codicil should convey the estate to the uses declared by the will. It was, therefore, an executory trust, and the question was not whether in mere equitable estates a life interest resulting to the heir-at-law would unite with a limitation to the heirs of his body, but whether according to the true construction of the will the settlement was not meant to be executed in such a form as to make the heirs of the body purchasers. In this light the question was one of \*intention, [\*144] and not of legal operation. The case was subsequently affirmed on appeal by Lord Cranworth, and it is conceived substantially, though not in terms, upon the ground above indicated as the true principle.<sup>(p)</sup>

We have said, that, if technical words be employed, they must be taken in their legal and technical sense; but as to this, a distinction must be drawn between trusts *executed*, and trusts that are only *executory*: for to trusts executed the position is strictly applicable, but in the case of trusts that are executory it must be received with considerable allowance.

A trust *executed* is where the limitations of the equitable interest are complete and final; in the *executory* trust, the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period.

The distinction we are considering was very early established, and was recognised successively by Lord Cowper,<sup>(q)</sup> Lord King,<sup>(r)</sup> Lord Talbot,<sup>(s)</sup> and by no one more frequently than by Lord Hardwicke himself;<sup>(t)</sup> yet

(o) See note by Butler to *Fearne's Contingent Remainders*, p. 41.

(p) *Coape v. Arnold*, 4 De Gex, Mac. & Gord. 574.

(q) *Bale v. Coleman*, 8 Vin. 267; *Earl of Stamford v. Sir John Hobart*, 3 B. P. C. 33.

(r) *Papillon v. Voice*, 2 P. W. 471.

(s) *Lord Glenorchy v. Bosville*, Cas. t. Talbot, 3.

(t) *Gower v. Grosvenor*, Barnard, 62; *Roberts v. Dixwell*, 1 Atk. 607; *Basker-*

in *Bagshaw v. Spencer*<sup>(u)</sup> Lord Hardwicke almost denied that any such distinction existed. "As to the difference," he said, "between trusts executed and trusts executory, no one is more unwilling than I am *quieta movere*; but this distinction never has been established by any direct resolution, though said *arguendo*, and was it to be examined to the bottom, it might sound strange how it should be established. All trusts in notion of law are executory,<sup>(v)</sup> and to be carried into execution here by *subpoena*. The first essential part of a trust is, that the trustee is to convey the estate some time or other, whether the testator has directed it or not, which every testator is presumed to know; \*therefore a doubt [\*145] may be reasonably made how there can be a difference, whether the testator has directed a conveyance or not." But in a subsequent case<sup>(w)</sup> his lordship felt himself called upon to offer some explanation. "He did not mean," he said, "in *Bagshaw v. Spencer*, that no weight was to be laid on the distinction, but that, if it had come recently before him, he should then have thought there was little weight in it, although he should have had that deference for his predecessors, as not to lay it out of the case, not intending to say that all which his predecessors did was wrong founded, which he desired might be remembered."

But whatever doubts may formerly have existed upon the subject, they have long since been dispelled by the authority of succeeding judges. "The words executory trust," said Lord Northington, "seem to me to have no fixed signification. Lord King describes an executory trust to be, where the party must come to this court to have the benefit of the will. But that is the case of every trust; and I am very clear, that this court cannot make a different construction on the limitation of a trust, than courts of law would make on a limitation in a will, for in both cases the intention shall take place. The true criterion is this: Wherever the assistance of this court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the court should model the limitations; but where the trusts and limitations are already expressly declared, the court has no authority to interfere, and make them different from what they would be at law."<sup>(x)</sup> And Lord Eldon observed, "Where there is an executory trust, that is, where the testator has directed something to be done, and has not himself completed the devise, the court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that intention, the court inquires what it is itself to do, [\*146] \*and it will mould what remains to be done, so as to carry that intention into execution: I repeat, where there is a trust *executory*; be-

ville v. Baskerville, 2 Atk. 279; Marryatt v. Townly, 1 Ves. 102; Read v. Snell, 2 Atk. 648; Woodhouse v. Hoskins, 3 Atk. 24.

(u) 1 Ves. 152; and see Hopkins v. Hopkins, 1 Atk. 594.

(v) See Lord Eldon's observations, Jervoise v. Duke of Northumberland, 1 J. & W. 570; and Lord Henley's, Austen v. Taylor, 1 Ed. 366.

(w) Exel v. Wallace, 2 Ves. 323. And Lord Henley once said, he believed Lord Hardwicke had at last renounced his opinion, Barnard v. Proby, 2 Cox, 8.

(x) Austen v. Taylor, 1 Ed. 366, 368; and see Stanley v. Lennard, 1 Ed. 95; Wright v. Pearson, 1 Ed. 125.

\* cause one is a good deal confused by the inaccuracy of the expressions 'trust executory,' and 'trust executed.' The latter, no doubt, in one sense of the word is a trust executory, that is, if A. B. is a trustee for C. D., or for C. D. and others, that in this sense is executory, that C. D., or C. D. and the other persons, may call upon A. B. to make a conveyance, and execute the trust. But these are cases where the testator has clearly decided what the trust is to be; and, as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same, whether the estate is equitable or legal.' (y)

We proceed to the inquiry to what extent in executory trusts a latitude of construction is admissible: and to draw the line correctly, we must again distinguish between executory trusts in *marriage articles*, where the court has a clue to the intention from the very nature of the contract, and executory trusts in *wills*, where the court knows nothing of the object in view *a priori*, but in collecting the intention must be guided solely by the language of the instrument.

This distinction was at first but very imperfectly understood. Because executory trusts under wills admitted a degree of latitude, it was held by some, they were to be treated precisely on the same footing as executory trusts in marriage articles; while, because trusts under wills did not admit an equal latitude of construction, it was held by others they were not to be distinguished from trusts executed. (z) Even Lord Eldon once observed, "There is no difference in the execution of an executory trust created by will, and of a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity." (a) But Lord Mannors said he could not assent to this doctrine; (b) and Lord Eldon some time after took an opportunity of correcting himself. (c)

\*The distinction we are considering has been put in a very clear light by Sir W. Grant. "I know of no difference," he [\*147] said, "between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. Where the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement be to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention. But if a will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; the subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given. But if it is clearly to be ascertained from any thing

(y) *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; and see *Coape v. Arnold*, 4 De Gex M. & G. 585.

(z) See *Bale v. Coleman*, 8 Vin. 267.

(a) *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227, 230; and see *Turner v. Sargent*, 17 Beav. 519.

(b) *Strafford v. Powell*, 1 B. & B. 25; *Synge v. Hales*, 2 B. & B. 508.

(c) *Jervoise v. Duke of Northumberland*, 1 J. & W. 574.



in the will, that the testator did not mean to use the expressions which he has employed, in their strict proper and technical sense, the court in decreeing such settlement as he has directed, will depart from his words in order to execute his intention."(*b*)

To apply the foregoing distinction to the cases that have occurred: if in *marriage articles* the real estate of the husband or wife be so limited to the *heirs of the body*, or the *issue*(*c*) of the contracting parties, or either of them, that heirs of the body, or issue, if taken in their ordinary legal sense, would enable one or other of the parents to defeat the provision intended for the children, these words will then be construed in equity to mean first and other sons; and the settlement will be made upon them successively in tail, as purchasers.(*d*)

[\*148] \*If the settlement has been already made, then, provided the execution of it was after the marriage, it will be rectified by the articles;(*e*) but if the execution of it was prior to the marriage, the court will presume the parties to have entered into a different agreement,(*f*) unless the settlement expressly state itself to be made in pursuance of the articles, when that presumption will be rebutted, and the settlement will be rectified,(*g*) or unless it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from mistake.(*h*)

Under the law as it stood prior to the Fines and Recoveries Act(*i*) a strict settlement was not decreed, where the property of the *husband* was limited to the heirs of the body of the *wife*; for this created an entail which neither husband nor wife could bar without the concurrence of the other, and the intent might have been, that the husband and the wife *jointly* should have the power of destroying the entail;(*j*) but, it is conceived, that as to articles executed subsequently to the act referred to, the case would be otherwise.(*k*)

Nor will the court read heirs of the body as first and other sons, where such a construction is negatived by any thing in the articles themselves:

(*b*) *Blackburn v. Stables*, 2 V. & B. 369; and see *Maguire v. Scully*, 2 Hog. 113; *Rockford v. Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 18; 4 Ir. Eq. Rep. 375.

(*c*) *Dod v. Dod*, Amb. 274.

(*d*) *Handick v. Wilkes*, 1 Eq. Ca. Ab. 393; *Trevor v. Trevor*, 1 P. W. 622; *Jones v. Langton*, 1 Eq. Ca. Ab. 392; *Cusack v. Cusack*, 5 B. P. C. 116; *Griffith v. Buckle*, 2 Vern. 13; *Stonor v. Curwen*, 5 Sim. 269, per Sir L. Shadwell; *Davies v. Davies*, 4 Beav. 54; *Rochford v. Fitzmaurice*, *ubi supra*.

(*e*) *Streatfield v. Streatfield*, Cas. t. Talb. 176; *Warrick v. Warrick*, 3 Atk. 293, per Lord Hardwicke; *Legg v. Goldwire*, Cas. t. Talb. 20, per Lord Talbot; *Burton v. Hastings*, Gilb. Eq. Rep. 113; S. C. 1 Eq. Ca. Ab. 393, overruled.

(*f*) *Legg v. Goldwire*, Cas. t. Talbot, 20; and see *Warrick v. Warrick*, 3 Atk. 291.

(*g*) *Honor v. Honor*, 1 P. W. 123; *Roberts v. Kingsley*, 1 Ves. 238; *West v. Errissey*, 2 P. W. 349; but not it seems against a purchaser, *Warrick v. Warrick*, 2 Atk. 291.

(*h*) *Bold v. Hutchinson*, 5 De Gex, M. & G. 568.

(*i*) See 3 & 4 W. 4. c. 74, s. 16, 17.

(*j*) *Howel v. Howel*, 2 Ves. 358; *Whately v. Kemp*, cited *ib.*; *Honor v. Honor*, 1 P. W. 123; *Green v. Ekins*, 2 Atk. 477, per Lord Hardwicke; *Highway v. Banner*, 1 B. C. C. 587, per Sir L. Kenyon.

(*k*) *Rochford v. Fitzmaurice*, 2 Drur. & War. 19.



as if one part of an estate be limited to the husband for life, the remainder to the wife for life, remainder to the first and other sons in tail, and another part be given to the husband for life, remainder to the heirs male of his body; for, as it appears the parties knew how a strict settlement should be framed, the limitation of part of the estate in a different mode could only have proceeded from a different intention. (l) [\*149]

It was formerly argued, that daughters in marriage articles were not entitled to the same consideration as sons, on the ground that they do not, like sons, continue the name of the family, and are generally provided for, not by the estate itself, but by portions out of the estate; but it is now clearly settled, that, as they are purchasers under the marriage, and are entitled to some provision, the court will in their favour construe heirs female to mean daughters; (m) and, except the articles themselves make an express provision for them by way of portion, &c., (n) will hold daughters, as well as sons, to be included under the general term of heirs of the body, (o) or issue. (p) And the settlement will be executed on the daughters, in default of sons, as tenants in common in tail general, with cross remainders between them. (q)

If chattels be article'd to be settled on the parents for life, and then on the *heirs of the body* of either, or both, it seems the chattels will not vest absolutely in the parents, but in the eldest son as the heir, though taking by purchase, and if there be no son, in the daughters as co-heiresses; (r) and for the son or daughters to take, it is not necessary that they should survive the parents and become the actual heir, (s) unless there be words in the articles to give it to the heirs of the body living at the death of the surviving parent, as "if the parent die without *leaving* heirs of the body." (t)

Again, if in *marriage articles* a party covenant to settle *goods and* \**chattels* upon the same trusts, and for the same intents and purposes, as the freeholds are settled, the court will not apply the [\*150] limitations to the personal estate literally, the effect of which would be to vest the absolute interest in remainder in the first son on his birth, but will insert a proviso that will have the effect at least to a certain extent, of making the personal estate follow the course of the real.

Sir Joseph Jekyll said, the practice of conveyances was to insert a limitation over on "dying under 21;" (u) but Lord Hardwicke conceived

(l) *Howel v. Howel*, 2 Ves. 359; and see *Powell v. Price*, 2 P. W. 535; *Chambers v. Chambers*, Fitzgib. Rep. 127; S. C. 2 Eq. Ca. Ab. 35; *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 174.

(m) *West v. Errissey*, 2 P. W. 349.

(n) *Powel v. Price*, 2 P. W. 535; and see Mr. Fearne's observations. Conting. Rem. 103.

(o) *Burton v. Hastings*, Gilb. Eq. Rep. 113; S. C. 1 Eq. Ca. Ab. 393, per Lord Cowper.

(p) *Hart v. Middlehurst*, 3 Atk. 371; and see *Maguire v. Scully*, 2 Hog. 113; S. C. 1 Beat. 370.

(q) See *Marryat v. Townly*, 1 Ves. 105.

(r) *Hodgeson v. Bussey*, 2 Atk. 89; S. C. Barn. 195. See *Bartlett v. Green*, 13 Sim. 218.

(s) *Theebridge v. Kilburne*, 2 Ves. 233.

(t) *Read v. Snell*, 2 Atk. 642.

(u) *Stanley v. Leigh*, 2 P. W. 690.

the common limitation over to be on "dying under 21 without issue."<sup>(v)</sup> In *The Duke of Newcastle v. The Countess of Lincoln*,<sup>(w)</sup> the chattels were articled to be settled to the same uses as the realty, viz. to A. for life, remainder to the first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, remainders over. A. died, having had a son who lived only nine months. Lord Loughborough said, "I perfectly agree that in wills you are not to do for the testator all that can be done by law; you are to do for the testator no more than what he has intended to be done, and according to the common acceptation of the words. But I put it to you whether in the nature of things there is not a radical and essential difference between marriage-settlements and wills. The parties contract upon a settlement for all the remainders; they are not voluntary, but within the consideration; the issue are all purchasers. Suppose then a settlement to be made of freehold estate, and as to the leasehold estate there is only this article, that the settlement shall be analogous to that of the freehold: do I execute it, and make a like settlement, by giving an interest which cuts off all the issue? Suppose a bill was brought to carry the settlement into effect after a child had lived a single day, should I permit the father to say it was his property? It is utterly impossible to make the identical settlement of the leasehold estate as of the freehold; but if I am to make it in analogy to the settlement of the freehold, shall [\*151] I not carry it on to all the \*near events, or shall they fail because I cannot embrace all the remote events?"<sup>(x)</sup> My opinion decidedly is, that, in the case of marriage articles, the settlement should be such that no child born and not attaining 21 should, by his birth, attain a vested interest to transmit to his representatives, and thereby defeat the ulterior objects of the articles; which are not decidedly in favour of one son, but equally extended to every son; and that I take to be the settled rule and established practice."<sup>(y)</sup> His lordship therefore held that the leaseholds had not vested absolutely in the deceased son of A., and ordered a proviso to be inserted in the settlement, that they should not vest absolutely in any son of B, who should not attain 21, or *die under that age leaving issue male*. From this decision an appeal was carried to the house of the lords;<sup>(z)</sup> but, before the cause could be heard, a son of B. having attained 21, the decree was, that the son of B. had become absolutely entitled. Thus the house of lords decided that the absolute interest had not vested in the first tenant in tail on his birth; but what proviso ought to have been inserted, whether a limitation over "on dying under 21," or "on dying under 21 without issue male," the house in event was not called upon to determine. The order of the house of lords in this case was made with the approbation of Lord Ellenborough and Lord Erskine, who took part in the debate: and also of Lord Thurlow.<sup>(a)</sup> But Lord Eldon denied before the house that there was any distinction between articles and wills, and therefore rely-

(v) *Gower v. Grosvenor*, Barn. 63; S. C. 5 Mad. 348.

(w) 3 Ves. 387.

(y) *Ib.* 397.

(a) 12 Ves. 237.

(x) 3 Ves. 394.

(z) 12 Ves. 218.

ing upon *Foley v. Burnell*, and *Vaughan v. Burslem*, two cases upon wills decided by Lord Thurlow, he said had the cause come originally before him, he should have decreed the absolute interest to have vested in the eldest child upon birth; that, notwithstanding several *dicta* in favour of a limitation over, no case could be found in which articles had been actually so executed; that assignments had been made of leasehold property under the notion that a son when born would take an absolute interest; and, were the house to sanction the decree of Lord Loughborough, it would shake a \*very large property.<sup>(b)</sup> [\*152] However, his lordship conceived that Lord Hardwicke's doctrine was originally the best, and therefore, recollecting the opinion of that great judge, the opinion of Sir Joseph Jekyll, and the decision of the court below, and knowing the concurrent opinions of Lord Ellenborough and Lord Erskine, and also the opinion of Lord Thurlow (whose present sentiments, however, he could not reconcile with the cases of *Foley v. Burnell*, and *Vaughan v. Burslem*, formerly decided by his lordship),<sup>(c)</sup> he bowed to all these authorities; and, though he was in some degree dissatisfied with the determination, he nevertheless would not move an amendment.<sup>(d)</sup>

It must be observed, that a settlement of the personalty cannot be made exactly analogous to a settlement of the realty, whether the limitation adopted be "on dying under 21," or "on dying under 21 without issue." For if the former be supposed, then, the object of the articles being to knit the leasehold estate to the freehold, if the son die under age leaving issue who will succeed to the freehold, the two estates will go in different directions. But, if the limitation over be "on dying under 21 without issue," then, if the son die leaving issue, the grandchild may die under age and unmarried, when the leaseholds will go to the son's personal representative, while the freeholds will devolve on the second son.<sup>(e)</sup> The case of the Countess of Lincoln v. The Duke of Newcastle appears to be the only authority upon the subject, and that has sanctioned the insertion of the proviso, "on dying under 21 without issue."

Again, in *marriage articles*, as *joint-tenancy* is an inconvenient mode of settlement on the children of the marriage (for, during their minorities no use can be made of their portions, as the joint-tenancy cannot be severed),<sup>(f)</sup> the court will rectify the articles by the presumed intent of the contract, and will permit \*words that would be construed a joint-tenancy at law, to create in equity a tenancy in common.<sup>(g)</sup> [\*153]

In other cases the court has varied the literal construction by supplying words, as where the agreement was to lay out 200*l.* in the purchase of 30*l.* a-year, to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee,

(b) 12 Ves. 236, 237.

(c) Lord Eldon could not reconcile Lord Thurlow's opinion with these cases, because his lordship refused to admit the distinction between articles and wills.

(d) The Countess of Lincoln v. The Duke of Newcastle, 12 Ves. 237.

(e) Countess of Lincoln v. Duke of Newcastle, 12 Ves. 228, 229.

(f) Taggart v. Taggart, 1 Sch. & Lef. 88, per Lord Redesdale; and see *Rigden v. Vallier*, 3 Atk. 734, and *Marryat v. Townley*, 1 Ves. 103.

(g) Taggart v. Taggart, 1 Sch. & Lef. 84.



and, until the settlement should be made, the 200*l.* was to be applied to the separate use of the wife; and, if no settlement were executed during their joint lives, the 200*l.* was to go to the wife, if living; but, if she died before her husband, then to her brother and sister; and the wife died before her husband, but left issue; it was held the brother and sister had no claim to the fund, the words "if she died before her husband" intending plainly if she so died "without leaving issue."<sup>(h)</sup>

Next as to *wills*; and here, as no presumption arises *à priori*, that "*heirs of the body*," were intended as words of purchase, if the executory trust of real estate be to "A. and the heirs of his body,"<sup>(i)</sup> or to "A. and the heirs of his body and their heirs,"<sup>(j)</sup> or to A. for life and after his decease to the heirs of his body,"<sup>(k)</sup> the legal and ordinary construction will be adopted, and A. will be made tenant in tail. So where the estate was directed to be settled on the testator's "daughter and her children, and, if she died without issue," the remainder over, the court said, that, by an immediate devise of the land in the words of the will, the daughter would have been tenant in tail, and in the case of a voluntary devise the court must take it as they found it, though upon the like words in marriage articles it might have been otherwise.<sup>(l)</sup>

[\*154] And where a testator directed lands to be settled on his "nephew \*for life, remainder to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively one after another as they should be in seniority of age and priority of birth, every elder and the heirs male of his body to be preferred before every younger," Lord Cowper said, the nephew took by a voluntary devise, and, although executory, it was to be taken in the very words of the will as a devise, and was not to be supported or carried further in a court of equity than the same words would operate at law in a voluntary conveyance.<sup>(m)</sup> The decision apparently went upon the ground that the words "and the heirs male of the body of every such heir male, severally and successively," &c., were all included in the notion of an entail, and *expressio eorum, quæ tacite insunt, nihil operatur*.

And in a more recent case, where the executory trust was for A. generally, with a direction, that the trustees should not give up their trust till "a proper entail was made to the heir male by him," it was determined that A. took an estate tail.<sup>(n)</sup> But, in another case, where the devise was extremely similar, viz., to A. with a direction that the estate should be entailed on his heir male, Lord Eldon, on the assumption that it was an executory trust, and not a legal devise, considered

(h) *Kentish v. Newman*, 1 P. W. 234; and see *Targus v. Puget*, 2 Ves. 194; *Master v. De Croismar*, 11 Beav. 184; *Martin v. Martin*, 2 R. & M. 507.

(i) *Harrison v. Naylor*, 2 Cox, 247; *Bagshaw v. Spencer*, 1 Ves. 151, per Lord Hardwicke; *Marshall v. Bousfield*, 2 Mad. 166.

(j) *Marryat v. Townley*, 1 Ves. 104, per Lord Hardwicke.

(k) *Blackburn v. Stables*, 2 V. & B. 370, per Sir W. Grant; *Seale v. Seale*, 1 P. W. 290; *Meure v. Meure*, 2 Atk. 266, per Sir J. Jekyll.

(l) *Sweetapple v. Bindon*, 2 Vern. 536.

(m) *Legatt v. Sewell*, 2 Vern. 551.

(n) *Blackburn v. Stables*, 2 V. & B. 367; recognized in *Marshall v. Bousfield*, 2 Mad. 166; and see *Dodson v. Hay*, 3 B. C. C. 405.



the entail so doubtful that he would not compel a purchaser to accept a title under it.<sup>(o)</sup>

But "heirs of the body" will in the case of executory trusts in wills as well as in articles be read first and other sons, provided the testator expressly manifest such an intention, as if he direct a settlement on A. for life "without impeachment of waste,"<sup>(p)</sup> or with a limitation to preserve contingent remainders,<sup>(q)</sup> or if he desire that "care be taken in the settlement that the tenant for life shall not bar the entail;"<sup>(r)</sup> and \*in one case "heirs of the body" was so construed, where a testator had devised to the separate use of a *feme covert* for life, [\*155] so as she alone should receive the rent, and the husband should not intermeddle therewith, and after her decease in trust for the heirs of her body; for, from the limitation to the heirs immediately after the wife's decease, coupled with the direction that the husband should not intermeddle with the estate, the court collected the intention of excluding the husband's curtesy, an object which could only be accomplished by giving to "heirs of the body" the construction of words of purchase.<sup>(s)</sup>

And a direction to settle on A. and the heirs of his body "as counsel shall advise,"<sup>(t)</sup> or "as the executors shall think fit,"<sup>(u)</sup> is strong collateral evidence, that something more was intended than a simple estate tail.

And Sir L. Shadwell thought that if a testator directed an estate to be settled on a *feme covert* for life, for her separate use, and at her death on her issue, the feme would not be tenant in tail, for the separate use requiring the life estate to be vested in trustees, the equitable estate in the feme could not unite with the legal estate in the issue, and therefore the rule in Shelley's case would not apply.<sup>(v)</sup> And where the trust was to settle on A. for life, *without impeachment of waste*, with remainder to his issue in *strict settlement*, the court directed the estates to be settled on A. for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to the daughters, as tenants in common in tail male, with cross remainders in tail male, and the proper limitations to trustees were inserted to preserve contingent remainders.<sup>(w)</sup>

We may here remark that "*heirs of the body*" and "*issue*" are far from being synonymous expressions. The former are properly words of limitation, whereas the latter term is in its \*primary sense a word of purchase. In several cases the court appears to have [\*156] ordered a strict settlement from the use of the term "*issue*," where,

(o) *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; and see *Woolmore v. Burrows*, 1 Sim. 512.

(p) *Glenorchy v. Bosville*, Cas. t. Talbot, 3.

(q) *Papillon v. Voice*, 2 P. W. 471; and see *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 158.

(r) *Leonard v. Lord Sussex*, 2 Vern. 526.

(s) *Roberts v. Dixwell*, 1 Atk. 607; S. C. West's Rep. t. Lord Hardwicke, 536.

(t) *White v. Carter*, 2 Ed. 366; reheard, Amb. 670.

(u) *Read v. Snell*, 2 Atk. 642.

(v) See *Stonor v. Curwen*, 5 Sim. 268; *Earl of Verulam v. Bathurst*, 13 Sim. 386.

(w) *Trevor v. Trevor*, 13 Sim. 108; affirmed on this point, 1 H. of L. Ca. 239; and see *Coape v. Arnold*, 2 Sm. & Gif. 311; 4 De Gex, Mac. & Gord. 574.

had the expression been "heirs of the body," the estate would probably have been construed an estate tail.(x)

Of course, daughters as well as sons will be included under "heirs of the body,"(y) or "issue;"(z) for they equally answer the description, and are equally objects of bounty; and the settlement will be made upon them in default of sons, as tenants in common in tail, with cross remainders between (or amongst) them.(a)

In executing a strict settlement the court, before the 8 & 9 Vict. c. 106, always took care that proper limitations to *trustees* should be inserted after the life estates for the preservation of contingent remainders;(b) and, although by the effect of the act last referred to, contingent remainders are no longer destructible by the forfeiture, merger, or surrender of the previous life estate, the limitations to trustees to preserve ought still, it is conceived, to be interposed, as well with the view of affording a convenient means of protecting the interests of contingent remaindermen in the event of wilful waste or destruction being committed by the tenant for life before any remainderman comes *in esse*;(c) as with the view of preserving the protectorship, under the Fines and Recoveries Act, in the event of the destruction of the previous life estate.

In a case occurring before the Fines and Recoveries Act (3 & 4 W. 4, c. 74,) where the testator had shown an anxious \*wish that [\*157] the power of defeating the entail should be as much restricted as possible, the court, instead of giving the first freehold to the tenant for life, which would have enabled him to make a tenant to the præcipe, ordered the freehold during his life to be vested in *trustees* in trust for him.(d)

However in a case occurring after the Fines and Recoveries Act where an estate was vested in a trustee upon trust to execute a strict settlement on Lady Le Despencer and her family, and the master, to whom a reference was directed, approved of a settlement on Lady Le Despencer for life, &c., but refused to appoint a *protector* under the 32nd section of the act, the court held that, though in certain cases it might be advisable to appoint a protector, there should be special circumstances to warrant it. That the trustee was the "settlor" within the meaning of the 32nd section, and had the power to appoint a protector; and as he did not desire it, the court, unless there were good reasons to the contrary, would not control his discretion; that a protector under the act was an irres-

(x) Ashton v. Ashton, cited in Bagshaw v. Spencer, 1 Coll. Jur. 402; Meure v. Meure, 2 Atk. 265; and see Horne v. Barton, Coop. 25; Dodson v. Hay, 3 B. C. C. 405; Stonor v. Curwen, 5 Sim. 264; Crozier v. Crozier, 2 Conn. & Laws. 311; and see Rochford v. Fitzmaurice, 1 Conn. & Laws. 158; Bastard v. Proby, 2 Cox, 6.

(y) Bastard v. Proby, 2 Cox, 6.

(z) Meure v. Meure, 2 Atk. 265; Ashton v. Ashton, cited in Bagshaw v. Spencer, 1 Coll. Jur. 402; Trevor v. Trevor, 13 Sim. 108.

(a) Meure v. Meure, Ashton v. Ashton, Bastard v. Proby, and Trevor v. Trevor, ubi supra; Marryat v. Townley, 1 Ves. sen. 105.

(b) Harrison v. Naylor, 2 Cox, 247; S. C. 3 B. C. C. 108; Woolmore v. Burrows, 1 Sim. 512; Baskerville v. Baskerville, 2 Atk. 279; Trevor v. Trevor, 13 Sim. 108; Stamford v. Hobart, 3 B. P. C. 31; and see Hopkins v. Hopkins, 1 Atk. 593.

(c) Garth v. Cotton, 1 Ves. 554.

(d) Woolmore v. Burrows, 1 Sim. 512, see 527.

possible person, and was at liberty to act from caprice, ill-will, or any bad motive, and might even take a bribe for consenting to bar the entail, without being amenable to the court, and therefore, on the whole, it was better not to clog the settlement with a protector.<sup>(e)</sup>

Where *gavelkind* lands are the subject of the executory trust, the circumstance of the custom will not prevent the settlement upon the first and other sons successively, for the heirs take not by custom, but under the construction of a court of equity, which must be guided by the rules of the common law.<sup>(f)</sup>

In the foregoing cases the court has rectified the will on the ground of the limitations having been imperfectly declared; but if a testator direct a settlement, and be *his own conveyancer*, that is, declare the limitations himself, intending them to be final, the hands of the court are bound, and the words must be taken in their natural sense.<sup>(g)</sup> Thus a testator \*devised to A. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remain- [\*158] der to the heirs of the body of A., remainders over, and then directed the residue of his personal estate to be laid out in a purchase of lands, and declared that the lands when purchased "should remain and continue to, for, and upon such and the like estate or estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before limited, and declared of and concerning his lands and premises thereinbefore devised, or as near thereto as might be, and the deaths of parties would admit." Lord Northington observed, "It is said, that if the limitations had been repeated, it would have been the same with *Papillon v. Voice*, (2 P. W. 471;) but I think not; because the testator refers no settlement to his trustees to complete, but declares his own uses and trusts, which being declared, I know no instance where the court has proceeded so far as to alter or change them."<sup>(h)</sup> However, the decision to which his lordship came seems not to have met with the entire approbation of Lord Eldon.<sup>(i)</sup>

In the cases relating to executory trusts of *chattels* in wills, the bequest, instead of being direct, has generally been by way of reference to a previous strict settlement of realty.

The law upon this subject was for a long time in a very fluctuating state, as will appear from a review of the cases.

In *Gower v. Grosvenor*,<sup>(k)</sup> a testator devised his real estate to Sir Thomas Grosvenor for life, with remainder to his first and other sons in tail, and in default of issue to Robert Grosvenor for life, with remainder to his first and other sons in tail, and the testator then proceeded. "My will and mind is, that my library of books, &c., shall go as *heir-looms* as far as they can by law, to the heirs male of my family successively,

(e) *Bankes v. Le Despencer*, 11 Sim. 508.

(f) *Roberts v. Dixwell*, 1 Atk. 607.

(g) *Franks v. Price*, 3 Beav. 182; and see *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 173; 2 Drur. & War. 21.

(h) *Austen v. Taylor*, 1 Ed. 361.

(i) See *Green v. Stephens*, 17 Ves. 76; *Jervoise v. Duke of Northumberland*, 1 J. & W. 572.

(k) 5 Madd. 337; *Barnardiston*. 54.



as my real estate is hereby settled." Sir Thomas died without issue, and the bill was filed by a legatee \*of Sir Thomas against Robert Grosvenor, who was the executor of Sir Thomas, and the tenant in possession of the real estate, to have the books, &c., applied as part of Sir Thomas's personal estate. It was argued for the plaintiff that the chattels had vested absolutely in Sir Thomas, inasmuch as he had a son who, as tenant in tail of the real estate, might have claimed the chattels absolutely, and that the limitations after the entail, intended for the second son, were void for remoteness; but Lord Hardwicke held the meaning of the limitations as regards the chattels on the death of Sir Thomas to be in the alternative, that is, if Sir Thomas should have a son, then such son was to take, but if he should have no son, then to go to Robert for life, with remainder to his first and other sons, so that the limitation to Robert and his son was not in remainder after an entail, but a contingency to be determined on the death of Sir Thomas; that as the heir-looms were to go as far as they could by law, the testator intended a settlement to be made by the court, and the trust being executory, the proper limitations would be to Sir Thomas for life, with remainder to his first son absolutely: but if he died under 21 without issue, then to the second son in like manner; and if he had no such son, then to Robert Grosvenor for life, &c. The court, therefore, decided that the chattels had not vested absolutely in Sir Thomas, the tenant for life. The point actually determined, viz., that Sir Thomas did not take absolutely, was clearly right; but the doctrine laid down by Lord Hardwicke, that the trust was executory, and that the chattels would be settled in the manner suggested by him, has been much questioned.<sup>(l)</sup> The direction that chattels shall go along with strictly settled real estate, "as far as the law will allow," may either mean that the chattels shall be held upon the same trusts as the real estate, so far as the different natures of the two properties will permit, in which case the first tenant in tail of the real estate will be entitled to the personal estate absolutely; or it may intend, that the court shall make such a settlement of the [\*160] chattels, and insert in it such limitations as will carry \*them in the same channel with the real estate, for as long a period as by any device in the law can be effected. In the former construction the testator is said to be his own conveyancer, that is, he has declared the limitations himself, and the legal consequence must follow, though it may disappoint the object, by giving the tenant in tail of the real estate the absolute interest in the personal. In the latter construction the trust is executory; that is, the testator has only expressed the general intention, and has committed to the trustees the duty of giving it effect by inserting the proper limitations in making the settlement. Lord Hardwicke entertained the first view, but the latter has been adopted in more recent decisions.

In *Trafford v. Trafford*,<sup>(m)</sup> a testator devised lands in trust for Sigismund for life, remainder to his first and other sons in tail male, remainder to Clement for life, remainder to his first and other sons in tail male, with

<sup>(l)</sup> See *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 228.

<sup>(m)</sup> 3 Atk. 347.



remainders over, and then bequeathed as follows: "*I devise* all my plate, &c., to such *male person* (when he shall attain the age of 21 years) who shall then be entitled to the trust in possession of the real estate; and *I direct* that till such male person shall attain 21, the said plate, &c., shall be kept on D., and be used by such male person residing there: and *I declare* it to be my express wish and desire that the said plate, &c., may, in the nature of *heir-looms*, go with the said estate, and be used therewith, *as long as the law of the realm will permit*." Sigismund died without issue. Clement died, and the bill was filed by his eldest son, then an infant, to have the heir-looms delivered to him, which the executrix of Sigismund resisted, on the ground that Sigismund, who was under 21 at the date of the will, had afterwards, on attaining that age, become absolutely entitled. Lord Hardwicke declared that the plaintiff, on attaining 21, would take the *property* of the heir-looms, and in the mean time was entitled to the *use*. The first observation that occurs is, that as the limitation of the heir-looms, was not to such *son* of the tenants for life, but to *such male person* as should attain 21, a century might \*occur, through successive infancies, before the heir-looms would [\*161] be vested. The legality of the direction might therefore have been questioned *in limine*.<sup>(n)</sup> However, to pass by this point, which was overlooked by the court, the case is remarkable, as the only instance in which, under a will, the court has inserted a limitation over on the death of the tenant in tail under 21. Possibly Lord Hardwicke might have executed the trust in this manner, in pursuance of the general principles laid down by him in *Gower v. Grosvenor*; but Lord Eldon has justly observed<sup>(o)</sup> that in *Trafford v. Trafford*, the testator himself had expressly said that the property should not vest until that age. The case, therefore, has been regarded by subsequent judges as resting upon its own special circumstances, and not as an authority for the insertion of such a limitation in ordinary cases.

In *Foley v. Burnell*,<sup>(p)</sup> a testator bequeathed all the standards, fixtures, &c., "to be held and enjoyed by the several persons who, from time to time, should respectively and successively be entitled to the use and possession of the houses before devised by him in strict settlement, *as and in the nature of heir-looms*, to be annexed to and go along with such houses respectively," and then added, "it is my will and intention, that one of the services of plate should go to and be enjoyed by the possessor of W., and the other by the possessor of S. for the time being." Edward Foley was first tenant for life of the real estate, and the heir-looms were taken by the sheriff under an execution against E. Foley, and the bill was filed by the first remainderman in tail to have the heir-looms restored. Lord Thurlow, in looking over the evidence, discovered that a son had been born to E. Foley, which son had died a few days after birth, and so dismissed the bill, on the ground that the absolute interest had

(n) See *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Be. 54; *The Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 231; *Ibbetson v. Ibbetson*, 5 Myl. & Cr. 26.

(o) See *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 231; and see observations of Lord St. Leonards, in *Potts v. Potts*, 3 Jones & Lat. 353.

(p) 1 B. C. C. 274.

vested in E. Foley, as administrator of his deceased child. From this decision the plaintiffs appealed to the lords commissioners, and the question was, whether the absolute interest had vested in the \*child [\*162] absolutely, or whether the court ought not, as the trust was executory, to have inserted a limitation over to the remainderman on the death of the child under 21. Lord Loughborough said there was no rule of law against the latter construction, if the intention sufficiently appeared; but that the court would not act upon mere conjecture. Lord Commissioner Ashurst was of opinion that the testator had been his own conveyancer, and had declared his own limitations. Lord Commissioner Hotham concurred, and the bill was dismissed. An appeal was carried to the house of lords, (q) when the decree of the lords commissioners was affirmed. This case, if it stood alone, might have been distinguished from *Gower v. Grovesnor*, as in the latter the will was merely *directory*, while in *Foley v. Burnell* there was a *direct bequest* of the heir-looms: so that in the former case the trust was executory, while in the latter it was a trust executed. However, this distinction has not been observed in more recent cases.

In *Vaughan v. Burslem*, (r) the testator said, "I direct that all my plate, &c., shall go *as heir-looms*, with my real estate, and be held and enjoyed by the person or persons that shall, for the time being, by virtue of my will, be entitled to my real estate, *as far as the rules of law and equity will permit*." Lord Thurlow considered the words "as far as the rules of law and equity will permit" to refer only to the known rule that the personal property could not go as far as the real, and that there was no case where the settlement had been carried to the utmost extent of what the law *might do*. That the words were not sufficient to prevent the vesting of the absolute interest in the first tenant in tail, and the bill which was filed by a remainderman, on the supposition that the heir-looms had not vested absolutely in a prior tenant in tail who had died an infant, was dismissed. Here, if in any case, the trust was executory; and yet, notwithstanding the words, "that the plate, &c., should go *as heir-looms*," and "as far as the rules of law and equity would permit," the court held the property to vest absolutely in the first tenant in tail, though he did not attain 21.

\*Other decisions to the same effect have since followed, (s) and [\*163] *Gower v. Grosvenor*, and *Trafford v. Trafford*, may be considered as overruled. The law at the present day appears to be, that where a testator devises lands in strict settlement, and then bequeaths heir-looms to be held by or in trust for the parties entitled under the limitations of the real estate, or without making any bequest, directs or expresses a desire that the heir-looms shall be held upon the like trusts, even though the testator should add the words "as far as the rules of law and equity will permit," the use of the heir-looms will belong to the tenant for life of

(q) 4 Brown's P. C. 328.

(r) 3 B. C. C. 101.

(s) *Carr v. Errol*, 14 Ves. 478; *Lord Deerehurst v. Duke of St. Albans*, 5 Madd. 232; *Stratford v. Powell*, 1 B. & B. 1; *Rowland v. Morgan*, 6 Hare, 463, S. C. on appeal, 2 Phill. 764; and see *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 217; *Doncaster v. Doncaster*, 3 K. & J. 26.

the real estate for his life only, and the property of the heir-looms will vest absolutely in the first tenant in tail immediately on his birth, though he afterwards die an infant. The court, in these cases, either regards the trust as executed, and not of a directory character, or if the trust be executory, the court considers it has no authority in making a settlement to insert a limitation over on the tenant in tail dying under 21. However, there is no unlawfulness in such a limitation, so that if a bequest of heir-looms in a will be clearly executory, and the testator manifests a distinct and unequivocal intention that a settlement shall be made of the heir-looms, and that such clauses shall be inserted as will render them inalienable for as long a period as the law will permit, the court would probably execute the intention by settling the heir-looms, and inserting a limitation, by which the absolute interest in the first tenant in tail should, by his death under 21, be carried over, as in the *Countess of Lincoln v. Duke of Newcastle*, a case of marriage articles, to the person next entitled in remainder.(t)

Again, in *wills*, if the words taken in their usual sense would create a *joint-tenancy*, the court has no authority, as it has in articles, to execute the trust by giving a tenancy in common; \*but where the testator has shown a desire of providing for his children,(u) or putting [\*164] himself *in loco parentis* for his grand-children,(v) the court has adopted the same construction, as in articles: however, in the cases which have occurred, there has always been some accompanying circumstance to denote a tenancy in common, as the estate really intended.

Executory trusts in *post-nuptial* settlements, whether voluntary or founded on a valuable consideration, will be construed in the same manner as executory trusts in wills.(w)

We shall conclude this branch of our subject with a few observations upon the powers to be introduced in the execution of settlements, where the trust is executory.

If the testator or contracting parties give no directions as to the insertion of powers, the court cannot, upon the ground of implied intention, order a power to be introduced,(x) except possibly a power of *leasing*, which differs from all other powers in being an almost necessary adjunct for the preservation of the estate itself.(y) If the authority be expressed in general terms, as "to insert all *usual* powers," the trustees may then introduce powers of leasing for 21 years,(z) of sale and exchange,(a) of

(t) See the observations of Lord Loughborough in *Foley v. Burnell*, 1 B. C. C. 284, and of Lord Thurlow in *Vaughan v. Burslem*, 3 B. C. C. p. 106.

(u) *Marryat v. Townley*, 1 Ves. 102.

(v) *Synge v. Hales*, 2 B. & B. 499.

(w) *Rochford v. Fitzmaurice*, 1 Conn. & Laws. 158.

(x) *Wheate v. Hall*, 17 Ves. 80, see 85; and see *Brewster v. Angell*, 1 J. & W. 628. In a recent case, however, where a will had simply directed a settlement without authorizing any powers expressly, the M. R. held a tacit intention to be implied that powers of leasing, sale and exchange, and appointment of new trustees, and of signing receipts, with provisions for maintenance, education, and advancement, should be inserted. *Turner v. Sargent*, 17 Beav. 515.

(y) See *Fearne's P. W.* 310; *Woolmore v. Burrows*, 1 Sim. 518.

(z) See *Hill v. Hill*, 6 Sim. 144; *The Duke of Bedford v. The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(a) *Hill v. Hill*, 6 Sim. 136; *Peake v. Penlington*, 2 V. & B. 311; and see *Williams v. Carter*, Append. to Treat. of Powers, No. 5.



varying securities by investing in government or real securities,<sup>(b)</sup> and of appointment of new trustees;<sup>(c)</sup> and, it seems, where the property is joint, or contains mines, or is fit for building, they may also insert powers of partition, of \*leasing mines, and of granting building leases.<sup>(d)</sup> [\*165] "But there is a palpable distinction," said Sir Launcelot Shadwell, "between powers for the management and better enjoyment of the settled estate, as powers of leasing, of sale and exchange, &c., which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to charge portions to raise money for any particular purpose, &c."<sup>(e)</sup> The latter, therefore, may not be introduced under a direction to insert *usual* powers, for they have the effect of diminishing the *corpus* of the settled estate, and the court has no rule by which to determine the *quantum* of the charge.<sup>(f)</sup> And if the will or articles direct the insertion of some particular powers by name, then, as *expressio unius exclusio alterius*, the meaning of the words "usual powers" will be materially qualified. Thus where it was stipulated that the settlement should contain a power of leasing for 21 years in possession, a power of sale and exchange, of appointment of new trustees, and *other usual powers*, it was held that a power of granting building leases could not be inserted.<sup>(g)</sup> So, if the trustees be authorized to insert a power of sale and exchange of estates in the county of Hereford, and *all other usual powers*, they would not be justified in extending the power of sale and exchange to estates lying in a different county.<sup>(h)</sup> And where a testator directed that the settlement should contain all proper powers for making leases, and *otherwise according to circumstances*, and that provision should also be made for the appointment of new trustees, and the court was asked to insert a power of sale and exchange, Lord Eldon said, "It was held by Sir W. Grant, that unless the insertion of a power were authorized by the direction to make a settlement, it could not be introduced; and if, where nothing is expressed, nothing can be implied, it is impossible, where something is expressed, I can imply more than is expressed; and [\*166] particularly where the will notices what powers are to be given."<sup>(i)</sup> But \*where a testator directed the insertion of powers of leasing, and sale or exchange, or partition, and then added, "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are *usually* inserted in settlements of the like nature," and the question was raised, whether, under these words, a power of appointment of new trustees might be introduced, Lord Cottenham, then M. R., said, "He had referred to the will, and as he found that those general words were in a separate and distinct sentence, he was of opinion they would authorize the insertion of the power."<sup>(k)</sup>

(b) *Sampayo v. Gould*, 12 Sim. 426.

(c) *Lindow v. Fleetwood*, 6 Sim. 152; *Brewster v. Angell*, 1 J. & W. 628, per Lord Eldon; *Sampayo v. Gould*, 12 Sim. 426.

(d) See *Hill v. Hill*, 6 Sim. 145; *The Duke of Bedford v. The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(e) *Hill v. Hill*, 6 Sim. 144.

(f) *Higginson v. Barneby*, 2 S. & S. 516, see 518.

(g) *Pearse v. Baron*, Jac. 158.

(h) *Hill v. Hill*, 6 Sim. 141, per Sir L. Shadwell.

(i) *Brewster v. Angell*, 1 J. & W. 625; and see *Horne v. Barton*, Jac. 439.

(k) *Lindow v. Fleetwood*, 6 Sim. 152.



A testator had directed the insertion of *proper* powers for making leases or otherwise to be reserved to the *tenants for life*, while qualified to exercise them, and, whenever disqualified, to the *trustees*. In the execution of the settlement, a power of sale and exchange was introduced, and was *limited to the trustees with the consent of the tenant for life*; but it was held by Lord Eldon, that the insertion of the power in that mode was not in conformity with the instructions.<sup>(l)</sup> It was afterwards debated before Sir T. Plumer, whether a power of sale and exchange could in any form, be admitted; when his honor said, "The first point to be considered is, in whom the powers are to be vested; and it is clear that they are to be given to the tenants for life, if qualified, and if they should not be able to act, to the trustees.—Now, if the power of sale and exchange is to be given to the tenant for life without check or control, I cannot say that it is a proper power; on the contrary, it may be very dangerous, as the tenant for life may, for many reasons, be induced to sell, when it may not be for the benefit of the remaindermen; nor is it usual to give him this power without the check of requiring the assent of the trustees. Take it the other way: if the tenant for life is disqualified, as by infancy, can the court say it is a proper power to be given exclusively to the trustees?" And therefore his honor thought the power of sale and exchange could not be introduced.<sup>(m)</sup>

If a settlement of stock with a power of varying securities \*contain a covenant to settle real estate upon the like trusts, and [\*167] with the like powers, a power of sale and exchange is implied as corresponding with the power of *varying securities*.<sup>(n)</sup> Trusts are often created by words of reference to other trusts, and where this is the case, care should be taken to insert a proviso where such is the intention, that charges on the estate shall not be increased or multiplied. Should the clause, however, be omitted, the court will exercise its judgment on the question whether the duplication of charges was or not intended by the parties.<sup>(o)</sup>

## SECTION II.

### OF IMPLIED TRUSTS.

Wherever a person, having a power of disposition over property, manifests any intention with respect to it in favour of another, the court, *where there is sufficient consideration, or in a will where consideration is implied*, will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed.

A frequent case of implied trust arises where a testator employs words *precatory, or recommendatory, or expressing a belief*.<sup>(p)</sup> Thus if he

(l) *Brewster v. Angell*, 1 J. & W. 625.

(m) *Horne v. Barton*, Jac. 437.

(n) *Williams v. Carter*, 2 Sug. Pow. 635; and see *Horne v. Barton*, Jac. 440.

(o) *Hindle v. Taylor*, 5 De Gex, Mac. & Gord. 577.

(p) *Cary v. Cary*, 2 Sch. & Lef. 189, per Lord Redesdale; *Paul v. Compton*, 8 Ves. 380, per Lord Eldon.

"desire,"(g) "will,"(r) "request,"(s) "will and desire,"(t) "wish and request,"(u) "entreat,"(v) \**"most heartily beseech,"*(w) "order" [\*168] and direct,"(x) "authorise and empower,"(y) "recommend,"(z) "hope,"(a) "do not doubt,"(b) "be well assured,"(c) "confide,"(d) "have the fullest confidence,"(e) "trust and confide,"(f) "have full assurance and confident hope,"(g) "well know,"(h) or use such expressions as "of course the legatee will give,"(i) "in consideration the legatee has promised to give,"(k) &c. In these and similar cases, the intention of the testator is considered imperative, and the devisee or legatee is bound, and may be compelled to give effect to the injunction.

But such a construction will not in general prevail where either the objects intended to be benefited are imperfectly described,(l) or the

(g) *Harding v. Glyn*, 1 Atk. 469; *Mason v. Limbury*, cited *Vernon v. Vernon*, Amb. 4; *Trot v. Vernon*, 8 Vin. 72; *Pushman v. Filliter*, 3 Ves. 7; *Brest v. Offley*, 1 Ch. Rep. 246; *Cary v. Cary*, 2 Sch. & Lef. 189; *Cruwys v. Colman*, 9 Ves. 319; and see *Shaw v. Lawless*, L. & G. 154; S. C. 5 Cl. & Fin. 129; S. C. Ll. & G. temp. Plunkett, 559.

(r) *Eales v. England*, Pr. Ch. 200; *Cloudsly v. Pellham*, 1 Vern. 411.

(s) *Pierson v. Garnet*, 2 B. C. C. 38; S. C. affirmed, Id. 226; *Eade v. Eade*, 5 Mad. 118; *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26.

(t) *Birch v. Wade*, 3 V. & B. 198; *Forbes v. Ball*, 3 Mer. 437.

(u) *Foley v. Parry*, 5 Sim. 138; affirmed, 2 M. & K. 138.

(v) *Prevost v. Clarke*, 2 Mad. 458; *Meredith v. Heneage*, 1 Sim. 553, 555, per Chief Baron Wood; and see *Taylor v. George*, 2 V. & B. 378.

(w) *Meredith v. Heneage*, 1 Sim. 553, per Chief Baron Wood.

(x) *Cary v. Cary*, 2 Sch. & Lef. 189; *White v. Briggs*, 2 Phill. 583.

(y) *Brown v. Higgs*, 4 Ves. 708; 5 id. 495; affirmed, 8 Ves. 561; and in D. P. 18 Ves. 192.

(z) *Tibbitts v. Tibbitts*, Jac. 317; S. C. affirmed, 19 Ves. 656; *Horwood v. West*, 1 S. & C. 387; *Paul v. Compton*, 8 Ves. 380, per Lord Eldon; *Malim v. Keighley*, 2 Ves. jun. 333; S. C. Id. 529; *Malim v. Barker*, 3 Ves. 150; *Meredith v. Heneage*, 1 Sim. 553, per Chief Baron Wood; *Kingston v. Lorton*, 2 Hog. 166; *Cholmondeley v. Cholmondeley*, 14 Sim. 590; *Hart v. Tribe*, 18 Beav. 215; and see *Meggison v. Moore*, 2 Ves. jun. 630; *Sale v. Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Y. & C. 636; *Randal v. Hearle*, 1 Anst. 124. As to *Cunliffe v. Cunliffe* (Amb. 686), see *Pierson v. Garnet*, 2 B. C. C. 46; *Malim v. Keighley*, 2 Ves. jun. 532; *Pushman v. Filliter*, 3 Ves. 9.

(a) *Harland v. Trigg*, 1 B. C. C. 142; and see *Paul v. Compton*, 8 Ves. 380.

(b) *Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 V. & B. 378; *Malone v. O'Connor*, Lloyd & Goold. temp. Plunkett, 465; and see *Sale v. Moore*, 1 Sim. 534.

(c) *Macey v. Shurmer*, 1 Atk. 389; S. C. Amb. 520. See *Ray v. Adams*, 3 M. & K. 237.

(d) *Griffiths v. Evans*, 5 Beav. 241.

(e) See *Wright v. Atkyns*, 17 Ves. 255, 19 Ves. 299, Coop. 111, 1 T. & R. 143; *Webb v. Woolls*, 2 Sim. N.S. 267; *Palmer v. Simmonds*, 2 Drewry, 225; *Barnes v. Grant*, 2 Jur. N.S. 1127.

(f) *Wood v. Cox*, 1 Keen, 317; S. C. 2 M. & C. 684; *Pilkington v. Boughey*, 12 Sim. 114.

(g) *Macnab v. Whitbread*, 17 Beav. 299.

(h) *Bardswell v. Bardswell*, 9 Sim. 323; *Nowlan v. Nelligan*, 1 B. C. C. 489; *Briggs v. Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525.

(i) *Robinson v. Smith*, 6 Mad. 194; but see *Lechmere v. Lavie*, 2 M. & K. 197; and see *Leach v. Leach*, 13 Sim. 304.

(k) *Clifton v. Lombe*, Amb. 519.

(l) *Harland v. Trigg*, 1 B. C. C. 142; *Tibbitts v. Tibbitts*, 19 Ves. 664, per Lord Eldon; *Richardson v. Chapman*, 1 Burn's Eccles. Law, 245; *Pierson v. Garnet*, 2 B. C. C. 45, per Lord Kenyon, S. C. id. 230, per Lord Thurlow; *Knight v. Knight*, 3 Beav. 173, per Lord Langdale; *Sale v. Moore*, 1 Sim. 534; *Cary v. Cary*, 2 Sch.

amount of the property to which the trust \*should attach is not sufficiently defined ;(*m*) for the difficulty that would attend the [\*169] execution of such imperfect trusts is converted by the court into an argument that no trust was really intended :(*n*) but although vagueness in the object will unquestionably furnish reason for holding that no trust was intended, this may be countervailed by other considerations ; and if it appear clearly that a trust was intended, though the objects are not sufficiently defined, there will be a resulting trust for the benefit of the heir-at-law, or next of kin, according to the nature of the property.(*o*) The rule as laid down by Lord Alvanley and since recognised as the correct principle was this, "Wherever a testator points out *the objects, the property, and the way in which it shall go*, that creates a trust unless there are plain express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated.(*p*)

The *objects* have been held to be uncertain where *personal estate* has been given to A., with a hope "that he would continue it in the family ;"(*q*) but, as regards *personal estate*, the word *family* has been sometimes construed as equivalent to relations, that is next of kin ;(*r*) and where *freeholds* were so devised, it was held that by "family" was to be understood \*the worthiest member of it, viz. the heir-at-law.(*s*) Even in freeholds, however, the designation was held to [\*170] be too uncertain where the request was to distribute "amongst such members of the person's family" as he should think most deserving.(*t*) In another case *both real and personal estate* were blended together, and given to A., in full confidence that she would devise the whole of the estate to "such of the heirs of the testator's father as she might think best deserved a preference," and the court could not determine whether heirs were intended, or next of kin, or both.(*u*) Again, a residuary

& Lef. 189, per Lord Redesdale ; Meredith v. Heneage, 1 Sim. 542, see 558, 559, 565 ; Ex parte Payne, 2 Y. & C. 636.

(*m*) Lechmere v. Lavie, 2 M. & K. 197 ; Knight v. Knight, 3 Beav. 148 ; Meredith v. Heneage, 1 Sim. 556 ; Buggins v. Yates, 9 Mod. 122 ; Sale v. Moore, 1 Sim. 534 ; Anon. case, 8 Vin. 72 ; Tibbits v. Tibbits, 19 Ves. 664, per Lord Eldon ; Wynne v. Hawkins, 1 B. C. C. 179 ; Pierson v. Garnet, 2 B. C. C. 45, per Lord Kenyon ; S. C. Ib. 230, per Lord Thurlow ; Bland v. Bland, 2 Cox, 349 ; Le Maitre v. Bannister, cited in note to Eales v. England, Pr. Ch. 200 ; Sprange v. Barnard, 2 B. C. C. 585 ; Pushman v. Filliter, 3 Ves. 7 ; Attorney-General v. Hall, Fitzg. 314 ; Wilson v. Major, 11 Ves. 205 ; Eade v. Eade, 5 Mad. 118 ; Curtis v. Rippon, 5 Mad. 434 ; Russell v. Jackson, 10 Hare, 213.

(*n*) Morice v. Bishop of Durham, 10 Ves. 536, per Lord Eldon.

(*o*) Briggs v. Penny, 3 Mac. & Gor. 546.

(*p*) Malim v. Keighley, 2 Ves. jun. 335. See Knight v. Boughton, 11 Cl. & Fin. 548, 551.

(*q*) Harland v. Trigg, 1 B. C. C. 142. See Wright v. Atkins, Coop. 121 ; Woods v. Woods, 1 M. & C. 401 ; Re Parkinson's Trust, 1 Sim. N. S. 242 ; Williams v. Williams, 1 Sim. N. S. 321 ; but see White v. Briggs, 2 Phill. 583 ; and Liley v. Hey, 1 Hare, 580.

(*r*) Cruwys v. Colman, 9 Ves. 319.

(*s*) Atkins v. Wright, 17 Ves. 255 ; S. C. 19 Ves. 299 ; S. C. Coop. 111 ; and see S. C. 1 Turn. & Russ. 143 ; Malone v. O'Connor, Lloyd & Goold. temp. Plunkett, 465 ; Griffiths v. Evans, 5 Beav. 241 ; White v. Briggs, 2 Phill. 583 ; Green v. Marsden, 1 Drewry, 646.

(*t*) Green v. Marsden, 1 Drewry, 646.

(*u*) Meredith v. Heneage, 1 Sim. 542, see 558, 559, 565 ; but see Wright v. Atkins, Coop. 119.



estate was bequeathed to A., with a recommendation that she would "consider the testator's relations." Sir A. Hart asked, "Who are the objects of the trust? Did the testator mean relations at his own death, or at A's death? Did he mean that she should have the liberty of executing the trust the day after his death?" And his honor was of opinion that no trust could attach.<sup>(v)</sup> But there can be no uncertainty of the objects where such a trust is to be executed by *will*, for then those who answer the description at the death of the donee of the power must be the parties contemplated.<sup>(w)</sup>

The court has refused to establish the trust from the uncertainty of the *subject*, that is, of the property intended to be bound by the trust, where the recommendation has been to "consider certain persons,"<sup>(x)</sup> "to be kind to them,"<sup>(y)</sup> to "remember them,"<sup>(z)</sup> "to do justice to them,"<sup>(a)</sup> "to make ample provision for them,"<sup>(b)</sup> "to use the [\*171] property for herself and her children, and to remember the church of God, and the poor,"<sup>(c)</sup> "to give what should remain at his death, or what he should die seised or possessed of,"<sup>(d)</sup> "to finally appropriate as he pleases," with a recommendation to divide amongst certain persons,<sup>(e)</sup> to divide and dispose of the savings,<sup>(f)</sup> or the bulk of the property,<sup>(g)</sup> or wherever the donee of the property has had power to dispose of any part he pleased, whether expressly given him, or arising from implication, or from the nature of the subject.<sup>(h)</sup> But where the recommendation was, that the legatee, in case she married again, should settle what she possessed under the testator's will to her separate use, and should bequeath what she should die possessed of under the will in favour of certain persons, it was held that the *whole* personal estate was overreached by the trust. Sir John Leach said, "the testator directs, that upon a marriage, whenever a second marriage may happen, the whole of the property shall be secured, and a power to dispose of any part of the property absolutely, at any time during her life, is not to be reconciled to that provision. I must therefore consider that, when he recommends her to give what she shall die

(v) *Sale v. Moore*, 1 Sim. 534, see 540; and see *Macnab v. Whitbread*, 17 Beav. 299; but see *Wright v. Atkyns*, Coop. 119-123.

(w) *Pierson v. Garnet*, 2 B. C. C. 38; S. C. id. 226; *Atkyns v. Wright*, 17 Ves. 255; S. C. 19 Ves. 299; S. C. Coop. 111; and see S. C. 1 Turn. & Russ. 162; *Knight v. Knight*, 3 Beav. 173; *Meredith v. Heneage*, 1 Sim. 558.

(x) *Sale v. Moore*, 1 Sim. 534; and see *Hoy v. Master*, 6 Sim. 568.

(y) *Buggins v. Yates*, 9 Mod. 122.

(z) *Bardswell v. Bardswell*, 9 Sim. 319.

(a) *Le Maitre v. Bannister*, Pr. Ch. 200, note (1); *Pope v. Pope*, 10 Sim. 1.

(b) *Winch v. Brutton*, 14 Sim. 379.

(c) *Curtis v. Rippon*, 5 Mad. 434.

(d) *Sprange v. Barnard*, 2 B. C. C. 585; *Green v. Marsden*, 1 Drewry, 646; *Pushman v. Filliter*, 3 Ves. 7; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Mad. 118; *Wynne v. Hawkins*, 1 B. C. C. 179; *Lechmere v. Lavie*, 2 M. & K. 197; *Bland v. Bland*, 2 Cox, 349; *Attorney-General v. Hall*, Fitzg. 314; and see *Meredith v. Heneage*, 1 Sim. 556; *Tibbits v. Tibbits*, 19 Ves. 664; *Pope v. Pope*, 10 Sim. 1.

(e) *White v. Briggs*, 15 Sim. 33.

(f) *Cowman v. Harrison*, 10 Hare, 234.

(g) *Palmer v. Simmonds*, 2 Drewry, 221.

(h) *Malim v. Keighley*, 2 Ves. jun. 531, per Lord Loughborough; and see *Knight v. Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Huskinson v. Bridge*, 4 De Gex & Sm. 245.



possessed of, he had in view the whole property which she should possess under his will.”(i)

And where both objects and property are certain, yet no trust will arise, if the testator expressly declares that the language is not to be deemed imperative, or the construing it a trust would be a contradiction to the terms in which the preceding bequest is given,(j) or if, all circumstances considered, \*it is more probable the testator meant to communicate a mere discretion ;(k) as if he at the same time [\*172] declare that the estate shall be “unfettered and unlimited,”(l) or if he “recommend but do not absolutely enjoin,”(m) or if the gift be absolutely to A., with words expressing merely the *reason* or *motive* with which the gift is made, as “to enable him to assist such of the children of B. as he shall find deserving of encouragement.”(n) The construction of the words we are considering never turns on their grammatical import, they may be imperative, but are not necessarily so.(o) In *Shaw v. Lawless*,(p) the trustees were recommended to employ a receiver, and Lord Cottenham, alluding to that case, observed, “It was there laid down as a rule which I have since acted upon, that though ‘recommendation’ may in some other cases amount to a direction and create a trust, yet, that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more. In that case the interest supposed to be given to the party recommended was inconsistent with other powers which the trustees were to exercise, and those powers being given in unambiguous terms, it was held that as the two provisions could not stand together, the flexible term was to give way to the inflexible term.”(q)

And if a trust be created, it does not follow that it shall be equally restrictive, as where the trust is properly such. Thus an estate was devised to A. and her heirs, “in the fullest confidence” that after her decease she would devise the property to the family of the testator ; and Lord Eldon asked, \* “Is there any case in which the doctrine [\*173] has been carried so far, that the tenant in fee shall not be at liberty, with respect timber and mines, to treat the estate in the same husbandlike manner as another tenant in fee ?” and his lordship said he should hesitate a long time before he held that the person bound by the

(i) *Horwood v. West*, 1 S. & S. 387.

(j) *Webb v. Wools*, 2 Sim. N.S. 267 ; *Huskisson v. Bridge*, 4 De Gex & Sm. 245.

(k) *Bull v. Vardy*, 1 Ves. jun. 270 ; *Knott v. Cottee*, 1 Phill. 292 ; *Knight v. Knight*, 3 Beav. 148 ; *Meggison v. Moore*, 2 Ves. jun. 630 ; *Hill v. Bishop of London*, 1 Atk. 618 ; and see *Paul v. Compton*, 8 Ves. 380 ; *Knight v. Knight*, 3 Beav. 174, 11 Cl. & Fin. 513 ; *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1.

(l) *Meredith v. Heneage*, 1 Sim. 542 ; S. C. 10 Price, 230 ; *Hoy v. Master*, 6 Sim. 568.

(m) *Young v. Martin*, 2 Y. & C. Ch. Ca. 582.

(n) *Benson v. Whittam*, 5 Sim. 30 ; *Thorp v. Owen*, 2 Hare, 611.

(o) *Meggison v. Moore*, 2 Ves. jun. 632, per Lord Loughborough ; and see *Johnston v. Rowlands*, 2 De Gex & Sm. 358, per Vice-Chancellor Knight Bruce.

(p) *Ll. & Goold, t. Sugden*, 154 ; 5 Cl. & Fin. 129 ; *Lloyd & Goold, t. Plunkett*, 559.

(q) *Knott v. Cottee*, 2 Phill. 192.

trust was not entitled to cut timber in the ordinary management of the property.<sup>(r)</sup> And so it was afterwards decided by the house of lords on appeal.<sup>(s)</sup>

The current of decisions has of late years set against the doctrine of converting the devisee or legatee into a trustee.<sup>(t)</sup>

Of course, where the words are construed in equity to raise a partial trust, the devisee or legatee is deemed a trustee to the extent only of the charge, and the surplus will not result to the heir or next of kin, but will belong to the devisee or legatee beneficially.<sup>(u)</sup>

But if a trust be established as to the *whole* property given, and the objects of the trust for any reason fail, the *whole* beneficial interest will be a resulting trust in favour of the testator's real or personal representative.<sup>(v)</sup>

Again (to proceed with the instances of implied trusts,) if a person by will direct his realty to be sold, or charge it with debts and legacies,<sup>(w)</sup> or with any particular legacy,<sup>(x)</sup> the legal estate may descend to the heir, or it may pass to a devisee; but the court will view the direction as an implied declaration of trust, and will enforce the execution of it against the legal proprietor.

[\*174] Again, if a person agrees for valuable consideration to settle a specific estate, he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow;<sup>(y)</sup> and so if he covenant to charge all lands that he may possess at a particular time,<sup>(z)</sup> or at any time,<sup>(a)</sup> he will be a trustee of such lands to the extent of the charge. And even if a person engages on his marriage to settle *all* the personal estate that he may acquire during the coverture, the trusts upon which it is so agreed the personalty shall be settled will fasten upon the property as it falls into possession; and if the money has been laid out in a purchase, may be followed into the land.<sup>(b)</sup>

Again, if a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the purchaser, and is accountable to him for the rents and profits;<sup>(c)</sup> and if the tenants have

(r) See *Wright v. Atkyns*, Turn. & Russ. 157, 163.

(s) See *Lawless v. Shaw*, Lloyd & Goold, t. Sugden, 164.

(t) *Sale v. Moore*, 1 Sim. 540; and see *Meredith v. Heneage*, id. 566; *Lawless v. Shaw*, 1 Lloyd & Goold, 164; *Knight v. Knight*, 3 Beav. 148; *Williams v. Williams*, 1 Sim. N.S. 358; *Lefroy v. Flood*, 4 Ir. Chan. Rep. 9.

(u) *Wood v. Cox*, 1 Keen, 317; reversed, 2 M. & C. 684.

(v) *Briggs v. Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525.

(w) *Pitt v. Pelham*, 2 Freem. 134; S. C. 1 Ch. Re. 283; *Locton v. Locton*, 2 Freem. 136; *Asby v. Doyl*, 1 Ch. Cas. 180; *Tenant v. Brown*, ib.; *Garfoot v. Garfoot*, 1 Ch. Ca. 35; S. C. 2 Freem. 176; *Gwilliams v. Rowel*, Hard. 204; *Blatch v. Wilder*, 1 Atk. 420; *Carvill v. Carvill*, 2 Ch. Re. 301; *Cook v. Fountain*, 3 Sw. 592; *Bennet v. Davis*, 2 P. W. 318, &c.

(x) *Wigg v. Wigg*, 1 Atk. 382.

(y) *Finch v. Winchelsea*, 1 P. W. 277; *Freemoult v. Dedire*, ib. 429; *Kennedy v. Daly*, 1 Sch. & Lef. 355; *Legard v. Hodges*, 1 Ves. jun. 477; S. C. 3 B. C. C. 531, 4 B. C. C. 421; *Ravenshaw v. Hollier*, 7 Sim. 3.

(z) *Wellesley v. Wellesley*, 4 M. & C. 561.

(a) *Lyster v. Burroughs*, 1 Drury & Walsh, 149.

(b) *Lewis v. Madocks*, 8 Ves. 150; S. C. 17 Ves. 48.

(c) See *Acland v. Gaisford*, 2 Mad. 32; *Wilson v. Clapham*, 1 J. & W. 38.

been allowed improperly to run in arrear, *(d)* or there has been unhusbandlike farming, *(e)* or any other injury done, either by the wilful waste or neglect of the vendor, *(f)* he is answerable to the purchaser as for a breach of trust. On the other hand, if any damage arise to the estate, not by the default of the vendor, as by fire, *(g)* or dilapidations, *(h)* the loss will fall on the purchaser; and if the accident by which the damage arises brings with it legal obligations which must be immediately satisfied, and which the vendor satisfies, the expense thus incurred must be borne by the purchaser; *(i)* and so, should the estate become by any accident more valuable, the purchaser will take the improvement. *(k)* It [\*175] \*should be observed, however, that the *vendor* is, after all, a trustee *sub modo* only, for he cannot be compelled to deliver up the possession until the purchase-money has been paid. *(l)* And so the *purchaser* is only a *cestui que trust sub modo*, and he cannot enforce any equitable rights attached to the estate until the contract has been completed. *(m)*

It would be endless to pursue implied trusts through all their ramifications, but the general principles may be collected from the examples given.

## \*CHAPTER VIII.

[\*176]

## OF RESULTING TRUSTS.

HAVING discussed the various questions involved in the creation of trusts by the act of a party, we shall next direct our attention to the creation of trusts by operation of law. Trusts of this kind may be regarded as twofold, viz. 1. Resulting, 2. Constructive.

Resulting Trusts, the subject of the present chapter, may be subdivided into the two following classes: First, Where a person being himself both legally and equitably entitled makes a conveyance, devise, or bequest of the legal estate, and there is no ground for the inference that he meant to dispose of the equitable; and, Secondly, Where a purchaser of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest.

*(d)* Acland v. Gaisford, 2 Mad. 28.

*(e)* Ferguson v. Tadman, 1 Sim. 530; Foster v. Deacon, 3 Mad. 394.

*(f)* Wilson v. Clapham, 1 J. & W. 39.

*(g)* Paine v. Meller, 6 Ves. 349; Harford v. Purrier, 1 Mad. 539, per Sir T. Plumer; Acland v. Gaisford, 2 Mad. 32, *per eundem*; as to Stent v. Bailis, 2 P. W. 220, see Paine v. Meller, 6 Ves. 352.

*(h)* Minchin v. Nance, 4 Beav. 332.

*(i)* Robertson v. Skelton, 12 Beav. 280.

*(k)* See Harford v. Purrier, 1 Mad. 539; Revell v. Hussey, 2 B. & B. 287; Paine v. Meller, 6 Ves. 352; Spurrier v. Hancock, 4 Ves. 667; White v. Nutts, 1 P. W. 61.

*(l)* See Acland v. Gaisford, 2 Mad. 32; Wall v. Bright, 1 J. & W. 494.

*(m)* See Tasker v. Small, 3 M. & Cr. 70.



## SECTION I.

## OF RESULTING TRUSTS WHERE THERE IS A DISPOSITION OF THE LEGAL AND NOT OF THE EQUITABLE INTEREST.

The general rule is, that wherever, upon a conveyance, devise, or bequest, it appears that the grantee, devisee, or legatee was intended to take the legal estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself, or his heir, or, if out of personal estate, to himself or his executor.

Should the interest resulting as a remnant of the real estate to the heir be of a chattel nature, as a term of years, or a sum \*of money, [\*177] it will on the death of the *heir*, devolve on *his* personal representative.<sup>(a)</sup>

And if real estate charged with debts be sold by the court in the lifetime of the heir, the surplus (as the exact amount required could not be raised) will, from the time of sale, be considered personal estate, and devolve on the heir's personal representative.<sup>(b)</sup>

The intention of excluding the person invested with the legal estate from the usufructuary enjoyment, may either be *presumed* by the court, or be actually *expressed* upon the instrument.

Should an estate be granted either without consideration or for merely a nominal one.<sup>(c)</sup> and no trusts be declared of *any part*, then if the conveyance be simply to a *stranger in blood*, and no intention appear of conferring the beneficial interest, as the law will not suppose a person to part with property without some inducement thereto, it seems a trust of the *whole* estate (as in the analogous case of uses before the statute of Henry) will result to the settlor.<sup>(d)</sup>

If the conveyance be to a *wife*<sup>(e)</sup> or *son*<sup>(f)</sup> it will be presumed an

(a) *Levet v. Needham*, 2 Vern. 138; *Wych v. Packington*, 3 B. P. C. 44; *Sewell v. Denny*, 10 Beav. 315; *Barrett v. Buck*, 12 Jur. 771. See *Halford v. Stains*, 16 Sim. 288.

(b) *Flanagan v. Flanagan*, cited *Fletcher v. Ashburner*, 1 B. C. C. 500.

(c) See *Hayes v. Kingdome*, 1 Vern. 33; *Sculthorpe v. Burgess*, 1 Ves. jun. 92.

(d) *Duke of Norfolk v. Browne*, Pr. Ch. 80; *Warman v. Seaman*, 2 Freem. 308. per Cur.; *Hayes v. Kingdome*, 1 Vern. 33; *Grey v. Grey*, 2 Sw. 598, per Lord Nottingham; *Elliot v. Elliot*, 2 Ch. Ca. 232, *per eundem*; *Attorney-General v. Wilson*, 1 Cr. & Phil. 1; and see *Sculthorpe v. Burgess*, 1 Ves. jun. 92; *Lady Tyrrell's case*, 2 Freem. 304; *Ward v. Lant*, Pr. Ch. 182; but in *Lloyd v. Spillet*, 2 Atk. 150, and *Young v. Peachey*, ib. 257, Lord Hardwicke was apparently of opinion that, since the Statute of Frauds, there are only two cases of resulting trust, viz.: 1st, Where an estate is purchased in the name of a stranger; and 2ndly, Where on a voluntary conveyance a trust is declared of part, in which case the residue results. It would seem to follow that, in his opinion, should a voluntary conveyance be made and no trust at all be expressed, the grantee would take the beneficial interest to his own use; and see *Hutchins v. Lee*, 1 Atk. 447.

(e) See *Christ's Hosp. v. Budgin*, 2 Vern. 683.

(f) *Jennings v. Scleek*, 1 Vern. 467; *Grey v. Grey*, 2 Sw. 598, per Lord Nottingham; *Elliot v. Elliot*, 2 Ch. Ca. 232, *per eundem*; and see *Hayes v. Kingdome*, 1 Vern. 33; *Baylis v. Newton*, 2 Vern. 28; *Cook v. Hutchinson*, 1 Keen, 42.



advancement, and the wife or son will be entitled \*beneficially. In a case where a son conveyed an estate to his father, as purchaser, [\*178] for the sum of 400*l.*, and then filed a bill against the devisees of the father for a re-conveyance, and it appeared from parol evidence which was read *de bene esse* that no money was ever paid, and that the intention of the parties was, that the son being in bad credit the father should be the ostensible owner of the estate, in order the more readily to raise money on mortgage, Sir J. Leach held, that since the Statute of Frauds, parol evidence was inadmissible to prove a trust, and that as there was no fraud or misapprehension, but the meaning was that the father should exercise towards the world at large the beneficial ownership, there was no resulting or constructive trust, but that the devisees must keep the estate. The court, however, decreed the son as vendor upon the face of the deed to have a lien upon the property for the 400*l.* as upon unpaid purchase-money.(g)

In a similar case of absolute sale upon the face of the deed, but where the grantee afterwards admitted himself in writing to be a trustee, Lord Kenyon held that, the written evidence establishing facts inconsistent with the deed, further evidence by parol was admissible to prove the truth of the transaction.(h)

Of course the court will not permit the grantee to retain the beneficial interest if there was any mistake on the part of the *grantor*.(i) or any *mala fides* on the part of the *grantee*.(k) But if the *grantor* himself intended a *fraud* upon the law, the assurance, if the defendant demurs, will be made absolute against the grantor;(l) however, if the defendant admit the trust, it seems the court will relieve.(m) It was said in one case that if a man transfer *stock* or deliver *money* to another, [\*179] \*it must proceed from an intention to benefit that other person, and therefore, although he be a stranger, it shall be *prima facie* a gift,(n) but if such an intention cannot be inferred consistently with the attendant circumstances, a trust will result.(o)

If upon a conveyance,(p) devise,(q) or bequest,(r) a trust be declared

(g) *Leman v. Whitley*, 4 Russ. 423.

(h) *Cripps v. Jee*, 4 B. C. C. 472.

(i) *Birch v. Blagrove*, Amb. 264; *Anon.* cited *Woodman v. Morrel*, 2 Freem. 33; and see *Attorney-General v. Boulden*, 8 Sim. 472.

(k) *Lloyd v. Spillet*, 2 Atk. 150; S. C. Barn. 388, per Lord Hardwicke; *Hutchins v. Lee*, 1 Atk. 448, *per eundem*; *Young v. Peachy*, 2 Atk. 254; *Wilkinson v. Brayfield*, cited *ib.* 257; S. C. reported 2 Vern. 307.

(l) *Cottington v. Fletcher*, 2 Atk. 156, per Lord Hardwicke; and see *Chaplin v. Chaplin*, 3 P. W. 233; *Muckleston v. Brown*, 6 Ves. 68.

(m) See *Cottington v. Fletcher*, *Muckleston v. Brown*, *ubi supra*.

(n) *George v. Howard*, 7 Price, 651-653.

(o) See *Custance v. Cunningham*, 13 Beav. 363.

(p) *Cottington v. Fletcher*, 2 Atk. 155; *Culpepper v. Aston*, 2 Ch. Ca. 115; *Cook v. Gwavas*, cited *Roper v. Radcliffe*, 9 Mod. 187; *Lloyd v. Spillet*, 2 Atk. 150; S. C. Barn. 388, per Lord Hardwicke.

(q) *Sherrard v. Lord Harborough*, Amb. 165; *Marquis of Townshend v. Bishop of Norwich*, cited *Saunders on Uses*, C. 3, s. 7, div. 3; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Nash v. Smith*, 17 Ves. 29; *Wych v. Packington*, cited *Roper v. Radcliffe*, 9 Mod. 187; *Davidson v. Foley*, 2 B. C. C. 203; *Kiricke v. Bransbey*, 2 Eq. Ca. Ab. 508; *Levet v. Needham*, 2 Vern. 138; *Halliday v. Hudson*, 3 Ves. 210; *Killet v. Killet*, 3 Dow. 248; &c.

(r) *Robinson v. Taylor*, 2 B. C. C. 589; *Mapp v. Elcock*, 2 Phill. 793; affirmed on appeal. 3 H. of L. Ca. 492; and see *Dawson v. Clarke*, 18 Ves. 254.

of *part* of the estate, and nothing is said as to the residue, then, *clearly*, the creation of the partial trust is regarded as the sole object in view, and the equitable interest undisposed of by the settlor results to him or his representative.

But upon this subject a distinction must be observed between a devise to a person for a particular purpose with no intention of conferring the beneficial interest, and a devise with the view of conferring the beneficial interest, but subject to a particular injunction. Thus, if lands be devised to A. and his heirs *upon trust to pay debts*, this is simply the creation of a trust, and the residue will result to the heir; but if the devise be to A. and his heirs, *charged with debts*, the intention of the testator is to devise beneficially subject to the charge, and then whatever remains, after the charge has been satisfied, will belong to the devisee.(s)

No positive rule can be laid down to determine in what cases the devise will carry with it a beneficial character, and in what it will be construed a trust; but on all occasions the court, refusing to be governed by the [180] mere technical \*phraseology, extracts the probable intention of the settlor from the general scope of the instrument.(t)

The recognition of the *relationship* of the parties has often materially influenced the court against the construction of a mere trust.(u) Thus, where a testator gave 5*l.* to his brother, who was his heir-at-law, and “made and constituted *his dearly beloved wife* his sole heiress and executrix, to sell and dispose thereof at her pleasure, and to pay his debts and legacies;” Lord King said, the devise that the wife should be sole heiress of the real estate did, in every respect, place her in the stead of the heir, and not as a trustee for him; that it was plainer by reason of the language of tenderness and affection, “*his dearly beloved wife*,” which must intend to her something beneficial, and not what would be a trouble only; and what made it still stronger was, that the heir was not forgot, but had a legacy of 5*l.* left him; and so his lordship decreed the devisee to be beneficially entitled.(v) But any allusion of this kind is merely one circumstance of evidence, and therefore to be counteracted by the language of other parts of the instrument.(w)

Although the introduction of the words “upon trust” may be strong evidence of the intention not to confer on the devisee a beneficial interest,(x) yet that construction may be negatived by the context, or the general scope of the instrument;(y) and, in like manner, the devisee may

(s) *King v. Denison*, 1 V. & B. 272, per Lord Eldon.

(t) *Hill v. Bishop of London*, 1 Atk. 620, per Lord Hardwicke; *Walton v. Walton*, 14 Ves. 322, per Sir W. Grant; *Starkey v. Brooks*, 1 P. W. 391, per Lord Cowper; *King v. Denison*, 1 V. & B. 279, per Lord Eldon.

(u) *Lloyd v. Spillet*, cited *Cook v. Duckenfield*, 2 Atk. 566; *Lloyd v. Wentworth*, cited *Robinson v. Taylor*, 2 B. C. C. 594; *Smith v. King*, 16 East, 283; *Coningham v. Mellish*, Pr. Ch. 31; *Cook v. Hutchinson*, 1 Keen, 42.

(v) *Rogers v. Rogers*, 3 P. W. 193.

(w) *Buggins v. Yates*, 9 Mod. 122; *Wych v. Packington*, 2 Eq. Ca. Ab. 507; and see *King v. Denison*, 1 V. & B. 274.

(x) See *Hill v. Bishop of London*, 1 Atk. 620; *Woollett v. Harris*, 5 Mad. 452.

(y) *Dawson v. Clarke*, 15 Ves. 409; S. C. 18 Ves. 247, see 257; *Coningham v. Mellish*, Pr. Ch. 31; *Cook v. Hutchinson*, 1 Keen, 42; *Hughes v. Evans*, 13 Sim. 496.

be designated as "trustee;" but if the term be used with reference to one only of two funds, he may still establish his title to the beneficial interest in the other.(z)

\*It must also be observed, that, as the heir is a person favoured in law, he will not be excluded from the resulting trust on bare [\*181] conjecture;(a) and there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention.(b) Thus, a legacy to the heir will not prevent a trust from resulting;(c) but, joined to other circumstances in favour of the devisee, it will not be without its effect.(d)

It need scarcely be remarked, that, as the species of trust we are now considering results by *presumption of law*, it may be rebutted by positive evidence by parol, that the testator's intention was to confer the surplus interest beneficially.(e)

Next, a trust results by operation of law, where the intention not to benefit the grantee, devisee, or legatee, is *expressed* upon the instrument itself, as if the conveyance, devise, or bequest, be to a person "upon trust," and no trust is declared,(f) or upon certain trusts that are too vague to be executed,(g) or \*upon trusts to be thereafter declared, [\*182] and no declaration ever made,(h) or upon trusts that are void for unlawfulness,(i) or that fail by lapse,(k) &c.; for in such cases the trustee

(z) *Batteley v. Windle*, 2 B. C. C. 31; *Pratt v. Sladden*, 14 Ves. 193; and see *Gibbs v. Rumsey*, 2 V. & B. 294.

(a) *Halliday v. Hudson*, 3 Ves. 211, per Lord Loughborough; and see *Kellett v. Kellett*, 3 Dow. 248; *Amphlett v. Parke*, 2 R. & M. 227; *Phillips v. Phillips*, 1 M. & K. 661; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668.

(b) See *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Tregonwell v. Sydenham*, 3 Dow. 211; *Lloyd v. Spillet*, 2 Atk. 151; *Habergham v. Vincent*, 2 Ves. jun. 225.

(c) *Randall v. Bookey*, 2 Vern. 425; S. C. Pr. Ch. 162; *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Starkey v. Brooks*, 1 P. W. 390, overruling *North v. Crompton*, 1 Ch. Ca. 196; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668.

(d) *Rogers v. Rogers*, 3 P. W. 193; S. C. Sel. Ch. Ca. 81; and see *Docksey v. Docksey*, 2 Eq. Ca. Ab. 506; *King v. Denison*, 1 V. & B. 274; *Amphlett v. Parke*, 2 R. & M. 230; *Mallabar v. Mallabar*, Cas. t. Talb. 78.

(e) *Crompton v. North*, as cited in *Gainsborough v. Gainsborough*, 2 Vern. 253; *Docksey v. Docksey*, 2 Eq. Ca. Ab. 506; *Mallabar v. Mallabar*, Cas. t. Talb. 78; *Cook v. Hutchinson*, 1 Keen, 50, per Lord Langdale.

(f) *Dawson v. Clarke*, 18 Ves. 254, per Lord Eldon; see *Southouse v. Bate*, 2 V. & B. 396; *Morice v. Bishop of Durham*, 10 Ves. 537; *Woollett v. Harris*, 5 Mad. 452; *Pratt v. Sladden*, 14 Ves. 198; *Dunnage v. White*, 1 Jac. & Walk. 583; *Goodere v. Lloyd*, 3 Sim. 538; *Anon. case*, 1 Com. 345; *Penfold v. Bouch*, 4 Hare, 271.

(g) *Fowler v. Garlike*, 1 R. & M. 232; *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522; *Stubbs v. Sargon*, 2 Keen, 255; S. C. 3 M. & C. 507; *Kendall v. Granger*, 5 Beav. 300; *Leslie v. Devonshire*, 2 B. C. C. 187; *Vezey v. Jamson*, 1 Sim. & Stu. 69; and see *Ellis v. Selby*, 7 Sim. 352; S. C. 1 M. & C. 286; *Williams v. Kershaw*, 5 Cl. & Fin. 111.

(h) *Emblyn v. Freeman*, Pr. Ch. 541; *City of London v. Garway*, 2 Vern. 571; *Collins v. Wakeman*, 2 Ves. jun. 683; *Fitch v. Weber*, 6 Hare, 145; and see *Brown v. Jones*, 1 Atk. 188; *Sidney v. Shelley*, 19 Ves. 352; *Brookman v. Hales*, 2 V. & B. 45.

(i) *Carrick v. Errington*, 2 P. W. 361; *Arnold v. Chapman*, 1 Ves. 108; *Tregonwell v. Sydenham*, 3 Dow. 194; *Jones v. Mitchell*, 1 S. & S. 290; *Gibbs v.*

(k) For note (k), see next page.



can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

And where, as in these cases, a trust results to the settlor or his representative, not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol.<sup>(l)</sup>

Having distinguished between the two kinds of resulting trusts (a classification necessary to be made for the purpose of ascertaining the admissibility of parol evidence,) we proceed to introduce a few remarks applicable to resulting trusts generally, whether arising by presumption of law or from the language of the instrument.

First, If real estate be devised upon trust to sell for a particular purpose, and that purpose either wholly fail or do not \*exhaust the [\*183] proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's *heir*, and not to his *next of kin*.<sup>(m)</sup> And the whole or surplus will result in this manner, though the proceeds of the realty be blended with personal estate in the formation of one common fund.<sup>(n)</sup> And even an express declaration that the proceeds of the sale shall be considered as part of the testator's *personal estate* will not prevent the operation of the rule;<sup>(o)</sup> for a direc-

Rumsey, 2 V. & B. 294; Page v. Leapingwell, 18 Ves. 463; Pilkington v. Boughey, 12 Sim. 114; and see Cooke v. The Stationers' Company, 3 M. & K. 262. If an estate was devised to A. and his heirs, in trust to sell and pay part of the proceeds to persons capable of taking, and other part to a charity, the statute of mortmain did not avoid the whole legal devise, but affects only the interest given to the charity; Young v. Grove, 4 Com. B. Re. 668; Doe v. Harris, 16 Mees. & W. 517.

(k) Ackroyd v. Smithson, 1 B. C. C. 503; Spink v. Lewis, 3 B. C. C. 355; Williams v. Coade, 10 Ves. 500; Digby v. Legard, cited Cruse v. Barley, 3 Cox's P. W. 22, note (1); Hutcheson v. Hammond, 3 B. C. C. 128; Davenport v. Coltman, 12 Sim. 610; Muckleston v. Brown, 6 Ves. 63.

(l) See Langham v. Sanford, 17 Ves. 442; S. C. 19 Ves. 643; Rachfield v. Careless, 2 P. W. 158; Gladding v. Yapp, 5 Mad. 59; White v. Evans, 4 Ves. 21; Walton v. Walton, 14 Ves. 322.

(m) Starkey v. Brooks, 1 P. W. 390; Randall v. Bookey, Pr. Ch. 162; Stonehouse v. Evelyn, 3 P. W. 252; Robinson v. Taylor, 2 B. C. C. 589; Cruse v. Barley, 3 P. W. 20; Buggins v. Yates, 2 Eq. Ca. Ab. 508; Hill v. Cock, 1 V. & B. 173; City of London v. Garway, 2 Vern. 571; Nicholls v. Crisp, cited Croft v. Slee, 4 Ves. 65; Digby v. Legard, 2 Dick. 500; Spink v. Lewis, 3 B. C. C. 355; Chitty v. Parker, 4 B. C. C. 411; Collins v. Wakeman, 2 Ves. jun. 683; Howse v. Chapman, 4 Ves. 542; Williams v. Coade, 10 Ves. 500; Berry v. Usher, 11 Ves. 87; Gibbs v. Rumsey, 2 V. & B. 294; Maugham v. Mason, 1 V. & B. 410; Wilson v. Major, 11 Ves. 205; Wright v. Wright, 16 Ves. 188; Hooper v. Goodwin, 18 Ves. 156; Jones v. Mitchell, 1 S. & S. 290; Page v. Leapingwell, 18 Ves. 463; Gibbs v. Ougier, 12 Ves. 416; McClelland v. Shaw, 2 Sch. & Lef. 545; Mogg v. Hodges, 2 Ves. 52; Eyre v. Marsden, 2 Keen, 564; Ex parte Pring, 4 Y. & C. 507; Watson v. Hayes, 5 M. & Cr. 125; Davenport v. Coltman, 12 Sim. 610; Bunnett v. Foster, 7 Beav. 540; Marriott v. Turner, 20 Beav. 557, &c. Note, Countess of Bristol v. Hungerford, 2 Vern. 645, is misreported—see Rogers v. Rogers, 3 P. W. 194, note (C).

(n) Ackroyd v. Smithson, 1 B. C. C. 503; Jessopp v. Watson, 1 M. & K. 665; Salt v. Chattaway, 3 Beav. 576.

(o) Collins v. Wakeman, 2 Ves. jun. 683; and see Amphlett v. Parke, 2 R. & M. 226. Ogle v. Cook, cited in Fletcher v. Ashburner, 1 B. C. C. 502, and in Ackroyd v. Smithson, id. 513, was for a long time considered contra; but in Col-



tion of this kind is construed to extend to the purposes of the *will* only, and not to give a right to those who claim, as the next of kin, by *operation of law*. In the case of *Phillips v. Phillips* (*p*) before Sir J Leach, the proceeds of the sale were directed to be taken as part of the testator's personal estate, and were blended into one fund with the personalty, and a legacy which had lapsed was decreed in favour of the next of kin; but the opinion of the profession was always against the decision; and it is observable, that *Collins v. Wakeman*, (*q*) the only authority precisely in point, was not once adverted to in \*this case, either by the bar or the bench. The case has repeatedly received the express [\*184] disapprobation of the court, (*r*) and has at length been overruled. (*s*)

If a testator direct the proceeds of the sale to be taken as personal estate, and *nothing more is said*, then, as every part of the will ought, if possible, to have an operation, the meaning of the testator might be thought to be, that the realty should be converted into personalty for the benefit of the next of kin; and in *The Countess of Bristol v. Hungerford*, (*t*) where the testator directed the proceeds of the sale to be taken as personal estate, and go to his executors, to whom he gave 20*l.* a piece, it is said the next of kin were declared entitled. It appears, however, that the two *next of kin* were also the *co-heirs*, and therefore as *utraque via data* the same persons would claim, it was obviously unnecessary to determine the question.

It has been decided in a late case that even if the testator say "nothing shall result to the heir-at-law," yet a bequest to the next of kin is not sufficiently implied, but the heir-at-law will take in spite of the intention to the contrary. (*u*)

If the execution of the trust require the estate to be sold, but the purposes of the trust do not exhaust the proceeds, the part that is undisposed of will result to the heir in the character of personalty, and, though the sale was not actually effected in his lifetime, will devolve on his executor: (*v*) but if the trusts declared by the testator do so entirely fail as not to call for a conversion, then the whole estate will result to the heir as realty, and descend upon his heir, (*w*) though the estate may by the mistake of the trustees have been actually sold. (*x*)

The doctrines upon this subject have been very clearly stated [\*185] \*by Sir John Leach in the case of *Smith v. Claxton*. (*y*) A tes-

*lins v. Wakeman*, 2 Ves. jun. 686, Lord Loughborough had the Reg. Lib. searched, and it was found the point had been left undecided.

(*p*) 1 M. & K. 649.

(*q*) 2 Ves. jun. 683.

(*r*) See *Fitch v. Weber*, 6 Hare, 145; *Shallcross v. Wright*, 12 Beav. 505; *Flint v. Warren*, 16 Sim. 124.

(*s*) *Taylor v. Taylor*, 3 De G. Mac. & Gord. 190.

(*t*) Pr. Ch. 81; S. C. 2 Vern. 645; corrected from Reg. Lib., in *Rogers v. Rogers*, 3 P. W. 194, note (C); and see Sir W. Basset's case, cited *Bayley v. Powell*, 2 Vern. 361.

(*u*) *Fitch v. Weber*, 6 Hare, 145, and compare *Johnson v. Johnson*, 4 Beav. 318.

(*v*) *Hewitt v. Wright*, 1 B. C. C. 86; *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Mad. 484; *Dixon v. Dawson*, 2 S. & St. 327; *Jessopp v. Watson*, 1 M. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204.

(*w*) *Smith v. Claxton*, *ubi supra*; *Chitty v. Parker*, 2 Ves. jun. 271.

(*x*) *Davenport v. Coltman*, 12 Sim. 610.

(*y*) 4 Mad. 484.

FEBRUARY, 1858.—14

tator by one devise had given an estate to trustees and their heirs upon trust to sell, and out of the proceeds to pay his funeral expenses, debts, and legacies and subject thereto, upon trust to pay the surplus to his wife. By a second devise he had given an estate to the same trustees and their heirs, upon trust to pay the rents to his wife for life, and after her death to Thomas for life, and after his death upon trust to sell and divide the proceeds amongst the children of Thomas, and, failing such children, between Joseph and Robert in equal shares. By a third devise he had given an estate to the same trustees and their heirs, upon trust, subject to an annuity, for Robert for life, and after his decease upon trust to sell and apply the produce for the benefit of the children of Robert, and, failing such children, upon trust for Thomas and Joseph in equal shares. The wife died in the lifetime of the testator; Robert also died in the lifetime of the testator without issue; Thomas survived the testator, but died a few months after, having had an only child, who had died in the testator's lifetime. Sir John Leach said—"Where a devisor directs his real estate to be sold, and the produce to be applied to particular purposes and those purposes partially fail, the heir-at-law is entitled to that part of the produce which in the events is thus undisposed of. The heir-at-law is entitled to it because the real estate was land at the devisor's death, and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. A devisor may give to his devisee either land or the price of land at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the testator to give land to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will, when the question is, whether the devisee, or the heir failing the devisee, takes an interest in land as land or money, the true inquiry is, whether [\*186] the devisor has expressed a purpose, that, in the events \*which have happened, the land shall be converted into money. Where a devisor directs his land to be sold and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division, and A. and B. take their several interests as money, and not land; and if A. die in the lifetime of the testator, and the heir stands in his place, the purpose of the devisor still applies to the case, and the heir shall take the share of A., as A. himself would have taken it, as money, and not land: but if A. and B. *both* die in the lifetime of the testator, and the *whole* interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the testator being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devise wholly failed, and the heir would therefore take the whole interest as land. To apply these principles to the present case: under the first devise, the estate is directed to be sold, and the produce applied in aid of the personal estate

in payment of debts and legacies, and the surplus is given to the wife. The debts and legacies are fully paid out of the personal estate, and the wife dies in the testator's lifetime. The whole interest thus resulted to the heir, and the deviser's purpose of sale, being plainly for a distribution according to the will, has no application to the events which have happened, and the heir took the estate as land, which descends in that character to his heir. Under the second devise, there is an obvious purpose of sale for the convenience of division between the sons of Thomas, or, failing them, between Joseph and Robert. The only son of Thomas, and the deviser's son Robert, both die in the deviser's lifetime, and the heir becomes entitled by lapse to the moiety of the produce intended for Robert. The purpose of sale for convenience of division still applies to the events which have happened, and this moiety is not land, but personal estate of the heir. Under the third devise, there is the same obvious purpose of sale: first, for a division between the children of Robert, and, failing them, between the heir and Joseph. There \*were no children of Robert, but the purpose of sale remains, and this moiety also is not land, but personal estate of [\*187] the heir."

Secondly. If a testator bequeath money to be laid out in a purchase of land, to be settled to uses which either wholly or partially fail to take effect, the undisposed of interest in the money, or estate if purchased, will result to the testator's executor, upon trust for his *next of kin*.

Should the *heir* advance a claim, it must be either in his character of *heir* or as *purchaser*. It cannot for a moment be contended, that he can establish a claim in the character of heir, for, to assert such a title, he must prove himself to be the heir of the person last seised, and here by the terms of the question the testator had no seisin.<sup>(z)</sup> "The conversion of the estate," said Lord Northington, "is to be after the testator's death, and whoever takes under the settlement directed to be made will take a new-created interest, which never did, and never was intended to vest in the testator, and therefore he cannot take but as purchaser."<sup>(a)</sup> But if the heir is to claim as purchaser, he must show that the will contains a bequest to him either *expressly* or *by implication*. Now, he cannot maintain that any express gift was made in his favour, for the supposition is, that the testator has declared no intention; nor is it easy to discover upon what ground any implied gift can be supported, for, if implied at all, it must be so from something said in the will; but if a testator merely direct 1000*l.* to be laid out in lands, to be settled on A. for life, the injunction plainly involves nothing more than what is actually expressed. To take the converse of this case, should a testator devise real estate to be sold, and direct the interest of the proceeds to be paid to A. for life, it is undoubted law, that the remainder of the stock would result to the heir, and is not by implication a bequest to the executor.<sup>(b)</sup> It may be said, that a testator is supposed so to favour the heir, that,

(z) Under the late Inheritance Act, 3 & 4 W. IV. c. 106, the title is to be deduced from the "*purchaser*," but the argument in the text is equally applicable.

(a) Robinson v. Knight. 2 Ed. 159.

(b) Wilson v. Major, 11 Ves. 205.



[\*188] where money is to be \*turned into land, a devise to the heir shall be presumed. But where is the maxim to be found, that a testator shall be taken to favour his heir more than his executor? That the law favours the heir is readily conceded, but it is only in the character of *heir*; that is, the law, which invests the heir with the title by which he claims the land, will support him in the maintenance of that title, until it appears he has been disinherited, either expressly, or by necessary implication. It was never contended that favour was to be shown to him in the character of a *purchaser*. As the trust is executory, and therefore admits a greater latitude of construction, it may be thought, perhaps, that the court would insert a limitation to the heir, on the ground, that had the question been put to the testator himself, he would have given a direction to that effect; but as the heir, except as to lands of which the ancestor was seised, is regarded in the light of a stranger, there seems no more reason why the court should insert a limitation to the heir, than to any indifferent person. Besides, the argument would have no application to such cases as that of *Leslie v. The Duke of Devonshire*,<sup>(c)</sup> where the uses of the remainder, though void, were actually expressed. But though the right of the heir may not appear to rest on any reasonable foundation, it may still be thought incongruous that land should go to the executor. However, this difficulty will, on examination, be found totally destitute of weight. The respective rights of the heir and executor are absolutely and immutably fixed at the moment of the intestate's decease: except so far as a person may have disposed of his property by will, what was then real estate will descend upon the heir, and what was then personal estate will devolve on the executor. The estate may, in the execution of some partial purpose expressed upon the will, have been converted into money, or a part of the personal estate may, with the same view, have been converted into realty; but, in either case, the undisposed of interest will, notwithstanding the conversion, result to that representative from whom in fact it was never aliened. If a testator direct the sale of an estate, and give one-third of the proceeds to A., and another to B., the remaining third is, even after the actual [\*189] \*sale, a portion of the land of which the ancestor was seised, and will therefore result to the heir; and, on the same principle, if 1000*l.* be bequeathed to be laid out in lands to be settled, one-third on A. and his heirs, and another on B. and his heirs, the remaining one-third, even after the investment, must be part of the testator's personal estate, and, as such, result to the executor. "All the cases," said Lord Eldon, "establish this proposition, that where a person, dealing upon his own property, has directed a conversion for a *particular purpose*, or *out and out*, but the proceeds to be applied to a *particular purpose*, when the purpose fails, the intention fails, and the court regards him as not having directed the conversion."<sup>(d)</sup> It may appear singular, that money should go to the heir, and land to the executor; but it is needless to mention the numerous cases in which money at law is land in equity, and land at law is money in equity.

(c) 2 B. C. C. 187

(d) *Ripley v. Waterworth*. 7 Ves. 435.



The old authorities<sup>(e)</sup> upon the subject are somewhat conflicting; but it will be unnecessary to enter upon a particular examination of them, as the case of *Cogan v. Stevens*,<sup>(f)</sup> before Lord Cottenham, while at the rolls, has decided the point in favour of the executor.

Thirdly. It often happens, that the settlor makes a primary disposition of the *whole* property to A. subject to a particular charge in favour of B., and the charge in event either wholly or partially fails so as either not to divest, or only *pro tanto* divest the estate of A. The reader must distinguish the preceding cases of resulting trust from such a gift as this; for here, as the entirety is disposed of in the first instance to A., so far as the charge does not exhaust it, there can nothing result to the heir, even should the charge not take effect. The distinction was thus stated by Sir J. Leach:—"If the devise," he said, "to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the \*residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon [\*196] the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure."<sup>(g)</sup>

Thus, if lands be devised to A. charged with a legacy to B. provided B. attain the age of twenty-one, should B. die without attaining that age, the devise has become absolute in A., and the will is to be read as if the legacy to B. had never been mentioned.<sup>(h)</sup> So if lands be given to A. charged with a legacy to B., and B. dies in the testator's lifetime.<sup>(i)</sup>

The construction is the same, if lands be given to A. subject to and charged with any sum not exceeding 10,000*l.* to such persons, and in such manner, as the testator shall appoint, and the power is either never exercised, or the execution of it is void:<sup>(k)</sup> for here, as the testator confers the whole interest on the devisee, reserving the power, if he either abstain from executing the power, or appoint for an illegal purpose, he does not diminish that interest, but the heir is wholly disinherited.<sup>(l)</sup>

And where a testator had devised certain estates upon trust to sell, and out of the proceeds to pay 5000*l.* unto his wife, her executors and administrators, *in part satisfaction of the sum of 10,000*l.* secured to her by marriage settlement in case of her surviving him*, and to invest the residue upon certain trusts, and the wife died in the lifetime of the husband, so that the 10,000*l.* never became raisable, it was held that the 5000*l.*, instead of resulting to the heir, was included in the residue.<sup>(m)</sup> The

<sup>(e)</sup> *Fletcher v. Chapman*, 3 B. P. C. 1; *Hayford v. Benlows*, Amb. 582; *Leslie v. Duke of Devonshire*, 2 B. C. C. 187; *Brown v. De Laet*, 4 B. C. C. 534; *Tregonwell v. Sydenham*, 3 Dow. 207; *Abbot v. Lee*, 2 Vern. 284; S. C. Append. No. II.; *Mogg v. Hodges*, 2 Ves. 52.

<sup>(f)</sup> Append. No. III. 5 L. J. N. S. Chy. 17; *Hereford v. Ravenhill*, 1 Beav. 481.

<sup>(g)</sup> *Cooke v. The Stationers' Company*, 3 M. & K. 264.

<sup>(h)</sup> *Tregonwell v. Sydenham*, 3 Dow. 210, per Lord Eldon. *Sprigg v. Sprigg*, 2 Vern. 394, was decided on this principle; *Cruse v. Barley*, 3 P. W. 20, should have been decided the same way, but the point was not noticed. So *Attorney-General v. Milner*, 3 Atk. 112; *Croft v. Slee*, 4 Ves. 60.

<sup>(i)</sup> *Sutcliffe v. Cole*, 3 Drew. 185.

<sup>(k)</sup> *Jackson v. Hurlock*, 2 Ed. 263; *Cooke v. The Stationers' Company*, 3 M. & K. 262.

<sup>(l)</sup> *Tregonwell v. Sydenham*, 3 Dow. 213, per Lord Eldon.

<sup>(m)</sup> *Noel v. Lord Henley*, 7 Price, 241; S. C. Dan. 211, and 322.

construction put upon the will was, that the whole fund was in the first instance given to the residuary legatees, subject to a charge of 5000*l.* to arise on a certain event, and that \*contingency having never [191] occurred, the primary devise of the entirety was never divested.<sup>(n)</sup>

Again, if an estate be settled to the use of trustees for a term of ninety-nine years, upon trusts that do not exhaust the whole interest, and from and after the expiration, or other sooner determination of the said term, and *subject thereto* to uses in strict settlement, the surplus of the term will be in trust, not for the heir, but for the devisees in remainder, for here the intention is express, that, subject to trusts which have been exhausted, the remaindermen shall take the whole estate.<sup>(o)</sup> So if an estate be devised to trustees upon trust within one year after the testator's decease to raise 2000*l.*, and "after raising the same" upon trust in strict settlement, the court hold the 2000*l.* to be a charge upon and not an exception out of the estate.<sup>(p)</sup>

And if the limitation be to trustees for ninety-nine years upon the trust thereafter expressed, (and the instrument makes no mention of the trusts,) and from and after the expiration, or other sooner determination of the said term, to uses in strict settlement, the court will consider the intention to be clearly *implied*, that the remaindermen should have the beneficial enjoyment in the first instance, and will read the will as if the words *subject thereto and to the trust thereof* had been actually expressed.<sup>(q)</sup>

There has been much discussion as to the applicability to a charity legacy of the rule establishing a distinction between a *charge upon* and *exception from* a devise. The question is one of difficulty, and before stating the apparent result of the cases, it may be useful to premise a few words as to the principle.

If a testator devise an estate worth 10,000*l.* to trustees in trust to sell, and out of the proceeds to pay 1000*l.* to A., and the residue to B., and [192] A. dies in the testator's lifetime, the \*lapse enures to the benefit not of the devisee but of the heir-at-law; the reason is, that in real estate the word "residue" has not the same meaning as in personal estate, but each devise is considered a specific one, and the 1000*l.* and 9000*l.* are distinct fractions of the estate, so that if either fail in event, the undisposed of interest results to the heir-at-law.

If, however, a testator devise an estate to A. and his heirs *charged* with a legacy of 1000*l.* to B., and B. dies in the testator's lifetime, then, as we have seen, A. takes the estate free from the legacy. The explanation is, not that the devisee was intended to take the legacy, *qua* legacy, but the testator has constituted a *hæres factus* to the disinherison at all events of the heir-at-law, and as the legacy is given not directly to the

(n) That the case was probably decided on this ground, see Observations of Richards, C. B., Dan. 235, and of Lord Eldon, ib. 338.

(o) Davidson v. Foley, 2 B. C. C. 203; Marshall v. Holloway, 2 Sw. 432; Lord Southampton v. Marquis of Hertford, 2 V. & B. 54; and see Maundrell v. Maundrell, 10 Ves. 259.

(p) Re Cooper's Trusts, 4 De Gex, M. & G. 757.

(q) Sidney v. Shelly, 19 Ves. 352; S. C. Coop. 206; overruling the *dictum* of Lord Hardwicke, in Brown v. Jones, 1 Atk. 191.

legatee, in which case it would be an exception from the devise of the estate, but has been made a charge to be raised, so far as may be necessary, out of the estate previously devised, the legacy, as in event it is not required to be raised, sinks for the benefit of the devisee.

Should an estate be devised to A., and his heirs, charged with a legacy to a charity, then these observations occur. On the one hand it may be said that in the case of an ordinary charge the lapse of the legacy was an incident to the bequest, which the testator may be taken to have contemplated, and he may have meant that on the occurrence of that event the devisee should be entitled; but in the instance of a charity, the object of the legacy *exists* at the testator's death, and the event on which the money was payable has arisen; he could not, therefore, have intended the devisee to take the legacy, which is bequeathed under the circumstances to the charity; the legacy therefore, in this case, though in form a charge, is in fact an exception. On the other hand it may be argued that where the legacy is admitted to be a charge and not an exception, the devisee does not take the legacy, *because it was intended for him*, since then in the case of a *lapse* the charge would not sink for the benefit of the devisee (for in real estate that only goes to the devisee which is not otherwise *expressed* to be disposed of, whether the bequest take effect or not, as in the case above noticed of a trust for sale, where the lapse of a legacy out of the proceeds enures to the benefit \*of the heir,) but, nevertheless, in a charge the devisee does [\*193] take the legacy in case of lapse, *from the form in which the legacy is given*; a result which shows the true view to be that the testator first constitutes the devisee the *hæres factus* of the whole estate, which disinherits the heir, and then as the legacy is made a graft upon that estate, and the legacy fails, the estate is exonerated from the burden. Lord Alvanley was of opinion that this was the true ground, and that it matters not in what way the failure of the legacy arises, whether by lapse, or the unlawfulness of the object: "It is now perfectly settled," said Lord Alvanley, "that if an estate is devised charged with legacies, and the legacies fail, *no matter how*, the devisee shall have the benefit of it and take the estate." (r)

The cases upon the subject are very conflicting, but the best results to be obtained from them appear to be these:

1. The first inquiry to be made is, whether upon the whole will the testator intended the legacy and the devise to be two distinct independent gifts, flowing directly from himself to the legatee and devisee, or whether he devised the whole estate in the first instance to the devisee to the disinherison of the heir, and then gave the legacy not as an original gift from the testator to the legatee, but by way of graft upon the estate previously given to the devisee; in the former case the legacy would be an exception,(s) and in the latter, a charge.

2. Assuming the legacy to be, according to the true construction of the will, not an exception but a charge, then if the legacy be given by

(r) Kennell v. Abbott, 4 Ves. 811.

(s) Cooper's Trusts, 4 De Gex, M. & G. 757.



way of a *condition* imposed on the devisee, the legacy, as the condition is void, sinks for the devisee's benefit.<sup>(t)</sup>

3. If the estate be devised charged with a sum, say of 1000*l.*, to be paid to the testator's executors and applied in discharge of his debts and legacies, including a legacy to a charity, in this case the charge is raisable as against the devisee, and \*the charity legacy will be a [\*194] resulting trust to the testator's heir-at-law.<sup>(u)</sup>

4. If the estate be simply devised to one, charged with or subject to a legacy in favour of another, and there is nothing on the face of the will to show that the legacy, though expressed in the form of of a charge, was meant to be an exception, then the leaning of the court at the present day would appear to be in favour of the devisee.<sup>(v)</sup>

5. It may be doubted whether the circumstance of a direction for an intermediate payment to the testator's executors of the sum to be raised be a tenable ground of distinction, and should the court decide in favour of the devisee in a case under the fourth head, such decision would undoubtedly shake those in favour of the heir under the third. It would be a reasonable and intelligible rule to lay down that where the failure of the legacy arises from any event which the testator might reasonably have contemplated, as, the death of the legatee in his lifetime, then the legacy should sink for the benefit of the devisee; but that where the legacy is raisable in the event which has happened, and the legacy is only not paid because the policy of the law, in spite of the intention, forbids it, as in the case of a legacy to a charity, there the legacy was in fact never given to the devisee, and a trust should result for the benefit of the heir. The subject, as the matter now stands, is in a very unsatisfactory state.

Fourthly. It has been stated in general terms, that, in the cases we have mentioned, a trust will result to the *settlor or his representatives*, but the doctrine must be received with at least this qualification, that [\*195] the interest which would \*have resulted be not otherwise disposed of by the settlor himself.

Any interest that would have resulted may of course be given away from the settlor's representative, by a *particular* and *specific* devise or bequest; it remains only to inquire what is the effect of certain *general* expressions.

With respect to a testator's realty, the heir "shall sit in the seat of his

(t) *Poor v. Mial*, 6 Madd. 32; *Arnold v. Chapman*, 1 Ves. 108; *Ridgway v. Woodhouse*, 7 Beav. 437. See contra, *Bland v. Wilkins*, cited *Wright v. Row*, 1 B. C. C. 61, note. In *Cooke v. Stationers' Company*, the M. R. said the condition made no difference, as it was no more than a charge, 3 M. & K. 266.

(u) *Arnold v. Chapman*, 1 Ves. 108; *Henchman v. Attorney-General*, 3 M. & K. 494.

(v) *Cooke v. Stationers' Company*, 3 M. & K. 262; *Baker v. Hall*, 12 Ves. 497, (but the heir was not a party;) *Barrington v. Hereford*, cited *Wright v. Row*, 1 B. C. C. 61; *Jackson v. Hurlock*, 2 Ed. 263; Amb. 487; and see remarks of Lord Redesdale and Lord Eldon on this case in *Tregonwell v. Sydenham*, 3 Dow. 208-213. Lord Eldon assumed the power to be good, but that as it was exercised in favour of a charity, the devisee was not affected by a void execution of the power, and was rightly allowed to retain the estate: in fact, there was no appointment to a charity, for the letter, not being of a testamentary character, could not be read. See contra, *Gravenor v. Hallum*, Amb. 643.



ancestor," unless the disinherison be expressed or clearly implied. The word "residue," therefore, has in devises received a strict and narrow construction, and is held to mean, not all that the testator has not actually disposed of, but only so much of which he has shown no intention of disposing. Thus, if, before the late Wills Act, lands had been devised upon trust to raise 5000*l.* for a charity, the residue to A.,<sup>(w)</sup> or upon trust to raise 5000*l.* for a charity, with a general devise "of all the residue of the testator's real estate, whatsoever and wheresoever,"<sup>(x)</sup> in either case the void legacy would have resulted to the heir, and not have been included in the residuary clause. But the law has now been altered in this respect by the late Wills Act, which makes a residuary devise sweep all interest undisposed of in real estate as a residuary bequest already did in respect of personal estate.<sup>(y)</sup>

And if a testator direct his lands to be sold, and afterwards add a general bequest of all his *personal estate*,<sup>(z)</sup> or appoint a person *residuary executor*,<sup>(a)</sup> any part of the proceeds of the sale that is undisposed of will not form part of the residuary fund in the first case, or pass to the residuary executor in the \*second; for nothing, properly speaking, is a testator's *personal estate*, but what possesses that character at the moment of his decease.<sup>(b)</sup> [\*196]

But the intention of converting the property absolutely by the sale, so as to make the proceeds undisposed of by the will pass by the description of the testator's "*personal estate*," may be collected from a will specially worded;<sup>(c)</sup> and the blending of the real and personal estates into one fund will be regarded as a circumstance in some degree indicative of such an intention;<sup>(d)</sup> and this of course will be the case, where the testator expressly directs the proceeds to be considered as part of his *personalty*.<sup>(e)</sup>

(w) *Hutcheson v. Hammond*, 3 B. C. C. 128; *Page v. Leapingwell*, 18 Ves. 463; *Collins v. Wakeman*, 2 Ves. jun. 683; *Cruse v. Barley*, 3 P. W. 20; *Jones v. Mitchell*, 1 S. & S. 293; *Sprigg v. Sprigg*, 2 Vern. 394, per Cur.; *Cooke v. Stationers' Company*, 3 M. & K. 264, per Cur.; *Anon. case*, 1 Com. 345.

(x) *Goodright v. Opie*, 8 Mod. 123; *Wright v. Hall*, Fort. 182; S. C. 8 Mod. 222; *Roe v. Fludd*, Fort. 184; *Watson v. Earl of Lincoln*, Amb. 325; *Oke v. Heath*, 1 Ves. 141, per Lord Hardwicke; *Cambridge v. Rous*, 8 Ves. 25, per Sir W. Grant; *Doe v. Underdown*, Willes, 293. But see *Page v. Leapingwell*, 18 Ves. 463; but it does not appear that the heir was a party, and the question was not discussed.

(y) 1 Vict. c. 26, s. 25.

(z) *Maugham v. Mason*, 1 V. & B. 410; and see *Gibbs v. Rumsey*, 2 V. & B. 294.

(a) *Berry v. Usher*, 11 Ves. 87.

(b) See *Maugham v. Mason*, 1 V. & B. 416.

(c) *Mallabar v. Mallabar*, Rep. t. Talb. 78; *Brown v. Bigg*, 7 Ves. 279; *Durour v. Motteux*, 1 Ves. 321. (See *Motteux's* will correctly stated, *Jones v. Mitchell*, 1 S. & S. 292, note (d)). See observations on *Mallabar v. Mallabar*, and *Durour v. Motteux*, in *Maugham v. Mason*, 1 V. & B. 416.

(d) Compare *Durour v. Motteux*, 1 Ves. 321, with *Maugham v. Mason*, 1 V. & B. 417; *Hutcheson v. Hammond*, 3 B. C. C. 148, per Lord Thurlow; but see *Berry v. Usher*, 11 Ves. 87.

(e) *Kidney v. Koussmaker*, 1 Ves. jun. 436; see *Lowes v. Hackward*, 18 Ves. 171. In *Collins v. Wakeman*, 2 Ves. jun. 683, the sum undisposed of did not fall into the residue on the principle adopted in *Davers v. Dewes*, 3 P. W. 40, and *Attorney-General v. Johnstone*, Amb. 577.

The question has been much discussed, what expressions of a testator will amount to such an absolute conversion of real estate into personal, that a *void or lapsed legacy* given out of the proceeds of the sale shall, as if the property had been personal, fall into the residuary bequest, instead of resulting to the heir. "I agree," said Lord Brougham, "a testator may provide that lapsed and void legacies shall go in this manner, as if the testator say in express words, 'I give all lapsed and void legacies as parcel of my residue to the residuary legatee,' and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument.<sup>(f)</sup> But what will amount to such an implication is a point that can with difficulty be brought under any very definite rule.

[\*197] Apparently the only principle to be extracted from the \*authorities is, that a lapsed or void legacy will pass to the residuary legatee, *if the testator expressly declare that the proceeds of the sale shall be considered as "personal estate," or if the intention of an absolute conversion into personal estate for all the purposes of the will can, without the aid of any such express declaration, be gathered from the general structure of the will.*<sup>(g)</sup> It was stated in a former page, that if a testator direct the proceeds of the sale to be taken as "*personal estate*," a part of the proceeds undisposed of by him will nevertheless not result to the *next of kin*. The distinction between the *next of kin* and the *residuary legatee* is this: the former claim *dehors* the will, while the latter is a claimant *under* the will, and when the proceeds of the sale are directed to be taken as personalty, the testator must be understood to mean for the purposes of the will only, and not for any object beyond it.

With respect to resulting trusts of *personal estate*; the general residuary bequest sweeps every interest, whether undisposed of by the will, or undisposed of in event, and therefore it is only where the will contains no residuary clause that the next of kin can assert a claim to the benefit of the resulting interest.<sup>(h)</sup> But if any part of the personal estate be expressly excepted from the residue, as if a testator reserve a sum to be disposed of by a codicil, and give the residue not disposed of or reserved to be disposed of to A., and no codicil is executed, the sum so specially excepted will then result to the next of kin.<sup>(i)</sup>

It may happen that a *cestui que trust* has died intestate, without heir [\*198] or next of kin, and in that case the beneficial interest undisposed of will, if the property be real estate (a \*trust not being liable to

(f) *Amphlett v. Parke*, 2 R. & M. 232; and see *McClelland v. Shaw*, 2 Sch. & Lef. 545.

(g) *Durour v. Motteux*, 1 Ves. 321, (see the will stated from Reg. Lib. in *Jones v. Mitchell*, 1 S. & S. 292, note (d)); *Kennell v. Abbott*, 4 Ves. 802; *Amphlett v. Parke*, 1 Sim. 275; S. C. 2 R. & M. 221; *Green v. Jackson*, 5 Russ. 35; S. C. 2 R. & M. 238; *Salt v. Chattaway*, 3 Beav. 576. As to *Mallabar v. Mallabar*, Rep. t. Talb. 78, see *Phillips v. Phillips*, 1 M. & K. 660.

(h) See *Dawson v. Clarke*, 15 Ves. 417; *Brown v. Higgs*, 4 Ves. 708; S. C. 8 Ves. 570; *Shanley v. Baker*, 4 Ves. 722; *Jackson v. Kelly*, 2 Ves. 285; *Oke v. Heath*, 1 Ves. 141; *Cambridge v. Rous*, 8 Ves. 25; *Cooke v. Stationers' Company*, 3 M. & K. 264.

(i) *Davers v. Dewes*, 3 P. W. 40; *Attorney-General v. Johnstone*, Amb. 577.

escheat,) sink into the land for the benefit of the legal tenant; (*k*) but in the case of personalty the resulting interest, as *bonum vacans*, falls to the crown by the prerogative. (*l*)

Lastly, it may be noticed that settlements to *charitable* purposes are an exception from the law of resulting trusts: for, upon the construction of instruments of this kind, the court has adopted the two following rules:—

1. Where a person makes a gift, whether by deed or will, and expresses a general intention of charity, but either particularizes no objects, (*m*) or such as do not exhaust the proceeds, (*n*) the court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

2. Where a person settles lands, or the rents and profits of lands to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order the surplus, instead of resulting to the heir, to be applied in the same or a similar manner with the original amount. (*o*)

\*But even in the case of charity, if the settlor do not give the land or the whole rents of the land, but, noticing the property [*\*199*] to be of a certain value, appropriate part only to the charity, the residue will then follow the general rule, and result to the heir-at-law. (*p*)

The exceptions we have noticed were established at an early period, when the doctrine of resulting trusts was imperfectly understood. (*q*) The interest of the heir was shut entirely out of sight, and the question

(*k*) *Henchman v. Attorney-General*, 3 M. & K. 485; *Taylor v. Haygarth*, 14 Sim. 8.

(*l*) See S. C.; and see *Middleton v. Spicer*, 1 B. C. C. 201; *Barclay v. Russell*, 3 Ves. 424; *Taylor v. Haygarth*, *ubi supra*.

(*m*) *Attorney-General v. Herrick*, Amb. 712.

(*n*) *Attorney-General v. Haberdashers' Company*, 4 B. C. C. 102; S. C. 2 Ves. jun. 1; *Attorney-General v. Minshull*, 4 Ves. 11; *Attorney-General v. Arnold*, Shower's P. C. 22; and see *Attorney-General v. Sparks*, Amb. 201; and see Lord Eldon's observations, *Attorney-General v. Mayor of Bristol*, 2 J. & W. 319.

(*o*) *Inhabitants of Eltham v. Warreyn*, Duke, 67; *Sutton Colefield case*, second resolution, Id. 68; *Hynshaw v. Morpeth Corporation*, Id. 69; *Thetford School case*, 8 Re. 130 b; *Attorney-General v. Johnson*, Amb. 190; *Kensington Hastings' case*, Duke, 71; *Attorney-General v. Mayor of Coventry*, 2 Vern. 397, reversed in D. P. 7 B. P. C. 236, (see the foregoing cases commented upon by Lord Eldon in *Attorney-General v. Mayor of Bristol*, 2 J. & W. 316;) *Attorney-General v. Coopers' Company*, 19 Ves. 189, per Lord Eldon; *Attorney-General v. Wilson*, 3 M. & K. 362; *Lad v. London City*, Mos. 99; *Attorney-General v. Coopers' Company*, 3 Beav. 29; *Attorney-General v. Master of Catherine Hall*, Cambridge, Jac. 381; *Attorney-General v. Drapers' Company*, 2 Beav. 508; 4 Beav. 67; *Attorney-General v. Christ's Hospital*, ib. 73; *Attorney-General v. Merchants Venturers' Society*, 5 Beav. 338; *Attorney-General v. Corporation of Southmolton*, 14 Beav. 357; *Attorney-General v. Caius College*, 2 Keen, 150; and see *Attorney-General v. Smythies*, 2 R. & M. 717; *Attorney-General v. Drapers' Company*, 6 Beav. 382.

(*p*) See *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307 and 332; *Attorney-General v. Gascoigne*, 2 M. & K. 647.

(*q*) *Attorney-General v. Johnson*, Amb. 190, per Lord Hardwicke; *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307, per Lord Eldon.



was viewed as between the charity and the trustee.<sup>(r)</sup> Were the subject still unprejudiced by authority, there is little doubt but the court would, at the present day, be governed by the general principle, and hold a trust to result.<sup>(s)</sup>

## SECTION II.

### RESULTING TRUSTS UPON PURCHASES IN THE NAMES OF THIRD PERSONS.

#### I. *Where the purchase is in the name of a stranger.*

"The clear result," said Lord Chief Baron Eyre, "of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold, whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly<sup>(t)</sup> or successive,<sup>(tt)</sup> results \*to the man who advances the purchase-money<sup>(u)</sup> and it [\*200] goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor.<sup>(v)</sup>

But no trust will result unless the person advance the money in the character of a purchaser; for if A. discharge the purchase-money by way of *loan* to B., in whose name the conveyance is taken, no trust will result in favour of A., who is merely a creditor of B.<sup>(w)</sup> And, on the other hand, should B. advance the purchase-money, but only on account of A., then A. is the owner in equity, and B. stands in the light of a creditor.<sup>(x)</sup>

And not only *real estate* but *personalty* also is governed by these principles, as if a man take a bond,<sup>(y)</sup> or purchase an annuity,<sup>(z)</sup> stock,<sup>(a)</sup> or other chattel interest,<sup>(b)</sup> in the name of a stranger, the equitable ownership results to the person from whom the consideration moved.

(r) See Thetford School case, 8 Re. 130.

(s) See Attorney-General v. Mayor of Bristol, 2 J. & W. 307.

(t) See Ex parte Houghton, 17 Ves. 251; Rider v. Kidder, 10 Ves. 367.

(tt) Withers v. Withers, Amb. 151; Howe v. Howe, 1 Vern. 415; Goodright v. Hodges, 1 Watk. Cop. 227; S. C. Lofft, 230; Smith v. Baker, 1 Atk. 385; Clarke v. Danvers, 1 Ch. Ca. 310; Pranker v. Pranker, 1 S. & S. 1.

(u) Redington v. Redington, 3 Ridg. 177, per Lord Loughborough; Hungate v. Hungate, Tothill, 120; Ex parte Vernon, 2 P. W. 549; Ambrose v. Ambrose, 1 P. W. 321; Willis v. Willis, 2 Atk. 71; Woodman v. Morrel, 2 Freem. 33, per Cur.; ib. 123; Finch v. Finch, 15 Ves. 50, per Lord Eldon; Grey v. Grey, 2 Sw. 597; S. C. Finch. 340, per Lord Nottingham; Wray v. Steele, 2 V. & B. 390, per Sir T. Plumer; Smith v. Camelford, 2 Ves. jun. 712, per Lord Loughborough; Anon. 2 Vent. 361; Pelly v. Maddin, 21 Vin. Ab. 498; Lever v. Andrews, 7 B. P. C. 288; Lade v. Lade, 1 Wils. 21; Groves v. Groves, 3 Y. & J. 170, per Ch. Bar. Alexander; Murlless v. Franklin, 1 Sw. 17, 18, per Lord Eldon; Crop v. Norton, 9 Mod. 235; S. C. Barn. 184; S. C. 2 Atk. 75, per Lord Hardwicke; Trench v. Harrison, 17 Sim. 111.

(v) Dyer v. Dyer, 2 Cox, 93; S. C. 1 Watk. Cop. 218.

(w) See Bartlett v. Pickersgill, 1 Ed. 516; Crop v. Norton, 9 Mod. 235.

(x) See Aveling v. Knipe, 19 Ves. 441. (y) Ebrand v. Dancer, 2 Ch. Ca. 26.

(z) Mortimer v. Davies, cited Rider v. Kidder, 10 Ves. 363, 366.

(a) Rider v. Kidder, 10 Ves. 360; Lloyd v. Read, 1 P. W. 607; and see Sidmouth v. Sidmouth, 2 Beav. 447.

(b) See Ex parte Houghton, 17 Ves. 253.



In *Crop v. Norton* <sup>(c)</sup> Lord Hardwicke doubted whether the rule was not confined to an individual purchaser. "Suppose," he said, "two persons purchase an estate, and club for the consideration-money; suppose the conveyance is taken in the name of one of them only, and it recites that the whole of the \*purchase-money was paid by the other. [\*201] I do not know a case wherein it has ever been declared there could be a resulting trust in part of the estate for the benefit of the other." <sup>(d)</sup> But in *Wray v. Steel*, <sup>(e)</sup> the point was expressly decided in conformity with the general principle, and Sir Thomas Plumer observed, that Lord Hardwicke could not have used the language ascribed to him; for what was there applicable to an advance by a *single* individual which was not equally applicable to a *joint* advance under similar circumstances?

If two persons joining in a purchase, take the conveyance, not in the name of a *stranger*, or of *one* of themselves, but in the names of *both* of themselves as joint-tenants, then a distinction must be observed between an *equal* and an *unequal* contribution. In the former case there is nothing on which to ground the presumption of a resulting trust, for persons making equal advances might very consistently take an estate in joint-tenancy, as each has it in his power to compel a partition, or by executing a conveyance to pass a moiety of the estate. <sup>(f)</sup> And so, if two persons *contract* for a purchase to them and their heirs, and one of them die, the court, if they paid equal proportions, will specifically perform the agreement, by ordering a conveyance, not to the heir of the deceased person and the survivor as tenants in common, but to the survivor alone. <sup>(g)</sup> But even where equal contributors take a conveyance in joint-tenancy, collateral circumstances may induce a court of equity to construe it a tenancy in common, as if two people join in lending money upon mortgage, equity says it could not have been the intention that the interest in that should survive; but though they took a joint security, each meant to lend his own, and take back his own. <sup>(h)</sup> And so where two tenants in \*common, of a mortgage term, purchase the equity of redemption [\*202] to them and their heirs, it was held the nature of the inheritance should follow that of the term. <sup>(i)</sup> And in all cases of a joint undertaking or partnership, by way of trade, or upon the hazard of profit and loss, the *jus accrescendi* is excluded, and the survivors are trustees, in due proportions, for the representatives of those who are dead. <sup>(k)</sup> And

<sup>(c)</sup> Barn. 179; S. C. 9 Mod. 233; S. C. 2 Atk. 74.

<sup>(d)</sup> Barn. 184.

<sup>(e)</sup> 2 V. & B. 388.

<sup>(f)</sup> *Rea v. Williams*, Append. to Vend. and Purch. No. 24; *Moyse v. Gyles*, 2 Vern. 385; *York v. Eaton*, 2 Freem. 23; *Rigden v. Vallier*, 3 Atk. 735, per Lord Hardwicke; *Hayes v. Kingdome*, 1 Vern. 33; *Aveling v. Knipe*, 19 Ves. 444, per Sir W. Grant; *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, per Sir Jos. Jekyll; Anon. Carth. 15; and see *Thicknesse v. Vernon*, 2 Freem. 84.

<sup>(g)</sup> *Aveling v. Knipe*, 19 Ves. 441.

<sup>(h)</sup> *Morley v. Bird*, 3 Ves. 631, per Lord Alvanley; *Rigden v. Vallier*, 3 Atk. 734, per Lord Hardwicke; Anon. case, Carth. 16; *Partridge v. Pawlet*, 1 Atk. 467; *Petty v. Styward*, 1 Ch. Re. 57; *Vickers v. Cowell*, 1 Beav. 529.

<sup>(i)</sup> *Edwards v. Fashion*, Pr. Ch. 332; and see *Aveling v. Knipe*, 19 Ves. 444.

<sup>(k)</sup> *Lake v. Gibson*, 1 Eq. Ca. Ab. 290; S. C. (by name of *Lake v. Craddock*), affirmed 3 P. W. 158; *Jeffereys v. Small*, 1 Vern. 217; *Elliot v. Brown*, cited

where the purchasers pay equally, and take a joint estate, and one afterwards *improves* the property at his own cost, he has a lien upon the land *pro tanto* for the money he has expended.<sup>(l)</sup> Should the contribution of the parties be *unequal*, then in all cases a trust results to each of them in proportion to the amount originally subscribed.<sup>(m)</sup>

If A. discharge the fine on a grant of copyholds to B., C., and D. successively for their lives, the equitable interest will result to A.; but should A. die intestate, on whom will the remaining equity devolve? Estates *pur autre vie* in copyholds were not within the Statute of Frauds,<sup>(n)</sup> nor the 14 G. 2, c. 20, s. 9,<sup>(o)</sup> and before the late Wills Act the questions were asked, can the *heir* take an estate which has no descendible property? or can the *executor* claim as assets what is not of the nature of personalty? or shall the tenants of the legal estate become the beneficial proprietors in the absence of any one to advance a better title? In *Clark v. Danvers*<sup>(p)</sup> the plaintiff was both *heir* and *executor* of the equitable owner, and was decreed the benefit of the trust. In *Howe v. Howe*<sup>(q)</sup> the administratrix was held entitled, and so it was allowed in *Rundle v. Rundle*,<sup>(r)</sup> and was determined in *Withers v. Withers*,<sup>(s)</sup> and was subsequently sanctioned by the high authority of Lord \*Mansfield. [\*203] "It is always presumed," said his lordship, "that whoever pays the fine takes for his own use and benefit, and does not mean to serve the others, who are mere nominees to give as large an estate as by the rules of the manor he can have; and as his personal estate is diminished by the payment of the fine-money his personal representative is entitled to the advantage resulting from it."<sup>(t)</sup> Now by the late Wills Act (1 V. c. 26, s. 6,) it is declared, that an estate *pur autre vie* in copyhold shall, if not disposed of by the will of the grantee, go to his personal representative.

The court cannot imply a resulting trust in evasion of an act of parliament, and therefore if A., on purchasing a ship, take the transfer in the name of B., the complete ownership, both legal and equitable, is in B.<sup>(u)</sup> In order to enforce the navigation laws, and secure to British subjects the exclusive enjoyment of British privileges, the Registry Acts require an exact history to be kept of every ship, how far throughout her existence she has been British built and British owned, and if implied trusts were permitted the whole intent of the legislature might be indirectly defeated.<sup>(v)</sup> It was at first contended that the acts were not meant to apply to transfers by operation of law; nor are they to transfers by mere operation of law that could not be effected in the mode prescribed by

*Jackson v. Jackson*, 9 Ves. 597; *Lyster v. Dolland*, 1 Ves. jun. 434, 435, per Lord Thurlow; and see *York v. Eaton*, 2 Freem. 23.

(l) *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, per Sir J. Jekyll.

(m) *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, per Sir J. Jekyll; *Rigden v. Vallier*, 3 Atk. 735, per Lord Hardwicke.

(n) 29 Car. 2, c. 3, s. 12.

(o) *Rundle v. Rundle*, Amb. 152.

(p) 1 Ch. Ca. 310.

(q) 1 Vern. 415.

(r) 2 Vern. 252, 264; S. C. Amb. 152.

(s) Amb. 151.

(t) *Goodright v. Hodges*, 1 Watk. Cop. 228; and see *Rumboll v. Rumboll*, 2 Ed. 15.

(u) *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; *Camden v. Anderson*, 5 T. R. 709.

(v) See *Ex parte Yallop*, 15 Ves. 66, 69.

the statutes, as in the transfer to executors, to assignees of bankrupts, &c.; but they do reach the case of transfers not by mere operation of law, but connected with the acts of parties, and arising *ex contractu*.(w)

Upon the same principle, while the papistry laws were in force, if A., a papist, had purchased an estate in the name of B., the court could not have presumed a resulting trust to A., which, as soon as raised, would have become forfeitable to the state.(x)

And so if a purchaser take a conveyance in the name of \*another, with the view of giving him a vote for a member of [\*204] parliament, he cannot afterwards claim the beneficial ownership, for the operation of such a right would render the original purchase fraudulent.(y)

As the Statute of Frauds(z) extends to creations or declarations of trusts by parties only, and does not affect, indeed expressly excepts, trusts arising by operation or construction of law, it is competent for the real purchaser to prove his payment of the purchase-money by *parol*, even though it be otherwise expressed in the deed.

In *Kirk v. Webb*(a) it was argued "there could be no trust unless there were a declaration in the deed to that purpose, for by the statute there could be no trust unless it were declared in writing; that if it were a resulting trust, it was made so by *parol* proof, which was directly contrary to the statute, and would open a door to all the mischiefs it was intended to prevent; that it would introduce an utter uncertainty into all men's titles, for the best title might be spoiled by proving the purchase-money to be another person's;" and the court refused to admit the evidence, and the decision was followed in subsequent cases;(b) however, the doctrine, though supported by numerous precedents, has since been clearly overthrown by the concurrent authority of the most distinguished judges.(c)

The rule as at present established will not warrant the admission of *parol* evidence, where an estate is purchased by an *agent*, and no part of the consideration is paid by the employer; for though an agent is a trustee in equity, yet the \*trust is one arising *ex contractu*, [\*205] and not resulting by operation of law.(d) The agent may be indicted for perjury in denying his character, and may be convicted, yet the court has no power to decree the trust.(e) The employer, therefore,

(w) See *Ex parte Yallop*, 15 Ves. 68; *Ex parte Houghton*, 17 Ves. 254.

(x) See *Redington v. Redington*, 3 Ridg. 184.

(y) *Groves v. Groves*, 3 Y. & J. 163, see 172, 173.

(z) 29 Car. 2, c. 3.

(a) *Prec. Ch.* 84.

(b) *Heron v. Heron*, Pr. Ch. 163; *S. C.* *Freem.* 248; *Skett v. Whitmore*, *Freem.* 280; *Kinder v. Miller*, Pr. Ch. 172; and see *Halcott v. Markant*, Pr. Ch. 168; *Hooper v. Eyles*, 2 Vern. 480; *Newton v. Preston*, Pr. Ch. 103; *Cox v. Bateman*, 2 Ves. 19; *Ambrose v. Ambrose*, 1 P. W. 321; *Deg v. Deg*, 2 P. W. 414. The earlier case of *Gascoigne v. Thwing*, 1 Vern. 366, accorded with the modern doctrine.

(c) *Ryall v. Ryall*, 1 Atk. 59; *S. C.* *Amb.* 413; *Willis v. Willis*, 2 Atk. 71; *Bartlett v. Pickersgill*, 1 Ed. 515; *Lane v. Dighton*, *Amb.* 409; *Knight v. Pechey*, 1 Dick. 327; *S. C.* cited from MS. 3 Vend. & Purch. 258; *Groves v. Groves*, 3 Y. & J. 163; *Lench v. Lench*, 10 Ves. 517.

(d) *Bartlett v. Pickersgill*, 1 Ed. 515; *Rastel v. Hutchinson*, 1 Dick. 44; *Lamas v. Bayly*, 2 Vern. 627; *Atkins v. Rowe*, *Mose.* 39; *S. C.* *Cas. Dom. Proc.* 1730.

(e) *Bartlett v. Pickersgill*, 1 Ed. 517.



as he cannot profit by the conviction, is not prevented by interest from being a witness against the agent.(f)

And parol evidence, where admitted, must prove the fact very *clearly*;(g) though no objection lies against the reception of mere *circumstantial* evidence, as that the circumstances of the pretended purchaser were so mean as to make it impossible he should have paid the purchase-money himself.(h)

Should the nominal purchaser *deny* the trust by his answer, there seems to be no reason why parol evidence should not be admitted to establish the fact against him; for, before the Statute of Frauds, parol evidence was undoubtedly admissible, and, as trusts by operation of law are expressly excepted from the statute, by what rule is parol evidence to be excluded?(i) But the solemnity of the defendant's oath will of course require a considerable weight of evidence to overcome its impression.(k)

It is laid down by Mr. Sanders, that "if a person at his death leave any papers disclosing the real circumstances of the case, the court will raise the trust even against the express declaration of the purchase-deed."(l) We have seen that, according to the latest authorities, parol [206] evidence is in ordinary \*cases admissible against the language of the purchase-deed; but, if Mr. Sander's opinion to the contrary(m) were well founded, it does not appear how mere papers would satisfy the requisitions of the statute; for, to have that effect, the writings ought also to be *signed* by the party. The cases of Ryall v. Ryall(n) and Lane v. Dighton,(o) which are cited for the position, do not at all turn upon the distinction suggested.

It is observed by the same writer, that, "*after the death of the supposed nominal purchaser*, parol proof alone can in no instance be admitted against the express declaration of the deed;"(p) but the cases relied upon in support of this doctrine(q) do not distinguish between proofs in a person's lifetime and after his decease: they are certainly authorities for the exclusion of parol evidence universally, but in this respect, as before noticed, they have been subsequently overruled. It would seem, upon principle, that the death of the nominal purchaser cannot affect

(f) King v. Boston, 4 East, 572.

(g) Gascoigne v. Thwing, 1 Vern. 366; Halcott v. Markant, Pr. Ch. 168; Willis v. Willis, 2 Atk. 71; Goodright v. Hodges, 1 Watk. Cop. 229, per Lord Mansfield; Groves v. Groves, 3 Y. & J. 163; and see Rider v. Kidder, 10 Ves. 364.

(h) Willis v. Willis, 2 Atk. 71, per Lord Hardwicke; and see Lench v. Lench, 10 Ves. 518; Wilkins v. Stevens, 1 Y. & C. Ch. Ca. 431.

(i) In Bartlett v. Pickersgill, 1 Ed. 515, where the defendant denied the trust, Lord Henley said, if the plaintiff had paid any part of the purchase-money, he would have admitted the evidence; and see Edwards v. Pike, 1 Ed. 267. Mr. Sanders, (Uses and Trusts, c. 3, s. 7, div. 2.) dissents from the doctrine; but the authorities cited by him to the contrary do not appear to warrant his conclusion.

(k) See Cooth v. Jackson, 6 Ves. 39.

(l) Uses and Trusts, c. 3, s. 7, div. 2.

(m) Uses and Trusts, c. 3, s. 7, div. 2.

(n) Amb. 413.

(o) Amb. 409.

(p) Uses and Trusts, c. 3, s. 7, div. 2.

(q) Kirk v. Webb, Pr. Ch. 84; S. C. Freem. 229; Heron v. Heron, Pr. Ch. 163; Halcott v. Markant, id. 168; Kinder v. Miller, id. 172; S. C. 2 Vern. 440; Deg v. Deg, 2 P. W. 414, per Lord King.



the *admissibility* of parol testimony, whatever effect it may have in detracting from its *weight*.

In the question, whether a purchase in the name of a third person can be established by parol testimony is also involved the question, whether trust-money can be followed into land by parol. A purchase with trust-money is virtually a purchase paid for by the *cestuis que trust*; and on the ground that such a purchase is a trust resulting by operation of law, and not within the purview of the Statute of Frauds, it has been settled that parol evidence is clearly admissible.<sup>(r)</sup>

On the other hand, as the trust results to the real purchaser by presumption of law, which is merely an *arbitrary implication* in the absence of *reasonable proof* to the contrary, the nominal purchaser is at liberty to rebut the presumption by \*the production of parol evidence showing the intention of conferring the beneficial interest.<sup>(s)</sup> And as he may repel the presumption *in toto*, so may he in part; as by proving the purchaser's intention to permit the legal tenant to enjoy beneficially for life.<sup>(t)</sup>

And when it has been once ascertained what was the understanding of the parties at the time of the purchase, it is not competent to the real purchaser to put a different construction upon the instrument at any subsequent period;<sup>(u)</sup> and even if under such circumstances the legal tenant agreed afterwards to execute a conveyance to the person who paid the money, the court would not enforce the contract, if merely voluntary.<sup>(v)</sup> The real purchaser may also be barred of his interest by laches, for the presumption of a resulting trust will not be raised, after a great length of time, in opposition to the evidence arising from actual enjoyment.<sup>(w)</sup>

II. *Where the purchase is made by a father in the name of his child.*

In this case, instead of a resulting trust, the presumption of law is, that a provision was intended.<sup>(x)</sup> The grounds of this doctrine are thus stated by Lord Nottingham:<sup>(y)</sup>—

1. "The natural consideration of blood and affection is so apparently

<sup>(r)</sup> *Lench v. Lench*, 10 Ves. 517, per Sir W. Grant; *Ryall v. Ryall*, 1 Atk. 59; S. C. Amb. 413; *Lane v. Dighton*, Amb. 409; *Balgney v. Hamilton*, Amb. 414; *Trench v. Harrison*, 17 Sim. 111.

<sup>(s)</sup> *Goodright v. Hodges*, 1 Watk. Cop. 227; S. C. Loft, 230; *Rider v. Kidder*, 10 Ves. 364; *Rundle v. Rundle*, 2 Vern. 252, 264; *Taylor v. Taylor*, 1 Atk. 386; *Redington v. Redington*, 3 Ridg. 106; see 165, 177, 178.

<sup>(t)</sup> *Rider v. Rider*, 10 Ves. 360; see 368; *Benbow v. Townsend*, 1 M. & K. 506.

<sup>(u)</sup> *Groves v. Groves*, 3 Y. & J. 172, per Alexander, C. B.

<sup>(v)</sup> *Groves v. Groves*, 3 Y. & J. 163.

<sup>(w)</sup> *Delane v. Delane*, 7 B. P. C. 279; and see *Groves v. Groves*, 3 Y. & J. 172.

<sup>(x)</sup> *Dyer v. Dyer*, 2 Cox, 93; S. C. 1 Watk. Cop. 219, per Eyre, C. B.; *Grey v. Grey*, 2 Sw. 597; S. C. Finch. 340, per Lord Nottingham; *Sidmouth v. Sidmouth*, 2 Beav. 454; per Lord Langdale; *Redington v. Redington*, 3 Ridg. 176, per Lord Loughborough; *Christy v. Courtenay*, 13 Beav. 96; *Elliot v. Elliot*, 2 Ch. Ca. 231, agreed; *Bedwell v. Froome*, cited 2 Cox, 97, and 1 Watk. Cop. 224, per Sir T. Sewell; *Goodwright v. Hodges*, 1 Watk. Cop. 228, per Lord Mansfield; *Pole v. Pole*, 1 Ves. 76, per Lord Hardwicke; *Lamplugh v. Lamplugh*, 1 P. W. 111, 2d point; *Woodman v. Morrel*, 2 Freem. 33, per Cur.; *Murless v. Franklin*, 1 Sw. 17, 18, per Lord Eldon; *Finch v. Finch*, 15 Ves. 50, *per eundem*; *Fearn's P. W.* 327, &c.

<sup>(y)</sup> *Grey v. Grey*, 2 Sw. 598.

FEBRUARY, 1858.—15

[\*208] predominant, that those acts which would imply a \*trust in a stranger will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument or some clear proof of a declaration of trust, and not depend upon an implication of law.

2. "All the books are agreed on this point, that a feoffment to a stranger without a consideration raised a use to the feoffor, but a feoffment to the son without other consideration raised no use by implication to the father, for the consideration of blood settled the use in the son, and make it an advancement. How can this court justify itself to the world if it should be so arbitrary as to make the law of trusts differ from the law of uses in the same case?"

3. "Again, as land can never lineally ascend, so neither shall the trust of land lineally ascend where it is left to the presumption of law;(z) for the reason why land doth not lineally ascend is, not, as my Lord Coke says, from natural philosophy, *quia gravia deorsum*, but from moral philosophy, *quia amor descendit non ascendit*, and from divinity, because fathers are bound to provide for their children, but children do not provide for their fathers: therefore, when a father, according to his duty, has provided for his son, it were hard to take away that provision by a constructive trust."

"The circumstance," said Lord Chief Baron Eyre, "of one or more of the nominees being a child or children of the purchaser, is held to operate by *rebutting the resulting trust*; and it has been determined in so many cases that the nominee being a child shall have such operation as a *circumstance of evidence*, that it would be disturbing land-marks if we suffered either of these propositions to be called in question;—namely, That such circumstance shall rebut the resulting trust; and, That it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as *purchasers for valuable consideration*. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of \*the cases, and would have prevented some [\*209] very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea without very certain guides."(a)

The difficulties arising from the light in which the question has been thus viewed will amply appear from the numerous refined distinctions upon which the court from time to time has been called upon to adjudicate.

1. A distinction was formerly taken where the child was an *infant*;(b) for a parent, it was said, could scarcely have intended to bestow a separate and independent provision upon one utterly incapable of undertaking

(z) This ground for the doctrine no longer exists—since the father, under the late Inheritance Act, takes next after brothers and sisters.

(a) *Dyer v. Dyer*, 2 Cox, 94; S. C. 1 Watk. Cop. 218.

(b) 2 Freem. 128, c. 151; and see *Binion v. Stone*, id. 169; S. C. Nels. 68.

the management of it. But still more improbable was the supposition that an infant should have been selected as a trustee,<sup>(c)</sup> and accordingly the notion has long since been overruled;<sup>(d)</sup> nay, the infancy of the child is now looked upon as a circumstance particularly favourable.<sup>(e)</sup>

2. It was objected, that a *reversionary estate*, from the uncertainty of the time when it would fall into possession, was not such a kind of interest as a parent would prudently purchase by way of provision for a child; but mere proximity or remoteness of the enjoyment, whether the reversion be expectant on the decease of the parent or a stranger, has since been held clearly insufficient to countervail the general rule.<sup>(f)</sup>

3. A purchase in the *joint names* of the father and son has met with objections; "for this," observes Lord Hardwick, "does not answer the purpose of an advancement, as it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's \*taking a chance to himself of being a survivor of the other moiety: nay, if the son die during his minor- [\*210] ity, the father would be entitled to the whole by survivorship, and the son could not prevent it by severance, he being an infant."<sup>(g)</sup> But surely no improvidence can be justly charged on a parent who so settles his estate, that if the son die a minor it shall revert to himself; that until the marriage of the son or other pressing occasion, the father and son shall possess an equal interest during their joint lives, with the right of survivorship as to the whole; that the son shall have the power, when necessary, of settling one moiety of the estate, but shall leave the other moiety to his parent. Whatever opinion may be entertained as to the *principle*, the doubts above expressed by Lord Hardwicke can scarcely be maintained in opposition to repeated decisions.<sup>(h)</sup> A purchase in the joint names of the son and a *stranger* is less favorable to the supposition of an intended advancement;<sup>(i)</sup> but even here the right of the child is now indisputably established.<sup>(k)</sup> However, the advancement cannot be *more extensive than the legal estate in the child*;<sup>(l)</sup> and therefore the *stranger, quatenus* the legal estate vested in *him*, must hold upon trust for the father.<sup>(m)</sup>

4. It is the custom, in many manors, to make grants for lives *successivè*. Should a father pay the fine upon a grant to himself and his two sons, shall this be held an advancement or a trust? Upon the difficulty of this case, Lord Chief Baron Eyre has remarked, "When the lessees

(c) See *supra*, p. 39.

(d) *Lamplugh v. Lamplugh*, 1 P. W. 111; *Lady Gorge's case*, cited 2 Sw. 600; *Skeats v. Skeats*, 2 Y. & C. Ch. Ca. 9; *Christy v. Courtenay*, 13 Beav. 96; *Collinson v. Collinson*, 3 De G. M. & G. 403; *Mumma v. Mumma*, 2 Vern. 19; *Finch v. Finch*, 15 Ves. 43, &c.

(e) *Fearne's P. W.* 327.

(f) *Rumboll v. Rumboll*, 2 Ed. 17, per Lord Henley; *Finch v. Finch*, 15 Ves. 43; *Murless v. Franklin*, 1 Sw. 13.

(g) *Stileman v. Ashdown*, 2 Atk. 480; and see *Pole v. Pole*, 1 Ves. 76.

(h) *Scroope v. Scroope*, 1 Ch. Ca. 27; *Back v. Andrews*, 2 Vern. 120; *Grey v. Grey*, 2 Sw. 599, and cases there cited.

(i) See *Hayes v. Kingdome*, 1 Vern. 34.

(k) *Lamplugh v. Lamplugh*, 1 P. W. 111; *Kingdome v. Bridges*, 2 Vern. 67.

(l) See *Rumboll v. Rumboll*, 1 Ed. 17.

(m) See *Kingdome v. Bridges*, 2 Vern. 67; *Lamplugh v. Lamplugh*, 1 P. W. 112.



are to take *successivè*, it is said, that as the father cannot take the whole in his name, but *must* insert other names in the lease, then the children shall be trustees for the father. And to be sure, if the circumstance of the child being the nominee is not *decisive* the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life \*of a child in preference to any other [\*211] person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of a child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to him in succession, the inference is very different.”(n) And in accordance with this reasoning was decided the case of *Dickinson v. Shaw*;(o) but in *Dyer v. Dyer*(p) the notion was overruled, as savouring too much of refinement; and so at the present day it must be considered as settled.(q)

5. It may happen, that the child in whose name the purchase is taken may have been *already provided for*, a circumstance of very considerable weight in rebutting the presumption of further advancement. “The rule of equity,” said Lord Chief Baron Eyre, “as recognized in other cases, is, that the father is the only judge on the question of a son’s provision, and therefore the distinction of the son being provided for or not is not very solidly taken.”(r) However, the distinction has been relied upon in several cases,(s) and has been repeatedly recognised by the highest authorities.(t) At the same time, it must be noticed that the prior advancement of the child has always been accompanied with some additional circumstance that tended to strengthen the presumption that no further provision was designed;(u) and Lord Loughborough laid down the general rule to be, that a purchase made by a father in the name of a son, already fully advanced and established by him, not *was*, but *might* be a trust for the father.(v)

[\*212] \*It is said by Lord Chief Baron Gilbert, that “if a father purchase in the name of a son *who is of full age, which by our law is an emancipation out of the power of the father* there if the father take the profits, &c., the son is a trustee for the father.”(w) But for this opinion there appears to be not the slightest ground.(x) The provision must exist not by a fiction of law but *bona fide* and substantially; as,

(n) *Dyer v. Dyer*, 2 Cox, 95; S. C. 1 Watk. Cop. 221.

(o) Cited 2 Cox, 95; 1 Watk. Cop. 221.

(p) 2 Cox, 92; 1 Watk. Cop. 216.

(q) *Swift v. Davis*, 8 East, 354, note (a); *Fearne’s P. W.* 327; *Skeats v. Skeats*, 2 Y. & C. Ch. Ca. 9.

(r) *Dyer v. Dyer*, 2 Cox, 94; S. C. 1 Watk. Cop. 220.

(s) *Elliot v. Elliot*, 2 Ch. Ca. 231; *Pole v. Pole*, 1 Ves. 76.

(t) See *Grey v. Grey*, 2 Sw. 600; S. C. *Finch*, 341; *Loyd v. Read*, 1 P. W. 608; *Redington v. Redington*, 3 Ridg. 190; *Gilb. Lex Præt.* 271.

(u) *Pole v. Pole*, *Elliot v. Elliot*, *ubi supra*; and see *Grey v. Grey*, 2 Sw. 600; *Gilb. Lex Præt.* 271.

(v) *Redington v. Redington*, 3 Ridg. 190; and see *Sidmouth v. Sidmouth*, 2 Beav. 456.

(w) *Lex Præt.* 271.

(x) In *Grey v. Grey*, (*ubi supra*), for instance, the son was of age.



said Lord Nottingham, "if the son be married in his father's lifetime, and with his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated."(*y*) A provision *in part* will not have the effect of rebutting the presumption of advancement;(*z*) and the settlement of a reversionary estate upon the son will not be deemed a provision, for he might starve before it fell into possession.(*a*)

6. Suppose the father continues, after the purchase, in the perception of the rents and profits, and exerts other acts of ownership, then, if the son be an infant, it is said, as the parent is the natural guardian of the child, the perception of the profits or other exercise of dominion shall be referred to that ground, and the right of the son shall not be prejudiced, and so in numerous cases the point has been adjudged;(*b*) and it will not vary the case if the son sign receipts in the name of the father, for during his minority he could give no other receipts that would discharge the tenants who hold by lease from the father.(*c*) Lord Chief Baron Eyre has expressed himself dissatisfied with this reasoning in reference to the guardianship, and puts the question, "If the father take the rents as guardian of his son, would the court sustain a bill by the son against the father for these rents? He should think it pretty difficult to succeed in such a bill."(*d*) Lord Nottingham has referred \*the decisions [*\*213*] to a higher ground. "Some," he said, "have taken the difference, that where the father has colour to receive the rents as guardian, there perception of profits is no evidence of a trust: otherwise it would be if the perception of profits were without any such colour. Plainly the reason of the resolutions stands not upon the guardianship, but upon the presumptive advancement, for a purchase in the name of an infant *stranger* with perception of profits, &c., will be evidence of a trust."(*e*)

7. Suppose the father purchases in the name of a son who is *adult*, and then, without contradiction from the son, takes the rents and profits, and exerts other acts of ownership; even here it has been determined the right of the son will prevail. A stronger instance can hardly be conceived than occurred in the very leading case of *Grey v. Grey*,(*f*) before Lord Nottingham. We have his lordship's own manuscript of this case, and the circumstances are thus stated:—"The evidence to prove this purchase in the name of the son to be a trust for the father consists of, 1st, father possessed the money; 2dly, received the profits twenty years; 3dly, made leases; 4thly, took fines; 5thly, enclosed part in a park; 6thly, built much; 7thly, provided materials for more; 8thly, directed Lord Chief Justice North to draw a settlement; 9thly, treated about the

(*y*) *Grey v. Grey*, 2 Sw. 600.

(*z*) *Ib.*; *Redington v. Redington*, 3 Ridg. 190.

(*a*) *Lamplugh v. Lamplugh*, 1 P. W. 111.

(*b*) *Gorge's case*, cited Cro. Car. 550, and 2 Sw. 600; *Mumma v. Mumma*, 2 Vern. 19; *Taylor v. Taylor*, 2 Atk. 386; *Lamplugh v. Lamplugh*, 1 P. W. 111; and see *Stileman v. Ashdown*, 2 Atk. 480; *Loyd v. Read*, 1 P. W. 608; *Christy v. Courtenay*, 13 Beav. 96.

(*c*) *Taylor v. Taylor*, 1 Atk. 386.

(*d*) *Dyer v. Dyer*, 2 Cox, 94; S. C. 1 Watk. 220.

(*e*) *Grey v. Grey*, 2 Sw. 600.

(*f*) 2 Sw. 594; *Finch*, 333.

sale of it:"(g) yet for all this, it was decided, after long and mature deliberation, that the consideration of blood and affection was so predominant, that the father's perception of rents and profits, or making leases, or the like acts, which the son, in good manners, did not contradict, could not countervail it.(h) The propriety of this decision, upon principle independently of authority, has been called into question. "Admitting," it is said, "that they are subsequent acts, whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts, yet they are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment."(i)

[\*214] \*It might perhaps be successfully contended, that Lord Nottingham's determination was founded upon the more enlarged view of the subject in respect even of *principle*; however, the point must at the present day be considered as settled at least upon *authority*, if any point can be considered as settled after repeated decisions.(k)

The advancement of the son is a mere question of intention, and therefore facts *antecedent to or contemporaneous with* the purchase,(l) or so *immediately after it* as to constitute part of the same transaction,(m) may properly be put in evidence for the purpose of rebutting the presumption. Thus it will not be held an advancement, if, on a grant of copyholds to a father and his son for their lives *successivè*, the father at the same court surrender the copyholds to the use of his will,(n) or obtain a license from the lord to lease for years,(o) or take possession by some overt act immediately consequential upon the purchase.(p)

So the father may prove a parol declaration of trust by himself, either before or at the time of the purchase, not that it operates by way of declaration of trust (for the Statute of Frauds would interfere to prevent it;) but as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration.

[\*215] \*Of course the father cannot defeat the advancement by any subsequent declaration of his intention.(q)

(g) 2 Sw. 596.

(h) See 2 Sw. 599.

(i) Dyer v. Dyer, 2 Cox, 95; S. C. 1 Watk. Cop. 220.

(k) Woodman v. Morrel, 2 Freem. 32, reversed on the re-hearing (see note by Hovenden); Shales v. Shales, ib. 252; Sidmouth v. Sidmouth, 2 Beav. 447; and see Elliot v. Elliot, 231; but see Loyd v. Read, 1 P. W. 607; Redington v. Redington, 3 Ridg. 190; Murless v. Franklin, 1 Sw. 17; Scawin v. Scawin, 1 Y. & C. Ch. Ca. 65.

(l) See Collinson v. Collinson, 3 De Gex, Mac. & Gord. 409; Murless v. Franklin, 1 Sw. 17, 19; Sidmouth v. Sidmouth, 2 Beav. 447; Loyd v. Read, 1 P. W. 607; Taylor v. Alston, cited 2 Cox, 96, 1 Watk. Cop. 223; Redington v. Redington, 3 Ridg. 177; Grey v. Grey, 2 Sw. 594; Rawleigh's case, cited Hard. 497; Baylis v. Newton, 2 Vern. 28; Shales v. Shales, 2 Freem. 252; Scawin v. Scawin, 1 Y. & C. Ch. Ca. 65; Christy v. Courtenay, 13 Beav. 96.

(m) Redington v. Redington, 3 Ridg. 196, per Lord Loughborough.

(n) Pranker v. Pranker, 1 S. & S. 1.

(o) Swift v. Davis, 8 East, 354, note (a).

(p) Lord Eldon could scarcely have meant more than this, when he observed, "Possession taken by the father at the time would amount to such evidence." Murless v. Franklin, 1 Sw. 17.

(q) See Elliot v. Elliot, 2 Ch. Ca. 231; Finch v. Finch, 15 Ves. 51; Woodman v. Morrell, 2 Freem. 33; Birch v. Blagrove, Amb. 266; Gilb. Lex Præt. 271; Sid-

On the other hand, the son may produce parol evidence to prove the intention of advancement,<sup>(r)</sup> and *a fortiori* such evidence is admissible on his side, as it tends to support both the legal operation and equitable presumption of the instrument.<sup>(s)</sup> And it seems the subsequent acts and declarations of the father may be used *against* him by the son, though they cannot be used *in his favour*,<sup>(t)</sup> but the subsequent acts or declarations of the son cannot be used against *him* by the father; for the question is, what did the *father* mean by the purchase? Nothing, therefore, that the son could do or say (short of a disclaimer) can affect his interest, except, indeed, he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father.<sup>(u)</sup>

From the manner in which the court has disposed of the several distinctions we have been considering, one general principle is to be extracted applicable to every case. "We think," said Chief Baron Eyre, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property, which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout;"<sup>(v)</sup> and Lord Eldon to the same effect observed, "that the court in *Dyer v. Dyer* meant to establish this principle, that the purchase is an advancement *prima facie*, and in this sense, that this principle of law and presumption is not to be frittered away by mere refinements."<sup>(w)</sup>

\*The doctrine of advancement has been applied to the case of even an *illegitimate son*;<sup>(x)</sup> for it is said the principle is, that a [\*216] father is under a moral duty to provide for his child, and as the obligation extends to the case of an illegitimate child, he is equally entitled to the benefit of the presumption.<sup>(y)</sup>

It has been said that the presumption is not so strong in favour of a *daughter* as of a *son*, because daughters are not generally provided for by a settlement of real estate;<sup>(z)</sup> but the distinction has been contradicted by more than one decision, and does not now exist.<sup>(a)</sup> Advancement will be presumed in the case of a *wife*,<sup>(b)</sup> and the presumption will be

mouth v. Sidmouth, 2 Beav. 456; Skeats v. Skeats, 2 Y. & C. Ch. Ca. 9; Christy v. Courtenay, 13 Beav. 96.

(r) Taylor v. Alston, cited 2 Cox, 96, 1 Watk. Cop. 223; Beckford v. Beckford, Lofft, 490.

(s) See Taylor v. Taylor, 1 Atk. 386; Lamplugh v. Lamplugh, 1 P. W. 113; Redington v. Redington, 3 Ridg. 182, 195.

(t) See Redington v. Redington, 3 Ridg. 195, 197; Sidmouth v. Sidmouth, 2 Beav. 455.

(u) See Murless v. Franklin, 1 Sw. 20; Pole v. Pole, 1 Ves. 76; but see Sidmouth v. Sidmouth, 2 Beav. 455; Scawin v. Scawin, 1 Y. & C. Ch. Ca. 65.

(v) 2 Cox, 98; 1 Watk. Cop. 226. (w) Finch v. Finch, 15 Ves. 50.

(x) Beckford v. Beckford, Lofft, 490; Fearne's P. W. 327.

(y) See Fonb. Eq. Tr. 123, note (i), 4th ed.

(z) Gilb. Lex Præc. 272.

(a) Lady Gorge's case, cited Cro. Car. 550, 2 Sw. 600; Jennings v. Selleck, 1 Vern. 467; and see Woodman v. Morrel, 2 Freem. 33; Clarke v. Danvers, 1 Ch. Ca. 310.

(b) Kingdome v. Bridges, 2 Vern. 67; Christ's Hospital v. Budgin, id. 683; Back v. Andrews, id. 120; Glaister v. Hewer, 8 Ves. 199, per Sir W. Grant; Rider v. Kidder, 10 Ves. 367, per Lord Eldon; Gilb. Lex Præc. 272.



the same where the purchase is made in the name of a grand-child,<sup>(c)</sup> of a nephew,<sup>(d)</sup> and, it is conceived, even of a stranger in blood,<sup>(e)</sup> towards whom the person purchasing has placed himself "*in loco parentis*."

Where the purchase is held to be an advancement, and the purchase-money has not been paid, it will be a charge on the father's assets as an ordinary debt.<sup>(f)</sup>

Of course the doctrine of advancement applies to personal as well as real estate; as where a father purchases stock in the name of his son.<sup>(g)</sup>

In a recent case, where moneys were lent out in the name of a person who was both son and solicitor of the owner of the sums lent, it was held that the particular relation of solicitor prevented the application of the general rule.<sup>(h)</sup>

[\*217]

## \*CHAPTER IX.

## OF CONSTRUCTIVE TRUSTS.

A *constructive trust* is raised by a court of equity, *wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee*; <sup>(i)</sup> for as it is impossible a trustee should be allowed to make a profit by his office, it follows, that so soon as the advantage in question is shown to have been acquired through the medium of the trust, the trustee, however good a *legal* title he may have, will be decreed in *equity* to hold for the benefit of his *cestui que trust*.

The most common instance of a constructive trust occurs in the renewal of leases; the rule being, that if a trustee,<sup>(k)</sup> or executor,<sup>(l)</sup> or even an executor *de son tort*,<sup>(m)</sup> renew a lease in his own name, he will

(c) *Ebrand v. Dancer*, 2 Ch. Ca. 26; and see *Loyd v. Read*, 1 P. W. 607; *Currant v. Jago*, 1 Coll. 265, note (c).

(d) *Currant v. Jago*, 1 Coll. 261.

(e) See the analogous class of cases in reference to double portions, *Powys v. Mansfield*, 3 M. & Cr. 359, &c.

(f) *Redington v. Redington*, 3 Ridg. 106, see 200.

(g) *Sidmouth v. Sidmouth*, 2 Beav. 447.

(h) *Garrett v. Wilkinson*, 2 De Gex & Sm. 244.

(i) As to the meaning of the term "constructive trust," and the branch of such trusts, reserved for description in a later chapter, see page 140, *supra*, and page 228, *infra*.

(k) *Griffin v. Griffin*, 1 Sch. & Lef. 354, per Lord Redesdale; *Pickering v. Vowles*, 1 B. C. C. 198, per Lord Thurlow; *Pierson v. Shore*, 1 Atk. 480, per Lord Hardwicke; *Nesbitt v. Tredennick*, 1 B. & B. 46, per Lord Manners; *Turner v. Hill*, 11 Sim. 13, per Sir L. Shadwell.

(l) *Walley v. Whalley*, 1 Vern. 484; *Holt v. Holt*, 1 Ch. Ca. 190; *Abney v. Miller*, 2 Atk. 597, per Lord Hardwicke; *Killick v. Flexney*, 4 B. C. C. 161; *Pickering v. Vowles*, 1 B. C. C. 198, per Lord Thurlow; *Luckin v. Rushworth*, Finch. 392; *Anon.* 2 Ch. Ca. 207; and see *Mulvany v. Dillon*, 1 B. & B. 409; *Fosbrooke v. Balguy*, 1 M. & K. 226; *Owen v. Williams*, Amb. 734; *Nesbitt v. Tredennick*, 1 B. & B. 46, per Lord Manners.

(m) *Mulvany v. Dillon*, 1 B. & B. 409.



be deemed in equity to be a trustee for those interested in the original term.

The leading authority upon this subject is *Sandford v. Keech*, commonly called the *Rumford Market Case*.<sup>(m)</sup> A lessee of the profits of a market had devised to a trustee for an infant, and the trustee applied for a renewal on behalf of the infant, which was refused, on the ground that there could \*be no distress of the profits of a market, but the remedy must rest singly in covenant, of which an infant was [\*218] incapable. Upon this the trustee took a lease for the benefit of himself; but Lord King said, "I must consider this a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. Though I do not say there is fraud in this case, yet he should rather have let it run out than have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease, but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que use*." And so decreed that the lease should be assigned to the infant.

Upon the same principle, if a person possessing only a partial interest in a lease, as a tenant for life<sup>(n)</sup> (though with an absolute power of appointment, but which he does not exercise,)<sup>(o)</sup> a mortgagee,<sup>(p)</sup> devisee subject to debts and legacies<sup>(q)</sup> or to an annuity,<sup>(r)</sup> a joint-tenant,<sup>(s)</sup> or partner,<sup>(t)</sup> renew the term upon his own account, he shall hold for the benefit of all parties interested in the old lease; for in consideration of equity the subject of the settlement is not only the lease, but also the right of renewal; and no person taking only a limited interest can avail himself of the situation in \*which the settle- [\*219] ment has placed him to obtain a disproportionate advantage in derogation of the rights of other equal claimants.

Even where a testator was possessed of leaseholds, and devised all his interest therein to A. for life, remainder to B., and the lease having expired in the testator's lifetime, he was at his death a mere yearly tenant, it was held that A., having renewed the lease, must hold it upon

(m) Sel. Ch. Ca. 61.

(n) *Eyre v. Dolphin*, 2 B. & B. 290; *Rawe v. Chichester*, Amb. 715; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Pickering v. Vowles*, 1 B. C. C. 197; *Taster v. Marriott*, Amb. 668; *Owen v. Williams*, id. 734; *James v. Dean*, 11 Ves. 383; S. C. 15 Ves. 236; *Kempton v. Packman*, cited 7 Ves. 176; *Giddings v. Giddings*, 3 Russ. 241; *Nesbitt v. Tredennick*, 1 B. & B. 46, per Lord Manners; *Crop v. Norton*, 9 Mod. 233; *Buckley v. Lananze*, Ll. & G. Rep. t. Plunket, 327; *Tanner v. Elworthy*, 4 Beav. 487; *Waters v. Bailey*, 2 Y. & C. Ch. Ca. 219.

(o) *Brookman v. Hales*, 2 V. & B. 45.

(p) *Rushworth's case*, Freem. 13; *Nesbitt v. Tredennick*, 1 B. & B. 46, per Lord Manners.

(q) *Jackson v. Welsh*, Ll. & G. Rep. t. Plunket, 346.

(r) *Winslow v. Tighe*, 2 B. & B. 195; *Stubbs v. Roth*, id. 548; and see *Webb v. Lugar*, 2 Y. & C. 247; *Jones v. Kearney*, 1 Conn. & Laws. 34.

(s) *Palmer v. Young*, 1 Vern. 276.

(t) *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Ex parte Grace*, 1 Bos. & Pul. 376.

the limitations of the will, for the yearly tenancy was an interest capable of transmission by devise; and the tenant for life could not, by acting upon the good-will that accompanied the possession, get the exclusive benefit of a more durable term.<sup>(u)</sup>

But if a person devise a lease in strict settlement, and the lease expire in his lifetime, and at the time of his death he is merely *tenant at will*, or *at sufferance*, then, if the executor renew, he is not a trustee for the devisees, for as there was no interest upon which the will could operate, there was, in fact, no devise.<sup>(v)</sup> And so, where a testator possessed leaseholds for years, and was in possession of other lands without title under the mistaken impression that they were contained in the lease, and devised the lands he held upon lease to A., his executrix, for life, with remainder over, and A. obtained a lease of the lands not passed by the will, it was ruled that no trust attached upon the term in favour of the remainderman.<sup>(w)</sup> But although the *devisees* cannot claim in these cases, the executor himself will not be allowed to keep the beneficial interest. "The question," said Lord Eldon, "is new, whether an executrix, dealing with the opportunities which she derives by her succession, without title to the estate (which) a tenant by sufferance or at will had held, is a trustee, for the devisee, who cannot say he took an interest under the will, or whether it is to be said only that the advantage she made of those opportunities should be for the general estate. The result is this: *I think it is impossible she could hold it for herself*. Supposing [220] another person, not the executrix, was residuary legatee, the \*question I should think, would be in favour of that residuary legatee, (the renewal) being a casual advantage from the dealing of the executrix."<sup>(x)</sup>

Neither can an agent,<sup>(y)</sup> or other person acting under the authority of a trustee, executor or tenant for life, renew for his own benefit; for "there is nothing," said Lord Hardwicke, "the court has more adhered to than that, if the tenant, or *any person claiming from the tenant*, apply to renew, whether the new lease be granted to the same person or *any other*, if the lessee in the new *take in the right of him who was the owner of the old lease*, he must take subject to all the equity to which the original lessee was liable."<sup>(z)</sup>

And if, instead of taking a renewal himself, the trustee, executor, or tenant for life, dispose of the right of renewal for a valuable consideration, the purchase-money will be subjected in equity to the trusts of the settlement; for if a person cannot appropriate the renewal to himself, the court will not suffer him to sell.<sup>(a)</sup>

And in the preceding cases the rule of equity will not be varied,

(u) *James v. Dean*, 11 Ves. 383; S. C. 15 Ves. 236.

(v) See *James v. Dean*, 11 Ves. 391, 392.

(w) *Rawe v. Chichester*, Amb. 715.

(x) *James v. Dean*, 11 Ves. 392, per Lord Eldon. In *Rawe v. Chichester*, ubi supra, the executrix was also residuary legatee.

(y) *Griffin v. Griffin*, 1 Sch. & Lef. 353; and see *Edwards v. Lewis*, 3 Atk. 538; *Mulvany v. Dillon*, 1 B. & B. 417.

(z) *Edwards v. Lewis*, 3 Atk. 538.

(a) *Owen v. Williams*, Amb. 734.

because the lease had not customarily been renewed,<sup>(b)</sup> or the period of the old lease had actually expired,<sup>(c)</sup> or the renewal was for a different term, or at a different rent,<sup>(d)</sup> or instead of a chattel lease, was for lives,<sup>(e)</sup> or other lands were demised not comprised in the original lease,<sup>(f)</sup> or the landlord refused to renew with the *cestui que trust*,<sup>(g)</sup> or the co-trustees refused to concur in a renewal for the *cestui's que trust* benefit,<sup>(h)</sup> \*or the lessee, having purchased the immediate reversion, took the renewal from the superior landlord.<sup>(i)</sup> [\*221]

But where a lessee of lands in Ireland charged a lease with a jointure, and then mortgaged it to Newcomen, and again to Nesbitt, and afterward the rent falling in arrear, the landlord recovered possession upon ejectment, and the lessee allowed six months, (the period of redemption by the lessee fixed by the statute) to pass without tendering the rent, fines, and costs, and Nesbitt (who, as mortgagee, had three months longer to redeem under the statute,) sent notice to the lessee that he would not redeem; but that if the lessee himself did not *proceed*, he should make the best bargain he could with the landlord, and then offered to take a new lease, to commence from the expiration of the three months, with a proviso, that if any other of the parties interested should make a lodgment before that time, the agreement should be void; it was decided by Lord Manners that the lease which was afterwards granted to the mortgagee was not bound by any trust for the mortgagor. "The principle," said his lordship, "to be extracted from all the authorities amounts to this,—that whenever a mortgagee, executor, trustee, or tenant for life, gets an advantage, either by being in possession, or behind the back of the party mortgagor, *cestui que trust*, or remainderman, he shall not retain the same for his own benefit, but hold it in trust,—the new lease, in any of those cases, will be considered as a graft upon the old one. Here there is full notice given by the mortgagee that he will not redeem, and he gives his reasons for it; he does not go behind the back of the mortgagor, nor is he in possession, nor does he use any means of getting to himself an advantage which belongs to another; and he cannot, as I apprehend, be brought within the principles of those cases by which in taking a new lease he becomes clothed with a trust. In all the cases upon this subject, the party by being in possession obtained the renewal, or it was done behind the back, or by some contrivance, or in fraud, of those who were interested in the old lease, and there was either a remnant of the old lease, or a tenant-right of renewal, on which the new lease could be \*ingrafted. Here no part of Nesbitt's conduct [\*222] shows a contrivance; nor was he in possession. All that Nesbitt

(b) See Featherstonhaugh v. Fenwick, 17 Ves. 298; Mulvany v. Dillon, 1 B. & B. 409; Eyre v. Dolphin, 2 B. & B. 290; Killick v. Flexney, 4 B. C. C. 161.

(c) Edwards v. Lewis, 2 Atk. 538, per Lord Hardwicke.

(d) Mulvany v. Dillon, 1 B. & B. 409; James v. Dean, 7 Ves. 383; S. C. 15 Ves. 236, &c.

(e) Eyre v. Dolphin, 2 B. & B. 299.

(f) Giddings v. Giddings, 3 Russ. 241. But the lease of the additional lands will not be a graft, Acheson v. Fair, 2 Conn. & Laws. 208.

(g) Keech v. Sandford, Sel. Ch. Ca. 61; Griffin v. Griffin, 1 Sch. & Lef. 353.

(h) Blewett v. Millett, 7 B. P. C. 367.

(i) Giddings v. Giddings, 3 Russ. 241.



treated for was a new lease, giving, however, full opportunity to the lessee to dispose of his interest, or to renew, if he was enabled to do so. It was urged, that a court of equity will relieve against penalties and forfeitures; but those are cases of contract and introduced by the acts of the parties themselves, not where a forfeiture arises under the provision of an act of parliament, and where the lessee has so totally forfeited his interest as not to be relievable either in law or in equity." And his lordship appears to have determined the case upon the general principle; for he observed, in conclusion, "But I have no occasion to touch upon the act of parliament."(*k*)

A trustee or executor who has renewed a lease has a lien upon the estate for the costs and expenses of the renewal, with interest;(*l*) and where lands are taken under the new lease that were not comprised in the original lease, the court will apportion the expenses according to the value of the respective lands.(*m*) The trustee will also be allowed for money subsequently laid out in lasting improvements,(*n*) though made during the suit for recovering the lease.(*o*)

In the case of a renewal by tenant for life, if he put in his own life, he of course can have no claim to reimbursement,(*p*) but if he put in the life of another, the expenses will be apportioned at the death of the tenant for life according to the time of his actual enjoyment of the renewed interest;(q) and he will be a creditor on the estate for the apportionment, though the remaindermen be his own children, who resist the claim on the ground of advancement.(*r*)

[\*223] In the case of a testator devising all his interest in leaseholds \*subject to an annuity, the question of the annuitant's contribution has been differently regarded by different judges. In *Maxwell v. Ashe*(*s*) Sir John Strange decided that the annuitant was *not* bound to contribute. In *Moody v. Matthews*,(*t*) where a feme *sold* an annuity to A. for his life, out of tithes held by her upon lease, and covenanted to pay the annuity, and that the tithes should continue subject to it during the life of A., and the feme married and died, and the husband, who took the term by survivorship, renewed at his own expense, Sir W. Grant determined that the annuitant was not to be called upon to contribute, for that would be to make him pay the consideration twice, and he said the case of *Maxwell v. Ashe* was decisive. On the other hand, it was ruled by Lord Manners, in the case of a will, that the annuitant must contribute in proportion to his interest in the property; for though

(*k*) *Nesbitt v. Tredennick*, 1 B. & B. 29.

(*l*) *Holt v. Holt*, 1 Ch. Ca. 190; *Rawe v. Chichester*, Amb. 715, see 720; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Lawrence v. Maggs*, 1 Ed. 453; *Pickering v. Vowles*, 1 B. C. C. 197; *James v. Dean*, 11 Ves. 383; *Kempton v. Packman*, cited 7 Ves. 176.

(*m*) *Giddings v. Giddings*, 3 Russ. 241.

(*n*) *Holt v. Holt*, *Lawrence v. Maggs*, ubi supra.

(*o*) *Walley v. Whalley*, 1 Vern. 484.

(*p*) *Lawrence v. Maggs*, 1 Ed. 453.

(*r*) *Lawrence v. Maggs*, 1 Ed. 453.

(*s*) *Maxwell v. Ashe*, cited 7 Ves. 184.

(*t*) 7 Ves. 174: and see *Jones v. Kearney*, 1 Conn. & Laws. 47; *Thomas v. Burne*, 1 Dru. & Walsh, 657.

(*q*) See *infra*.



the testator had given no direction upon this point, it was incident to this sort of tenure.<sup>(u)</sup> At the time of this decision his lordship was not aware of the cases before Sir J. Strange and Sir W. Grant; but on a subsequent occasion, when the same point again rose before him, he adhered to the same opinion, notwithstanding the authority, for "all the legatees," he said, "appear to have been equally the objects of the testator's favour. Could it have been his intention that one of them should alone bear the expense of the renewal, and that the others should receive the full amount of their annuities without any deduction?"<sup>(v)</sup>

In making the assignment to the *cestui que trust* the trustee will also be indemnified against the personal covenants which he entered into with the lessor;<sup>(w)</sup> and on his own part must clear the lease of all incumbrances created by him, except under-leases at rack-rent<sup>(x)</sup>

The trustee must also account to the *cestui que trust* for the \*mesne rents and profits which he has received from the estate,<sup>(y)</sup> [\*224] and also for any sub-fines that may have been paid to him by under-lessees.<sup>(z)</sup> And the *cestui que trust*, though the lease which was the ground of his equity has since actually expired, may still file a bill for an account of the rents and profits.<sup>(a)</sup> In the case of a renewal by tenant for life, the account will of course be restricted to the period since the tenant for life's decease.<sup>(b)</sup>

The *cestui que trust* may pursue his remedy not only against the original trustee, executor, or tenant for life, and volunteers claiming through them;<sup>(c)</sup> but also against a purchaser, with notice express or implied of the plaintiff's title;<sup>(d)</sup> and a purchaser will be deemed to have had notice if the lease assigned to him recited the surrender of a former lease which recited the surrender of a previous lease, in which mention was made of the settlement under which the *cestui que trust* claims;<sup>(e)</sup> and the volunteer or purchaser with notice will not be helped by a fine levied,<sup>(f)</sup> or even by a release from the *cestui que trust*, if executed by him while in ignorance of the facts of the case.<sup>(g)</sup> However, a purchaser will stand in the place of his assignor in respect of any allowances for expenses incurred in the renewal.<sup>(h)</sup>

A *cestui que trust* will be barred of his remedy if he be guilty of long acquiescence, as, it seems in one case, for a period of fifteen years.<sup>(i)</sup>

(u) Winslow v. Tighe, 2 B. & B. 195. (v) Stubbs v. Roth, 2 B. & B. 548.

(w) Giddings v. Giddings, 3 Russ. 241; Keech v. Sandford, Sel. Ch. Ca. 61.

(x) Bowles v. Stewart, 1 Sch. & Lef. 209, see 230.

(y) Giddings v. Giddings, Keech v. Sandford, ubi supra; Mulvany v. Dillon, 1 B. & B. 409; Walley v. Whalley, 1 Vern. 484; Lucken v. Rushworth, Finch, 392; Blewett v. Millett, 7 B. P. C. 367. (z) Rawe v. Chichester, Amb. 715, see 720.

(a) Eyre v. Dolphin, 2 B. & B. 290.

(b) James v. Dean, 11 Ves. 383, see 396; Giddings v. Giddings, 3 Russ. 241.

(c) Bowles v. Stewart, 1 Sch. & Lef. 209; Eyre v. Dolphin, 2 B. & B. 290; Blewett v. Millett, 7 B. P. C. 367.

(d) Coppin v. Fernyhough, 2 B. C. C. 291; Walley v. Whalley, 1 Vern. 484; Eyre v. Dolphin, 2 B. & B. 290.

(e) Coppin v. Fernyhough, ubi supra; Hodgkinson v. Cooper, 9 Beav. 304.

(f) Bowles v. Stewart, 1 Sch. & Lef. 209.

(g) S. C.

(h) Coppin v. Fernyhough, 2 B. C. C. 291.

(i) Isald v. Fitzgerald, cited Owen v. Williams, Amb. 735, 737; and see Norris v. Le Neve, 3 Atk. 38; Jackson v. Welsh, Ll. & G. Rep. t. Plunket, 346.

[\*225] \*If the trustee of a lease become the *purchaser of the reversion*, Sir W. Grant said, that, as he thereby intercepts and cuts off the chance of future renewals, and consequently makes use of his situation to prejudice the interest of those who stand behind him, there might be some sort of equity in a claim to have the reversion considered as a substitution for those interests, but his honor was not aware of any determination to that effect.<sup>(l)</sup>

But where a lease had been held of a college, and, the corporation having disposed of the reversion to a stranger, the trustee purchased of the alienee, his honor expressly decided that the parties interested in the original lease had no equity against the trustee, for the tenant-right of renewal with a public body was gone, and a lease at a rack-rent was all that could be expected from a private proprietor.<sup>(m)</sup>

The principle upon which a court of equity establishes constructive trusts might be pursued into numerous other instances : as if a factor,<sup>(n)</sup> agent,<sup>(o)</sup> or other confidential person, acquire a pecuniary advantage to himself through the medium of his fiduciary character, he is accountable for those profits to his employer or other person whose interest he was bound to advance.

So if a tenant for life commit equitable waste, he is a trustee of the proceeds for the benefit of the remainderman.<sup>(p)</sup> "The restraint upon the legal owner as to equitable waste," said Sir J. Leach, "is to be considered as founded on a breach of that trust and confidence which the deviser reposed in the tenant for life, that he would use his legal estate only for the purpose of fair enjoyment. It is a trust implied in equity from the subsequent limitations, and from the presumed intention of the testator that he meant an equal benefit to all in succession."<sup>(q)</sup>

[\*226] \*Again, where A. contracted for the sale of *part* of his estate, and the purchaser requiring a fine to be levied, B., who was A.'s attorney, and also his heir-apparent, advised a fine to be levied of the *whole* estate, whereby the will of the vendor was revoked, and the part not included in the sale descended to B. as heir-at-law, it was held that the devisee under the will could call upon B. as a trustee.<sup>(r)</sup> "Whether you meant fraud," said Lord Eldon, "whether you knew you were the heir-at-law of the testator or not, you have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have been entitled to it if you had known what as an attorney you ought

(l) *Randall v. Russell*, 3 Mer. 197; and see *Hardman v. Johnson*, ib. 347; *Norris v. Le Meve*, 2 Atk. 37 and 38; *Lesley's case*, 2 Freem. 52; *Fosbrooke v. Balguy*, 1 M. & K. 226; *Giddings v. Giddings*, 3 Russ. 241.

(m) *Randall v. Russell*, 3 Mer. 190.

(n) *East India Company v. Henchman*, 1 Ves. jun. 287; S. C. 8 B. P. C. 85.

(o) *Fawcett v. Whitehouse*, 1 R. & M. 132; *Hichens v. Congreve*, ib. 150; *Carter v. Horne*, 1 Eq. Ca. Ab. 7; *Brookman v. Rothschild*, 3 Simons, 153; *Gillett v. Peppercorne*, 3 Beav. 78; *Bentley v. Craven*, 18 Beav. 75.

(p) *Marquis of Ormonde v. Kynersley*, 5 Mad. 369.

(q) *Ib.*

(r) *Bulkly v. Wilford*, 2 Cl. & Fin. 177; S. C. 8 Bl. N. S. 111; and see *Segrave v. Kirwan*, Beat. 157.

to have known, and, not knowing it, you shall not take advantage of your own ignorance. It is too dangerous to the interests of mankind that those who are bound to advise, and who, being bound to advise, ought to be able to give sound and sufficient advice, to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others.”(s)

An agent employed by a trustee is accountable to his principal only, and cannot as a constructive trustee be made responsible to the *cestuis que trust*.(t) But of course the rule does not apply where the agent has taken an actively *fraudulent* part, and so made himself a principal.(u) “It cannot be disputed,” said Lord Langdale, “that if the agent of a trustee, whether a corporate body or not, knowing that a breach of trust \*is being committed, interferes and assists in that breach of trust, [\*227] he is personally answerable, although he may be employed as the agent of the person who directs him to commit that breach of trust.”(v) Thus, where a trust fund was lodged at a banker’s and was headed as a trust account, and the surviving trustee became indebted to the bank, and with the concurrence of the bankers (who were cognizant of the trust, not only from the heading of the account, but also expressly, from certain private transactions,) the trust fund was applied in discharge of the trustee’s private debt; the bankers could not protect themselves on the ground of mere agency, but were held responsible to the *cestuis que trust* for a breach of faith.(w)

Under the head of constructive trusts may be mentioned the case of a settlement left in the hands of a person taking only a partial benefit under it as a tenant for life; where the other persons interested and claiming under the same title have a right to the fair use of the document, and the holder is deemed a trustee for them, and is bound to produce it at their request;(x) and in one case it was ruled that if a person sell part of his estate and retain the *title-deeds*, though he may not have given a covenant for production, he is compellable to produce them as common property to the purchaser.(y) But in *Barclay v. Raine*,(z) Sir J. Leach seems to have doubted whether, if part be sold and the *title-deeds* be delivered to the purchaser, a future purchaser from him could be ordered, where there was no covenant for that purpose, to produce them to the

(s) 2 Cl. & Fin. 177.

(t) *Keane v. Robarts*, 4 Mad. 332, see 356, 359; *Davis v. Spurling*, 1 R. & M. 64; *S. C. Taml.* 199; *Crisp v. Spranger*, Nels. 109; *Saville v. Tancred*, 3 Sw. 141, note; *Nickolson v. Knowles*, 5 Mad. 47; *Myler v. Fitzpatrick*, 6 Mad. 360; *Fyler v. Fyler*, 3 Beav. 550; *Lockwood v. Abdy*, 14 Sim. 437; and see *Ex parte Burton*, 3 Mont. D. & De Gex, 364; *Re Bunting*, 2 Ad. & Ell. 467.

(u) See *Fyler v. Fyler*, 3 Beav. 550; *Portlock v. Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Pannell v. Hurley*, 2 Coll. 241; *Alleyne v. Darcy*, 4 Ir. Ch. Rep. 199.

(v) *Attorney-General v. Corporation of Leicester*, 7 Beav. 179.

(w) *Pannell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De Gex, Mac. & Gord. 908.

(x) *Banbury v. Briscoe*, 2 Ch. Ca. 42; *Harrison v. Coppard*, 2 Cox, 318; *Shore v. Collett*, Coop. 234; *Davis v. Dysart*, 20 Beav. 405.

(y) *Fain v. Ayers*, 2 S. & S. 533.

(z) 1 S. & S. 449; see 7 Byth. by Jarm. 375.



owners of the other parts. The real property commissioners observe, that previously to this case it had been supposed, either that an original independent equity existed entitling any party interested in a deed to call for its production by any other person having the custody of it, or [*\*228*] *at least* that such an equity existed wherever the parties *\*requir-*ing the production claimed under a person who had taken the precaution to procure a covenant for that purpose, and the person having the actual custody of it derived that custody from or through a person who had entered into such a covenant; (*a*) upon which Sir E. Sugden observes, that the rule in equity was never so universal as it is quoted in the first part of the above statement, but that the second branch, stating what *at least* the doctrine was, appears to be correct. (*b*)

Constructive trusts are said also to arise where the trust estate is converted by the trustee from one species of property into another; and again, where the trust estate passes from the trustee into the hands of a volunteer, whether with or without notice, or of a purchaser for valuable consideration with notice; but as these are cases rather of an existing trust continued and kept on foot than of a new trust created, the consideration of these topics will be reserved to a subsequent part of the treatise.

In concluding the subject of trusts by operation of law, it may be proper to offer a few remarks on the wording of the Statute of Frauds. (*c*)

By the eighth section it is enacted, that "where any *conveganance* shall be made of any lands or tenements by which a trust or confidence shall or may *arise or result by the implication or construction of law*, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if that statute had not been made; any thing thereinbefore contained to the contrary notwithstanding."

Lord Hardwicke upon this clause observed, "I am now bound down by the Statute of Frauds to construe nothing a resulting trust but what are there called trusts by operation of law; and what are those? Why, First, when an estate is purchased in the name of one person but the money or consideration is given by another; or, Secondly, where a [*\*229*] *\*trust* is declared only as to part, and nothing said as to the rest, in which case what remains undisposed of will result to the heir-at-law. I do not know any other instance besides these two, where the court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mala fide*." (*d*)

But upon this opinion of Lord Hardwicke, Mr. Fonblanque has made the following just remarks:—"This construction of the clause of the Statute of Frauds restrains it to such trusts as arise by *operation of law*, whereas it clearly extends to such as are raised by *construction of courts of equity*; as, in the case of an executor or guardian renewing a lease though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease. It is also observ-

(*a*) 3rd Rep.

(*c*) 29 Car. 2, c. 3.

(*b*) 2 Vend. & Purch. 11 Ed. 479, 480.

(*d*) Lloyd v. Spillet, 2 Atk. 150.



able, that the first instance stated by his lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule is subject, and the second instance is only applicable to a *will*, whereas the doctrine of resulting trusts is also applicable to *conveyances*.”<sup>(e)</sup> As to the latter part of this criticism it may be observed that while Atkyns makes Lord Hardwicke speak of a *will* only, Barnardiston, the other reporter, applies his lordship’s observation to a *conveyance*.<sup>(f)</sup> It would thus appear that Lord Hardwicke in fact extended his remark to both a will and a conveyance.

Both Lord Hardwicke and Mr. Fonblanque assume that the *seventh* or enacting clause embraces all trusts indiscriminately, and that such as arise by operation of law are only saved from the act by virtue of the subsequent exception contained in the eighth section ; but the language of the latter clause, that “where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may arise or result,” &c. seems to have escaped observation ; for, unless *conveyance* be taken with great violence to the meaning of words to include a *devise*, it is clear that trusts resulting under a will are not reached by the terms of the saving. Nor is it easy to suppose that the legislature could mean to include a \*devise ; for the fifth and sixth sections relate exclusively to devises, and, had it fallen within the scope of the act to [\*230] extend the eighth section to wills, it can scarcely be conceived that the proper and technical word should not necessarily have suggested itself. The question then arises, If resulting trusts upon a *will* are not saved by the exception, how are they not affected by force of the previous enactment ? As the statute was directed against frauds and perjuries, it is obvious that resulting trusts were not within the mischief intended to be remedied. The aim of the legislature was, not to disturb such trusts as were raised by maxims of equity, and so could not open a door to fraud or perjury, but, by requiring the *creation of trusts by parties* to be manifested in writing, to prevent that fraud and perjury to which the admission of parol testimony had hitherto given occasion. And the enactment itself is applicable only to this view of the subject ; for the legislature could scarcely direct, that “all declarations or creations of trusts should be manifested and proved,” &c., unless the trusts were in their nature capable of manifestation and proof ; but, as resulting trusts are the effect of a rule of law, to prove them would be to instruct the court in its own principles, to certify to the judge how equity itself operates. The exception could only have been inserted *ex majori cautela*, that the extent of the enactment might not be left to implication. But why, it will be asked, are resulting trusts upon *conveyances* excepted, and not resulting trusts upon *wills* ? The only explanation that suggests itself is this :—The statute had spoken only of *declarations* or *creations* of trust, and by a will no resulting trust is or can be *declared* or *created*. If lands be devised to A. and his heirs upon trust to pay the testator’s debts, the resulting trust of the surplus is no new declaration or creation ; the right construction is, that the testator has disposed of the legal estate to the

(e) 2 Tr. Eq. 116, note (a).

(f) See Lloyd v. Spillet, Barn. 388.

devisee, and of part of the equitable in favour of creditors ; but the residue of the equitable, though said to result, has in fact never been parted with, but descends upon the heir-at-law as part of the original inheritance. In *conveyances*, however, this is not equally the case ; for if a purchase be taken in the name of a third person, a trust which had no previous existence arises upon the property in favour \*of the real purchaser ; and so if a lease be renewed by a trustee, the equity which was annexed to the old term immediately fastens upon the new. Here, then, it is evident there is an actual *creation* of trust ; and, to obviate all doubts as to the operation of the enactment, resulting trusts arising out of *conveyances* are expressly excepted.

[\*232]

## \*CHAPTER X.

## OF DISCLAIMER AND ACCEPTANCE OF THE TRUST.

HAVING treated of the creation of trusts, whether by the act of a party or by operation of law, we shall next direct our attention to the *estate* and *office* of the *trustee*, and, as a preliminary inquiry, we propose in the present chapter to offer a few remarks upon the subject of the trustee's disclaimer or acceptance of the trust.

I. *Of Disclaimer.*

It may be laid down as a clear and undisputed rule, that no one is *compellable* to undertake a trust.(a) "Though a person," said Lord Redesdale, "may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede, except so far as his feelings may forbid it ; and it will be proper for him to do so, if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement."(b)

But there does not appear to be any instance in which, after acceptance by the trustee, his *heir* has been allowed to disclaim ; and if the law permitted it, many instances would no doubt have occurred. The inconveniences of such a right of disclaimer would be great, as the legal estate would become vested in the crown. However, where the heir takes not strictly in that character, but as special occupant, he may exercise his discretion in accepting the estate or not.(c)

[\*233] If the party named as trustee intend to decline the administration \*of the trust, he ought to execute a disclaimer without delay. There is no rule, however, that a trustee must execute a disclaimer within any particular time : thus it will operate after an interval of sixteen years, if the interval can be so explained as to rebut the pre-

(a) *Robinson v. Pett*, 3 P. W. 251, per Lord Talbot ; *Moyle v. Moyle*, 2 R. & M. 715, per Lord Brougham ; *Lowry v. Fulton*, 9 Sim. 123. per Sir L. Shadwell.

(b) *Doyle v. Blake*, 2 Sch. & Lef. 239.

(c) *Creagh v. Blood*, 3 Jones & Lat. 170.

sumption of his having accepted the trust.(d) But if he lie by for so long a time, it is for the jury to say whether it was not because he had assented to the devise;(e) and where a trustee, knowing his appointment as trustee, has done nothing, but has not disclaimed, it will be presumed after a long lapse of time, as twenty years,(f) and *a fortiori*, after thirty-four years,(g) that he had accepted the trust; and even where the deed was only four years old, Lord St. Leonards observed, "that where an estate was vested in trustees who knew of their appointment and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance, and it would require some strong act to induce the court to hold that in such a case the estate was divested. He spoke," he said, "with respect to the effect upon third parties; every court and every jury would presume an assent."(h)

The disclaimer should be by deed, for a deed is clear evidence and admits of no ambiguity;(i) and the instrument should be a *disclaimer* and not a *conveyance*, for the latter, as it transmits the estate, has been held to imply a previous acceptance of the office;(k) but Lord Eldon expressed his opinion, that, where the intention was disclaimer, the instrument ought to receive that construction, though it was a conveyance in form.(l)

If an executor of an executor take upon him the administration \*of the goods of the first testator, he cannot refuse the [\*234] administration of the goods of the latter; for, it is only through the medium of the latter testator that he can reach the executorship of the former. And although it was formerly thought that an executor might renounce probate of the original testator, and at the same time or subsequently prove the will of the immediate testator,(m) yet the practice has now been settled to the contrary.(n)

Suppose a trustee of two distinct settlements created at different times and wholly independent of each other were to devise *all* his trust estates to the same person, could such person accept one estate, and disclaim the other? It would probably be held, that he might; but he should lose no time in manifesting his intention, for should he act as owner of one estate and not expressly disclaim the other, the law would presume him to have accepted both.

If a person be nominated a trustee in a will and also take a benefit

(d) Doe v. Harris, 16 M. & W. 517; and see Noble v. Meymott, 14 Bear. 471.

(e) See Doe v. Harris, 16 M. & W. 522. (f) In re Uniacke, 1 Jones & Lat. 1.

(g) In re Needham, 1 Jones & Lat. 34.

(h) Wise v. Wise, 2 Jones & Lat. 403; see 412.

(i) Stacey v. Elph, 1 M. & K. 199, per Sir J. Leach.

(k) Crewe v. Dicken, 4 Ves. 97; and see Urch v. Walker, 3 M. & C. 702.

(l) Nicloson v. Wordsworth, 2 Sw. 372. In Attorney-General v. Doxley, 2 Eq. Ca. Ab. 194, the trustee who declined to act was directed to *convey*, and the same decree was made in Hussey v. Markham, Rep. t. Finch, 258. In Sharp v. Sharp, 2 B. & A. 405, it was held the trustees had not *acted*, though they had *conveyed* the estate instead of disclaiming. See Urch v. Walker, 3 M. & C. 702; Richardson v. Hulbert, 1 Anst. 65.

(m) Shepp. Touch. by Preston, 464; Wankford v. Wankford, Freem. 520; Hayton v. Wolfe, Cro. Jac. 614; S. C. Palmer, 156; Hutton, 30.

(n) In the goods of Perry, 2 Curt. 655; and see In the goods of Beer, 15 Jar. 160.



under it, can he claim the testator's bounty, and at the same time disclaim the onus of the trust?(*o*) It would seem that he might, for an executor, who is also a legatee, may renounce probate and yet claim the legacy, and it is difficult to point out the distinction between the two cases.

If one be named as trustee without any authority from himself, he is justified in taking the opinion of counsel upon the propriety of executing a deed of disclaimer, and if a person agree to pay the costs of the disclaimer, and the bill of costs be taxed, the item of counsel's opinion will be allowed.(*p*)

A trust may be disclaimed at the bar of the court,(*q*) or by answer in chancery, and the person named as trustee will be entitled to his costs,(*r*) [\*235] but only as between party and party,(*s*) \*though the bill be not dismissed against him before the hearing;(t) and if his answer be unnecessarily long, he will only be allowed what would have been the reasonable costs of a simple disclaimer.(*u*)

A trust may also be repudiated on the evidence of conduct without any express declaration of disclaimer;(v) but a person would act very imprudently, who allowed so important a question as whether he is a trustee or not to remain matter of construction.

After renunciation of the trust, whether by express disclaimer, or by conduct which is tantamount to it, a trustee may assist as agent, or act under a letter of attorney, in the management of the estate, without incurring responsibility;(w) but the caution need scarcely be suggested, that all such interference cannot be too scrupulously avoided before the fact of the renunciation of the trust has been most unquestionably established. The circumstance that the person named as trustee is to receive a profit from his agency, excites a suspicion in the mind of the court.(*x*)

What will amount to a disclaimer *at law*, so as to *divest the estate*, is a very distinct question from the disclaimer of the office in equity.

It was formerly held (at least such was the clear opinion of Lord Coke,) that a *freehold*, whether vested in a person by feoffment, grant,(y) or devise,(z) could not be disclaimed but by *matter of record*; and the reason, upon which this maxim was founded, was, that the suitor might

(*o*) See *Talbot v. Radnor*, 3 M. & K. 254; *Pollexfen v. Moore*, 3 Atk. 272; *Andrew v. Trinity Hall*, Camb. 9 Ves. 525.

(*p*) *In re Tryon*, 7 Beav. 496. (*q*) *Ladbrook v. Bleden*, M. R. 16 Jur. 630.

(*r*) *Hickson v. Fitzgerald*, 1 Moll. 14.

(*s*) *Norway v. Norway*, 2 M. & K. 278, overruling *Sherratt v. Bentley*, 1 R. & M. 655.

(*t*) *Bray v. West*, 9 Sim. 429.

(*u*) *Martin v. Persse*, 1 Moll. 146; *Parsons v. Potter*, 2 Hog. 281.

(*v*) *Stacey v. Elph*, 1 M. & K. 195.

(*w*) *Dove v. Everard*, 1 R. & M. 231; *Harrison v. Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, 6th ed., note (*y*); *Stacey v. Elph*, 1 M. & K. 195; *Lowry v. Fulton*, 9 Sim. 104; *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 480.

(*x*) *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 481.

(*y*) *Butler and Baker's case*, 3 Re. 26, a. 27, a; *Anon. case*, 4 Leon. 207; *Shepp. Touch.* 285.

(*z*) *Bonifant v. Greenfield*, Godb. 79, per Lord Coke; but at the rehearing (Cr. El. 80,) it was adjudged that three could pass the *whole* estate, the fourth having disclaimed by act *in pais*; and see *Shepp. Touch.* 452.



be more certainly apprised who was the tenant to the *præcipe*.(a) But the \*doctrine of modern times is, that disclaimer by matter of record is unnecessary ;(b) for, as Lord Tenterden observed, there [\*236] can be no disclaimer by a person in a court of record, unless some other person think fit to cite him there to receive his disclaimer, and if the estate be *damnosa hæreditas*, that is not very likely to happen.(c) Mr. Justice Holroyd laid it down, that even a deed might be dispensed with, and a party might disclaim a freehold by *parol* ;(d) and the doctrine has been sanctioned by an actual decision of Sir A. Hart,(e) and by the apparent approbation of other judges.(f)

It was laid down in Butler and Baker's case, that estates limited *under the statute of uses* were to be disclaimed with the same formalities as estates at common law ;(g) but Lord Eldon doubted whether a party *could* disclaim in the case of a conveyance to uses, except by release with intent of disclaimer : however, his lordship added, he was aware that such a doctrine would shake titles innumerable.(h)

It seems to be clearly established, that a disclaimer, even by parol declaration, will suffice to divest the legal estate, when the trust property is a mere *chattel interest*.(i)

Whether a *feme covert* could, under the Fines and Recoveries Act, disclaim an interest in real estate, was by the terms of the statute, left doubtful; the act enabling her only to "dispose of, release, surrender, or extinguish" any estate or power as if she were a *feme sole*.(k) In the Irish Act, 4 & 5 W. 4, c. 92, s. 68, the word "disclaim" was expressly introduced ; and now, by 8 & 9 Vict. c. 106, s. 7, a married woman is enabled, in like manner, to "disclaim" any estate or interest in lands in England.

\*The effect of disclaimer by a trustee is to vest the whole legal estate in the co-trustee ;(l) and, as regards the exercise of [\*237] the office, even if the trust be accompanied with a power, as, of signing receipts, the continuing trustee may administer the trust without the concurrence of the trustee who has chosen to renounce, and without the appointment of a new trustee.(m) The settlor, it is said, must be pre-

(a) Butler and Baker's case, 3 Re. 26, b.

(b) Townson v. Tickell, 3 B. & A. 31 ; Begbie v. Crook, 2 Bing. N.S. 70 ; S. C. 2 Scott, 128.

(c) Townson v. Tickell, 3 B. & A. 36.

(d) Ib. 38, citing Bonifant v. Greenfield, Cr. El. 80 ; and see Doe v. Smyth, 9 D. & R. 136.

(e) Bingham v. Clanmorris, 2 Moll. 253. And see Creed v. Creed, 2 Hog. 215 ; Re Ellison's trust, 1 Jur. N. S. 62.

(f) See Doe v. Harris, 16 M. & W. 517.

(g) 3 Re. 27, a.

(h) Nicloson v. Wordsworth, 2 Sw. 372.

(i) Shepp. Touch. 285 ; Butler and Baker's case, 3 Re. 26, b, 27, a ; Smith v. Wheeler, 1 Vent. 130 ; S. C. 2 Keb. 774 ; Doe v. Harris, 16 M. & W. 520, 521, per Parke, B.

(k) 3 & 4 W. 4, c. 74, s. 77.

(l) Bonifant v. Greenfield, Cr. El. 80 ; Crewe v. Dicken, 4 Ves. 100, per Lord Loughborough ; Small v. Marwood, 9 B. & C. 299 ; Freem. 13, case 111 ; Hawkins v. Kemp, 3 East, 410 ; Townson v. Tickell, 3 B. & A. 31 ; Browell v. Reed, 1 Hare, 435, per Sir J. Wigram ; and see Nicloson v. Wordsworth, 2 Sw. 369.

(m) Adams v. Taunton, 5 Mad. 435 ; Cooke v. Crawford, 13 Sim. 96 ; Bayley v. Cumming, 10 Ir. Eq. Rep. 410 ; Hawkins v. Kemp, 3 East, 410.

sumed to know what the legal consequences of the death or disclaimer of some of the trustees would be ;(*n*) and when the disclaimer has been executed, it operates retrospectively, and makes the other trustee the sole trustee *ab initio*.(*o*)

But in personal contracts the rule is different, for where A. covenants with B., C., and D. as trustees, and B. disclaims, C. and D. do not take the joint covenant, and cannot sue without B.(*p*)

If trustees are also appointed protectors of the settlement, and they intend to disclaim the protectorship, the deed of disclaimer must, by the Fines and Recoveries Act, be enrolled in chancery.(*q*)

## II. Of Acceptance.

A trustee may *accept* the office either by signing the trust deed,(*r*) or by an express declaration of his assent,(*s*) or by proceeding to act in the execution of the duties of the trust.

If a person named as a trustee has, during a long period, done nothing at variance with the acceptance of the office, the court, until the contrary be shown, presumes that he has accepted it.(*t*)

[\*238] \*If the trustee execute the deed, he should see that the recitals are correct. If it be stated, for instance, that stock has been transferred into the name of the trustee, he should ascertain that such is the truth, or the court may hold him liable for the consequences. However, in a late case(*u*) where, notwithstanding the recital to the contrary, it was suggested that no stock had ever been in existence, the master of the rolls observed, "I cannot say that the trustees are bound by the recital of that fact contained in the deed. We have had so many instances of parties representing that they were entitled to particular property, and which representation has afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations ; and I am not aware that it has ever been held that trustees are bound by the representations of parties about to be married, of the state of their property. I do not, therefore, accede to the argument, that the recital alone binds the trustees."

With respect to the liabilities of the trustee, it is perfectly immaterial to him whether he declare his acceptance of the office or his consent be implied, for in each case the obligations imposed upon him are precisely the same.(*v*) In the event of a *breach of trust* the consequences to the parties beneficially interested may admit of a slight variation. A breach of trust creates *per se* a *simple contract debt* only ;(*w*) but, if the trustee

(*n*) *Browell v. Reed*, 1 Hare, 435, per Sir. J. Wigram.

(*o*) *Peppercorn v. Wayman*, 5 De Gex & Smale, 230.

(*p*) *Wetherell v. Langston*, 1 Exch. 634.

(*q*) 3 & 4 W. 4, c. 74, s. 32.

(*r*) See *Buckeridge v. Glasse*, 1 Cr. & Ph. 131, 134.

(*s*) See *Doe v. Harris*, 16 Mees. & W. 517.

(*t*) In *re Uniacke*, 1 Jon. & Lat. 1 ; In *re Needham*, ib. 34 ; and see *James v. Frearson*, 1 Y. & C. Ch. Ca. 370 ; *Doe v. Harris*, 16 M. & W. 522.

(*u*) *Bateman v. Hotchkin*, 10 Beav. 418. I have been informed by one of the counsel in the cause that in *Bliss v. Bridgwater*, at the rolls, many years ago, Sir J. Leach held differently ; and see *Gore v. Bowser*, 3 Sm. & Gif. 6.

(*v*) See *Lord Montfort v. Lord Cadogan*, 19 Ves. 638.

(*w*) *Vernon v. Vawdry*, 2 Atk. 119 ; *S. C. Barn.* 280 ; *Cox v. Bateman*, 2 Ves. 19 ; *Kearnan v. Fitzsimon*, 3 Ridg. P. C. 18.

has agreed, under his hand and seal, to execute the trust, this amounts to a covenant even though the heirs be not named, and the breach of trust, thus becoming a *specialty debt*, will, in legal assets, take precedence of simple contract debts.<sup>(x)</sup> However the mere fact of a trustee being made a party to and executing a deed appointing him to that office, will not of itself amount \*to a covenant on his part to execute the trusts, if the deed do not contain any words which can be construed a covenant at law;<sup>(y)</sup> and if the deed do contain such words, yet the trustee cannot be sued upon covenant if he has not executed the deed; though, of course, after accepting the trust he will be liable for a breach of contract, as for a simple contract debt.<sup>(z)</sup> If he has executed the deed, it is not necessary, in order to make it a covenant, that there should be the words *covenant* or *agree*, but the word *declare* will suffice.<sup>(a)</sup> If the trustee has covenanted for himself and his *heirs*, a remedy then lies at common law against the heir in respect of estates descended; and by 3 W. & M. c. 14, the like remedy was enacted against the devisees of the debtor; but this was only where the specialty would have supported an *action of debt*, as in the case of a bond, and did not apply to a *covenant* by which, not a debt was created, but *damages* were recoverable;<sup>(b)</sup> but the 11 G. 4, and 1 Gul. 4, c. 47, has now perfected the remedy by extending it to the case of a covenant. A still more recent statute<sup>(c)</sup> has declared that the lands of a debtor shall be liable to *all his debts*, whether on simple contract or on specialty; but specialties, where the heir is bound, are still made to take precedence of simple contract debts, and specialties where the heir is not bound.

What *acts* of a person nominated as trustee will amount to a constructive acceptance of the office, is a question constantly arising, and not easily to be determined by any general rule.

If a person named as executor take out *probate* of the will, he thereby constitutes himself executor, and incurs all the liabilities annexed to the office.<sup>(d)</sup> But it was held in one \*case, that A. having after probate received part of the assets transmitted to him by the post, [ \*240 ] and handed over the money to B., the acting executor, was not liable; the receipt by A., in the first instance, not being his own act, and the transmission to B. being merely consequent upon the receipt.<sup>(e)</sup>

If the office of executor is, by the will, clothed with certain trusts, it is not competent to a person named as executor to prove the will and

(x) Wood v. Hardisty, 2 Coll. 542; Gifford v. Manley, For. 109; Mavor v. Davenport, 2 Sim. 227; Benson v. Benson, 1 P. W. 131; Deg v. Deg, 2 P. W. 414; Turner v. Wardle, 7 Sim. 80; Primrose v. Bromley, 1 Atk. 89; Cummins v. Cummins, 3 Jones & Lat. 64; see Baily v. Ekins, 2 Dick. 632.

(y) Adey v. Arnold, 2 De Gex, Mac. & Gord. 433; Wynch v. Grant, 2 Drewry. 312. It appears from the latter case, that in Adey v. Arnold, the trustee had executed the deed, a circumstance not mentioned in the report of Adey v. Arnold.

(z) Richardson v. Jenkins, 1 Drewry, 477; Vincent v. Godson, 1 Sm. & Gif. 384.

(a) Richardson v. Jenkins, ubi supra; and see Saltoun v. Houston, 1 Bing. N. C. 433; Cummins v. Cummins, 3 Jones & Lat. 64; 8 Ir. Eq. Rep. 723.

(b) Wilson v. Knubley, 7 East, 127.

(c) 3 & 4 W. 4, c. 104.

(d) Booth v. Booth, 1 Beav. 125; Ward v. Butler, 2 Moll. 533, per Lord Mansfield; Stiles v. Guy, 1 Mac. & Gord. 431, per Lord Cottenham; Scully v. Delany, 2 Ir. Eq. Re. 165.

(e) Balchen v. Scott, 2 Ves. jun. 678.



thereby make himself an executor, and then to reject the obligations that are knit to the office. Thus, if a testator direct that his "executors" shall get in certain outstanding effects to be applied to a particular purpose, a person cannot make himself executor by proving the will, and refuse the trusts. *(f)*

And if an executor be also designated as trustee of the real estate, he cannot desert the situation of trustee, and accept only that of executor, for the acting as executor is an acceptance of the entire trusteeship. *(g)*

And if a person, by the same instrument, be nominated trustee of two distinct trusts, he cannot divide them, but if he accept the one, he will be deemed to have accepted the other. *(h)*

And if an executor act in any part of the executorship, as by signing a power of attorney to get in part of the testator's estate, *(i)* he brings down the whole burden upon him, though at the time of acting he disclaim the intention of assuming the office generally. *(k)*

If A. be named as executor *and trustee*, and he renounces probate and disclaims the trust, and B. takes out letters of administration with the will annexed; B., though he thus becomes the personal representative, is not also trustee in any other sense than as holding the surplus assets after the ordinary administration, with notice of a trust. A proper trustee can only be appointed by the institution of a suit for [\*241] \*the purpose, unless such a case was specially provided for by the power of appointment contained in the will.

If a person be named as trustee in a settlement, but he does not execute it and declines to act; he, of course, will not be deemed to have accepted the trust by merely taking the settlement into his custody until a trustee can be found. *(l)*

Any *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor. Thus, where of four executors one only proved, and the other three gave a letter of attorney describing themselves as *executors* to the fourth, described as *acting executor*, to receive a quantity of stock, Lord Hardwicke ruled that the whole number, by this conduct, had drawn upon themselves the burden of the executorship. *(m)*

So the joining in an assignment of the testator's lease, *(n)* or the bringing an action in the course of executing the trust, *(o)* is an acceptance of the office, and an executor and trustee for sale will be deemed to have acted in the trust, if the property be sold by direction of the trustees, and he is present, and takes part, and exercises authority or ownership by giving orders respecting the sale, and afterwards calls on a co-executor to inquire into the state of the testator's accounts. *(p)*

*(f)* Mucklow v. Fuller, Jac. 198; and see Booth v. Booth, 1 Beav. 125; Williams v. Nixon, 2 Beav. 472.

*(g)* Ward v. Butler, 2 Moll. 533.

*(h)* Urch v. Walker, 3 M. & C. 702.

*(i)* Cummins v. Cummings, 8 Ir. Eq. Rep. 723.

*(k)* Doyle v. Blake, 2 Sch. & Lef. 231; but see Malzy v. Edge, 2 Jur. N. S. 80.

*(l)* Evans v. John, 4 Beav. 35.

*(m)* Harrison v. Graham, 3 Hill's MSS. 239; S. C. cited Churchill v. Lady Hobson, 1 P. W. 241, note *(y)*, 6th ed.; White v. Barton, 18 Beav. 192.

*(n)* Urch v. Walker, 3 M. & Cr. 702. *(o)* Montfort v. Cadogan, 17 Ves. 489.

*(p)* James v. Frearson, 1 Y. & C. Ch. Ca. 370; see 375, 377.



In *Orr v. Newton*,<sup>(g)</sup> A., one of six executors, *admitted in his answer* that during the life of B., another of the executors, and who had alone taken out probate, he had assisted in writing letters to the co-executors towards collecting the testator's estate, and it was *proved* that A. had written on behalf of himself and his co-executors to a debtor of the testator requiring payment. Lord Camden, notwithstanding the circumstances, observed in his argument, that "B. undertook to act *solely*, and did act *solely* until he died," implying that A. had, by his conduct, not assumed the character of executor. But the case <sup>was</sup> one of [<sup>\*242</sup>] "*cruel persecution*" against A.; and his lordship put the fairest possible construction upon all that A. had done: and besides, Lord Camden might only have meant that B. was *substantially* the sole acting executor, without adverting to the question, whether the interference of A. ought not, in strict legal construction, to be held an acceptance of the executorship.

The rule, that every voluntary interference with the subject-matter will convert a person into a trustee, must be taken with this qualification, that the interference is not such as to be *plainly* referrible to some other ground than the part execution of the trust. Thus A., B., and C. were named as executors and trustees, and A. alone proved the will and administered, and sold certain chattels to B., and afterwards applied to B. as the friend of the family for advice; B. in consequence negotiated the sale of the testator's property, and became a purchaser of part himself, taking the conveyance from A. the tenant for life and the heir-at-law, under the impression that the devise to A., B., and C. (as B. and C. did not act in the trust) had become inoperative. On A.'s death B. expressly renounced the executorship. A bill was filed under these circumstances against B., as having acted in the trust, and misconducted himself in that character; but Sir J. Leach was clearly of opinion, that "B. had never interfered with the property, except as the friend or agent of the widow. It was true he had never executed a deed disclaiming the trust, but his conduct had disclaimed the trust. In the purchase of the small real estate made by him he had taken by feoffment from the widow and eldest son of the testator, in whom the estates could only have vested by the disclaimer of the trustee;" and his honor dismissed the bill with costs.<sup>(r)</sup>

But if a trustee act *ambiguously* he cannot afterwards take advantage of the doubt, and say he acted not as trustee, but in some other character. Thus, a testator devised that the produce of a plantation should be consigned to A. and be employed by him upon certain trusts, and A. with full notice <sup>of</sup> the will received the produce of the estate, [<sup>\*243</sup>] and then pleaded that he had been acting merely as factor or agent; but Lord Hardwicke said it was incumbent on the trustee if he would not have acted to have refused, and not, going on in that ambiguous way, to leave himself at liberty to say he acted as trustee or not.<sup>(s)</sup>

(g) 2 Cox, 274; see *Lowry v. Fulton*, 9 Sim. 122.

(r) *Stacey v. Elph*, 1 M. & K. 195; and see *Dove v. Everard*, 1 Russ. & Myln. 231; *S. C. Taml.* 376; *Lowry v. Fulton*, 9 Sim. 115.

(s) *Conyngham v. Conyngham*, 1 Ves. 522; *Montgomery v. Johnson*, 11 Ir. Eq. Rep. 476; see *Lowry v. Fulton*, 9 Sim. 115; *Doe v. Harris*, 16 M. & W. 517.

Upon the question of acceptance or non-acceptance of the office, of course parol evidence is admissible as on any other issue.(t)

Where a fund is given to a person upon certain trusts, and he is appointed executor, as soon as he has severed the legacy from the general assets, and appropriated it to the specific purpose, he dismisses the character of executor, and assumes that of trustee.(u) Indeed the assent of the executor to the legacy, however proved, converts him into a trustee.(c)

If a person be asked and consent to become a trustee of a *marriage-settlement*, and thereupon his name is introduced into articles as the basis of the settlement, he may sue the parties bound by the articles for specific performance, though he may not have executed any written instrument declaratory of his acceptance of the trust.(w)

As soon as a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an *active* part in the execution of the trust. The law knows not such a person as a *passive* trustee. If, therefore, an unprofessional person be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called [\*244] formal acts. \*If he sign a power of attorney for sale of stock, or execute a deed of reconveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor and had the sole management of the transaction.

Again, when a trustee has entered upon the trust, he is bound at once to acquaint himself with the nature and particular circumstances of the property, and to take such steps as may be necessary for the due protection of it. Thus he is not liable for the defaults of any predecessor in the trust, but if the fund is in danger, and not in the state in which it ought to be, the court will presume him to have made proper inquiries, and will hold him responsible if he does not take such measures as may be called for.(x)

So a trustee of chattels personal for the separate use of a wife must take care, on accepting the trust, to have the effects ascertained by a proper inventory, or in a suit for an account of the trust estate he may be deprived of his costs.(y)

If part of the original trust estate is supposed to be lost, or is not forthcoming, the court will not appoint new trustees of the residue, so as to make them partial trustees only, but will appoint them trustees generally, and if required will at the same time, for the protection of the trustees, direct an inquiry whether any part of the trust fund has been lost, and what steps should be taken for its recovery.(z)

(t) See *James v. Fearson*, 1 Y. & C. Ch. Ca. 370.

(u) *Phillipo v. Munnings*, 2 M. & C. 309; *Byrchall v. Bradford*, 6 Mad. 13; S. C. ib. 235; *Ex parte Dover*, 5 Sim. 500; *Ex parte Wilkinson*, 3 Mont. & Ayr. 145; See *Wilmott v. Jenkins*, 1 Beav. 401.

(v) *Dix v. Burford*, 19 Beav. 409.

(w) *Cook v. Fryer*, 1 Hare, 498.

(x) See *Townley v. Bond*, 2 Conn. & Laws. 405; *James v. Fearson*, 1 Y. & C. Ch. Ca. 370; and see *Malzy v. Edge*, 2 Jur. N. S. 80; but quare.

(y) *England v. Downs*, 6 Beav. 269; see 279.

(z) *Bennett v. Burgis*, 5 Hare, 295.

We may add in conclusion, that if a person by mistake or otherwise assume the character of trustee, when it really does not belong to him, he may be called to account by the *cestuis que trust*, for the moneys he received under the colour of the trust. Thus, when a testator devised an estate to W. Thompson upon certain trusts, with a power of sale to him, his heirs and assigns, and the trustee devised all his real estates to his sister, Grace Thompson, charged with 50%. to his friend Watson, and died, leaving his brother Jonas Thompson his heir-at-law, and, on the death of the trustee, \*Grace Thompson assuming to be devisee, [\*245] sold the estate and received the money and paid it wrongfully to the tenant for life; in a suit against the representative of Grace Thompson, the court held, although she was neither heir nor devisee, yet as she had acted as trustee and received the money in that character, she was accountable for it to the *cestuis que trust*.(a)

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## \*CHAPTER XI.

[\*246]

### OF THE LEGAL ESTATE IN THE TRUSTEE.

UPON this subject we propose to treat, First. Of vesting the legal estate in the trustee; Secondly. Of the properties and devolution of the legal estate; and Thirdly. Of the question what persons taking the legal estate will be bound by the trust.

## SECTION I.

### OF VESTING THE LEGAL ESTATE IN THE TRUSTEE.

I. Of the legal estate in the trustee with reference to the Statute of Uses.

In the case of a simple trust, as the statute of Henry the Eighth operates upon the first use, whether designated in the instrument as a use or trust, if a conveyance or devise be to A. and his heirs "in trust" for B. and his heirs, the possession will be executed in B.;(a) and the statute must operate, notwithstanding the intention of the settlor to the contrary, for the will of the subject cannot control the express enactment of the legislature.(b) In order, therefore, to prevent the legal estate from being executed in the *cestui que trust*, it is necessary to vest

(a) *Rackham v. Siddall*, 16 Sim. 297; affirmed by the lord chancellor on appeal as to the point under consideration, 1 Mac. & Gord. 607.

(aa) As in *Austen v. Taylor*, 1 Ed. 361; *Robinson v. Grey*, 9 East, 1, &c. See *Broughton v. Langley*, 2 Salk. 679; *Chapman v. Blissett*, Cas. t. Talb. 150.

(b) See *Carwardine v. Carwardine*, 1 Ed. 36. In *Gregory v. Henderson*, 4 Taunt. 772, Judges Chambre and Gibbs laid a stress on the testator's *intent*, but Judge Health referred the case to the true principle, viz. that the trustees having a duty to perform, it was a trust special, and so out of the statute.



in the trustee not only the ancient common law fee, but also the primary use, as, by conveying or devising \**“to the trustee and his heirs* [\*247] *to the use of the trustee and his heirs,”* (c) or *“unto and to the use of the trustee and his heirs ;”* (d) for although by this form of limitation the trustee will be *in* by the common law, yet, as the use and the possession are both vested in the trustee, the trust over, as not being the primary use, will not be affected by the statute.

But *special* trusts are not within the purview of the act ; (e) and therefore, if any agency be imposed on the trustee, as by a limitation to A. and his heirs, upon trust to *pay* the rents, (f) or to *convey* the estate, (g) or if any control is to be exercised, or duty to be performed, as in the case of a trust to *apply* the rents to a person's *maintenance*, (h) or in making *repairs* (i) to hold for the *separate use* of a feme covert, (k) or to *preserve contingent remainders* (l) and *a fortiori* if to *raise a sum of money*, (m) or to *dispose of by sale*, (n) in all these cases as the trust is of a special character, the operation of the statute of uses is effectually excluded. But if an estate be released by *deed* to A. and his heirs *“upon trust,”* after the marriage of relessor *“for her and her assigns for life, for her own sole and separate use,”* but no active duty in respect of the separate use is expressed to be reposed in the trustee personally, a common [\*248] law court rejects the sole and separate use as an estate known only in equity, and holds the legal estate for life to be executed in the relessor. (o)

And if the trust be simply to *“permit and suffer A. to receive the rents,”* (p) the legal estate is executed in A. However, if the lands be devised to three persons and their heirs in trust, to permit A. to receive the *net* rents for her life for her own use, and after her death to permit

(c) *Robinson v. Comyns*, Rep. t. Talb. 154 ; *Attorney-General v. Scott*, id. 138 ; *Hopkins v. Hopkins*, 1 Atk. 589, per Lord Hardwicke.

(d) *Doe v. Passingham*, 6 B. & C. 305 ; *Doe v. Field*, 2 B. & Ad. 564 ; *Harris v. Pugh*, 12 Moore, 577 ; S. C. 4 Bing. 335 ; *Rackham v. Siddall*, 1 Mac. & Gord. 607.

(e) See Introduction ; and see *Wright v. Pearson*, 1 Ed. 125 ; *Mott v. Buxton*, 7 Ves. 201.

(f) *Robinson v. Grey*, 9 East, 1 ; *Symson v. Turner*, 1 Eq. Ca. Ab. 383, note. 3d resolution ; *Garth v. Baldwin*, 2 Ves. 646 ; *Chapman v. Blissett*, Cas. t. Talb. 145 ; *Barker v. Greenwood*, 4 M. & Wels. 429 ; *Anthony v. Rees*, 2 Cr. & Jer. 75 ; *White v. Parker*, 1 Bing. N. C. 573 ; and see *Doe v. Homfray*, 6 Ad. & Ell. 206 ; *Kenrick v. Lord Beauchlerk*, 3 Bos. & Pull. 178 ; *Nevil v. Saunders*, 1 Vern. 415 ; *Jones v. Say & Seal*, 1 Eq. Ca. Ab. 383.

(g) *Garth v. Baldwin*, 2 Ves. 646 ; *Doe v. Field*, 2 B. & Ad. 564 ; *Doe v. Edlin*, 4 Ad. & Ell. 582.

(h) *Sylvester v. Wilson*, 2 T. R. 444 ; *Doe v. Edlin*, 4 Ad. & Ell. 582.

(i) *Shapland v. Smith*, 1 B. C. C. 75.

(k) *Harton v. Harton*, 7 T. R. 652 ; and see *Nevil v. Saunders*, 1 Vern. 415 ; *Jones v. Lord Say & Seal*, 1 Eq. Ca. Ab. 383 ; *Doe v. Claridge*, 6 Com. B. Re. 641.

(l) *Biscoe v. Perkins*, 1 V. & B. 485 ; and see *Barker v. Greenwood*, 4 M. & W. 431.

(m) *Wright v. Pearson*, 1 Ed. 119 ; *Stanley v. Lennard*, 1 Ed. 87.

(n) *Bagshaw v. Spencer*, 1 Ves. 142.

(o) *Williams v. Waters*, 14 M. & W. 166.

(p) *Boughton v. Langley*, 1 Eq. Ca. Ab. 383 ; S. C. 2 Salk. 679 ; overruling *Burchett v. Durdant*, 2 Vent. 311 ; *Right v. Smith*, 12 East. 455 ; *Wagstaff v. Smith*, 9 Ves. 524, per Sir W. Grant ; *Gregory v. Henderson*, 4 Taunt. 773, per Heath, J. ; *Warter v. Hutchinson*, 5 Moor. 143 ; S. C. 1 B. & C. 721 ; *Barker v. Greenwood*, 4 M. & W. 429, per Parke, B.



B. to receive the *net* rents for her life for her sole and separate use, with remainder over and a power of sale to the trustees, it has been held that the legal estate is in the trustees, for that they are to receive the rents, and thereout pay the land-tax and other charges on the estate, and hand over the *net* rents only to the tenant for life.<sup>(q)</sup>

If the legal estate be limited to the trustees *charged with debts*, and subject thereto in trust for A., but no direction to the trustees personally to pay the debts,<sup>(r)</sup> here as the trustees have no agency assigned to them, but merely stand seised in trust, the statute will operate, and execute the possession in A.

And where copyholds were devised to trustees during the minority of the testator's son, "the same to be *transferred* to him" when he attained twenty-one, and if he died under twenty-one the testator gave the estate over, it was held that the trustees took a chattel interest only, until the son attained twenty-one, and that the copyholds then vested in the son. It was said, that if the devise were to the son on attaining twenty-one without the intervention of trustees, the *admission* of the son as tenant on the rolls would operate as a *transfer* of the estate, and that the words "the same to be transferred" did not imply that the trustees were to transfer \*the legal estate.<sup>(s)</sup> This construction appears somewhat forced, as the estate is not transferred by the admission, [\*249] but by the surrender. However, the estate remains in the surrenderor until the admission of the surrenderee, though it then operates retrospectively from the date of the surrender.

Where the trust was "to pay unto or permit and suffer a person to receive" the rents, as the former words would have created a special trust, and the latter would have been construed a use executed by the statute, the court determined, for want of a better reason, that the former or latter words should prevail, as the instrument, in which they were found, happened to be a deed or a will.<sup>(t)</sup>

II. Of the legal estate in the trustee as governed by the object and scope of the trust.

As legal limitations are properly cognisable by a common-law court, it might naturally be supposed that the construction put upon the instrument would stand wholly unaffected by the circumstance of the creation of the trust. But as the effect of a deed or will is to be ruled by the intention, and every person in limiting an estate to a trustee must be guided by the equity he proposes to raise upon it, the courts, as well of common law as of equity, were necessarily led to enter upon the consideration of the trust, in order to measure the extent of the legal interest by the scope and object of the equitable.<sup>(u)</sup>

The following rules of construction have been adopted by the courts in reference to this branch of our subject, and, except so far as they are

(q) *Barker v. Greenwood*, 4 M. & W. 421; *White v. Parker*, 1 Bing. N. C. 573.

(r) *Kenrick v. Lord Beaucherk*, 3 B. & P. 175; *Jones v. Lord Say & Seal*, 8 Vin. 262. In this case the remainder was given to the trustees upon trust subject to the annuities, and was held to be executed.

(s) *Doe v. Nicholls*, 2 B. & Cr. 336.

(t) *Doe v. Biggs*, 2 Taunt. 109.

(u) As to the cognisance of trusts by a court of law, see *Sims v. Marryat*, 17 Q. B. Rep. 292; *May v. Taylor*, 6 Mann. & Gr. 261.

controlled by the positive enactments of the late Wills Act,<sup>(v)</sup> must still be resorted to for guidance.

First, Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied: Secondly, The legal estate limited to the trustee shall not be carried farther than the complete execution of the trust necessarily requires.

1. To illustrate the first of these rules, the court has in *\*some* [*\*250*] instances *supplied the estate in toto*; as where a testator had devised to a *feme covert* the issues and profits of certain lands *to be paid by his executors*, it was held the land itself was devised to the executors in trust to receive the rents and profits to the use of the wife.<sup>(w)</sup>

If a testator simply appoint a person his executor and *trustee*, it seems the latter word is not so exclusively applied to real estate, as to carry by implication to the executor a devise of the testator's freeholds, but if the testator direct certain acts to be done by the trustee which belong to the owner of the freeholds, such a devise will be implied.<sup>(x)</sup> And so if the testator appoint a person his "trustee of inheritance," which is equivalent to making him the trustee of his inheritable property.<sup>(y)</sup> And if a testator constitute a trustee by will, and devise the legal estate to him, and then by a codicil "nominates and appoints another person to be trustee" in his place, the codicil not only confers the office of the trusteeship, but also carries the legal estate with it.<sup>(z)</sup>

In *other* cases the court has *extended the estate*, as where the devise was to three trustees, and the survivor of them, and the executors and administrators of such survivor, upon trust to pay certain annuities for lives, it was ruled that the trustees took an estate for the *several lives of the annuitants*.<sup>(a)</sup>

If land, said Lord Hardwick, be given to a man without the word *heirs*, and a trust be declared which can be satisfied in no other way but by the trustees taking an inheritance, it has been construed that a fee passes.<sup>(b)</sup>

Thus a trust to sell,<sup>(c)</sup> *\*even on a contingency*,<sup>(d)</sup> confers a fee [*\*251*] simple as indispensable to the execution of the trust; and the construction is the same in a sale implied, as where the devise is upon trust out of the rents and profits of an estate to discharge certain legacies

(v) 1 Vict. c. 26, ss. 30, 31.

(w) Bush v. Allen, 5 Mod. 63; Doe v. Homfray, 6 Ad. & Ell. 206; and see Oates v. Cooke, 3 Bur. 1684; Sir W. Black. 543; Doe v. Woodhouse, 4 T. R. 89.

(x) Oates v. Cooke, 3 Burr. 1684; Bush v. Allen, 5 Mod. 63; Anthony v. Rees, 2 Cr. & Jer. 75; Doe v. Shotton, 8 Ad. & Ell. 905.

(y) Trent v. Hanning, 1 B. & P. New Rep. 116; 10 Ves. 495; 7 East, 95; 1 Dow. 102; Doe v. Pratt, 6 Ad. & Ell. 180.

(z) Re Hough's Will, 4 De Gex & Sm. 371.

(a) Doe v. Simpson, 5 East, 162; and see Atcherley v. Vernon, 10 Mod. 523; Oates v. Cooke, 3 Bur. 1684; Shaw v. Weigh, 2 Str. 798; Jenkins v. Jenkins, Willes, 650. In Doe v. Simpson a life estate only was implied, as the trustee was merely such; but in Jenkins v. Jenkins, the trustee being also interested beneficially, the construction was more liberal, and it was thought the fee simple passed.

(b) Villiers v. Villiers, 2 Atk. 72.

(c) Shaw v. Weigh, 2 Str. 798; Bagshaw v. Spencer, 1 Ves. 144, per Lord Hardwicke; and see Glover v. Monckton, 3 Bing. 13; 10 Moore, 453. As to Hawker v. Hawker, 3 B. & Ald. 537, and Warter v. Hutchinson, 5 Moore, 143, S. C. 1 B. & C. 721, see remarks *infra*, pp. 256, 257.

(d) Gibson v. Lord Montfort, 1 Ves. 485, see p. 491.

made payable at a day inconsistent with the application of the annual profits only.(e)

But a power of selling will not be implied by a limitation to a trustee, or to a trustee his executors and administrators, upon trusts to pay debts and legacies generally,(f) or (*semble*) to raise a sum of money.(g) In such cases, where nothing in the context implies the limitation of the fee, a chattel interest only will pass. But, if a greater estate be limited expressly, as by a devise to A. *and his heirs* upon trust to pay debts, the court has no jurisdiction to cut down the expression and reduce the estate to a chattel,(h) though if a chattel interest be carved out of the fee and be so limited, the word "heirs" may be rejected as inconsistent with the estate, as where lands are devised to trustees and their heirs, until an infant attains twenty-one, and then to the infant in fee.(i)

If an estate be granted to two, and the survivor of them, and the heirs of such survivor, they are not joint tenants in fee, but take a freehold for their joint lives, with a contingent remainder to the one that may happen to survive. The same construction will be put upon a devise expressed simply in the same terms without any trust annexed, or even if there be \*a trust, provided the nature of it do not require the fee simple [\*252] to be vested in the trustees.(k) But if such a devise, even to beneficiaries, be coupled with words pointing to a joint tenancy, that construction will be adopted, as if the gift be to two and the survivor of them and their heirs,(l) or to them as joint tenants, and the survivors and survivor of them, and the heirs and assigns of such survivor.(m) And if the devise be to two and the survivor of them, and the heirs of such survivor, upon trusts that require the fee simple to be vested in the trustees, or upon trust for sale, the prevailing opinion is, that notwithstanding the old case of *Vick v. Edwards*(n) to the contrary, the courts would compel a purchaser to accept a title on the assumption that the trustees took the fee simple.(o) "Whatever doubts," observes Butler, "were formerly entertained, it now appears to be the settled opinion of the profession that a devise to two and the survivor of them, and the heirs and assigns of such survivor, enables the trustees to vest the fee in the purchaser, and that titles under such a devise are accepted with a conveyance from the trustees and without the concurrence of the heir."(p)

2. To illustrate the second rule, if an estate be devised to A. and his heirs upon trust to *permit* B. to *receive* the rents during his life, and on

(e) *Gibson v. Lord Montfort*, 1 Ves. 485.

(f) Co. Lit. 42 a; *Cordal's case*, Cr. El. 315; *Carter v. Barnadiston*, 1 P. W. 505; *Hilchins v. Hilchins*, 2 Vern. 403; *Doe v. Simpson*, 5 East, 171, per Lord Ellenborough, C. J.; *Roberts v. Dixwell*, 1 Atk. 609, per Lord Hardwicke.

(g) *Doe v. Simpson*, 5 East, 162; and see *Bosworth v. Forard*, O. Bridg. Rep. 167; *Thomason v. Mackworth*, id. 507; Co. Lit. 42 a, note (7), Butler's ed.

(h) *Wright v. Pearson*, 1 Ed. 119, see p. 123.

(i) *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 T. R. 41; *Warter v. Hutchinson*, 1 B. & C. 721; and see *Ackland v. Lutley*, 9 Ad. & Ell. 879; but see *Le-thieullier v. Tracy*, 3 Atk. 780, *Fearne's C. R.* 226, Butler's note.

(k) *Re Harrison*, 3 Anst. 836.

(l) *Doe v. Sotheron*, 2 Bar. & Ad. 628; *Oakley v. Young*, 2 Eq. Ca. Ab. 537.

(m) *Goodtitle v. Layman*, *Fearne's C. R.* 358.

(n) 3 P. W. 372.

(o) See *Doe v. Ewart*, 7 Ad. & Ell. 636; *Doe v. Sotheron*, 2 Bar. & Ad. 628.

(p) Co. Lit. 191 a. note 1; and see *Fearne's C. R.* 358.



his death to *convey* to C. in fee, here the legal estate for the life of A. is vested in B., and the remainder only in the trustee.(q) On the other hand, if an estate be devised to A. and his heirs in trust to pay the rents to B. for his life, and on his death the testator devises the estate to C. in fee, here the legal estate for the life of B. is in the trustee, and the legal estate in the remainder is vested in C.(r) So where a copyhold was devised to A. *and his heirs* upon trust for the separate use of a *feme covert* during her \*life, and after her decease in trust as the *feme* [\*253] should appoint, and in default of appointment to the testator's right heirs, it was thought by Judge Heath that the trustee took a base fee determinable on the life of the *feme*, and by Judge Chambre, that the devise amounted only to an estate *pur autre vie*.(s) But it seems that such a limitation in a *deed*, where the construction is narrower, would have conferred the fee simple.(t)

So in a devise to A. for life, remainder to trustees and their heirs to preserve contingent remainders (the words "during the life of A." being omitted,) with remainders over, the trustees were construed to take not a fee simple, but an estate for the life of A.(u) And Sir W. Grant expressed himself in favour of a similar construction where the instrument was a deed :(v) but it has since been decided that in the latter case a fee simple passes,(w) unless it be quite clear upon the face of the deed itself that the words "during the life of A.," were meant to be in the deed, and are wanting through inadvertence.(x) Of course there can be no such restriction of the estate by implication where the natural sense of the words admit of a fair and reasonable construction, as if before the late act the fee in the trustees would have supported any contingent limitations that would otherwise have been left at the mercy of the tenant for life.(y)

Upon the principle we are now considering, if the legal estate be given to trustees, and their heirs, upon a trust not executed by the statute during the life of A., and after A.'s decease to uses in strict settlement, the vesting of the estate \*in the trustee during the life of [\*254] A. will not prevent the operation of the statute in executing the uses in remainder.(z)

(q) Doe v. Bolton, 11 Ad. & Ell. 188; Adams v. Adams, 6 Q. B. Rep. 860.

(r) Adams v. Adams, 6 Q. B. Rep. 860; Cooke v. Blake, 1 Exch. Rep. 220.

(s) Doe v. Barthrop, 5 Taunt. 382, and see Ward v. Burbury, 18 Beav. 190; Doe d. Players v. Nicholls, 1 B. & Cr. 342; Doe v. Cafe, 7 Exch. Rep. 675.

(t) Wykham v. Wykham, 11 East, 458; see S. C. 18 Ves. 419, and following pages.

(u) Doe v. Hicks, 7 T. R. 433: as to Boteler v. Allington, 1 B. C. C. 72, see Doe v. Hicks, 7 T. R. 435, and Wykham v. Wykham, 18 Ves. 418; and see Nash v. Coates, 3 B. & Ad. 839.

(v) Curtis v. Price, 12 Ves. 89; but see Wykham v. Wykham, 18 Ves. 419, and following pages.

(w) Colmore v. Tyndall, 2 Y. & J. 605.

(x) Beaumont v. Marquis of Salisbury, 19 Beav. 198; Haddelsey v. Adams, 22 Beav. 266; Lewis v. Rees, 3 K. & J. 132.

(y) Venables v. Morris, 7 T. R. 342, 438; and see Curtis v. Price, 12 Ves. 100; Doe v. Hicks, 7 T. R. 437; Rochford v. Fitzmaurice, 1 Conn. & Laws. 169; 2 Drur. & Warr. 16.

(z) Doe v. Simpson, 5 East. 171. per Lord Ellenborough; Robinson v. Grey, 9

Thus, in the much disputed, but, as it appears, rightly decided case of *Jones v. Lord Say and Seal*,<sup>(a)</sup> where a testatrix devised to trustees and their heirs upon trust to pay the legacies, devises, and bequests thereafter mentioned (some life annuities only were given,) and to pay the residue of the rents and profits as her daughter should appoint for her life, and after her decease the trustees to “stand seised” of the premises to certain uses, “subject to the payment of the several annuities;”—it was held by the court that the legal estate during the life of the daughter was vested in the trustees, but that the remainder expectant upon her decease was executed to the *cestuis que use*: the trustees were not required to be *agents* after the death of the daughter, but were simply, subject to the payment of the annuities, which meant only, subject to the annuities, to stand seised to uses.

So, where a testator devised to three trustees and their heirs subject to the following uses and estates, viz. in trust to permit two persons to receive annuities, and, subject thereto, he devised the premises to the trustees and their heirs until A. attained twenty-one, upon certain trusts, and, when A. should attain twenty-one, he devised the premises to the trustees and their heirs to uses in strict settlement, it was held that the trustees took a chattel interest only, and that the uses in remainder were executed by the statute.<sup>(b)</sup> The testator prefacing each limitation with a devise to “the trustees and their heirs,” the repetition of these words was probably regarded as surplusage, and the will was construed as follows:—“I devise the estate to the trustees and their heirs to the following uses, to the use that A. and B. may receive annuities, and subject thereto to the use of the trustees until A. attain twenty-one and on A.’s attaining twenty-one \*to uses in strict settlement.” Independently of this construction, it seems the devise to the trustees [\*255] and their heirs until A. attained twenty-one would only have the effect of communicating a chattel interest;<sup>(c)</sup> for as every estate of a certain and definite duration, though determinable on a life, is a chattel in its nature, the limitation to the heirs would be rejected as repugnant.

In *Harton v. Harton*<sup>(d)</sup> a testator devised to A. and B. and their heirs upon trust to permit C., a *feme covert*, to receive the rents during her life for her separate use, and after her decease to the use of her first and other sons in tail; and in default of such issue to the use of the daughters in tail as tenants in common; and in default of such issue upon trust to permit D., a *feme covert*, to take the rents during her life for her separate use, with remainder to the use of her first and other sons in tail, with remainder to her daughters in tail as tenants in common; and in default of such issue, upon trust to permit E., a spinster,

East, 1; *Adams v. Adams*, 6 Q. B. Rep. 860; *Doe v. Ironmonger*, 3 East, 533; and see *Nash v. Coates*, 3 B. & Ad. 839.

(a) 8 Vin. 262.

(b) *Warter v. Hutchinson*, 5 Moor, 143; S. C. 1 B. & C. 721; and see *Ward v. Burbury*, 18 Beav. 190; *Doe v. Cafe*, 7 Exch. Rep. 675.

(c) *Goodtitle v. Whithy*, 1 Bur. 228; *Doe v. Lea*, 3 T. R. 41; and see *Ackland v. Lutley*, 9 Ad. & Ell. 879; but see *Lethicullier v. Tracy*, 3 Atk. 780; *Fearne's Conting. Rem.* 226, *Butler's note*.

(d) 7 T. R. 652.

FEBRUARY, 1858.—17

to receive the rents during her life for her separate use, with like remainder to the use of her first and other sons in tail, with remainder to her daughters in tail, as tenants in common; and it was determined that the fee simple was in the trustees; but this decision can scarcely be reconciled with principle, and seems to have presented some difficulty to the mind of Lord Eldon. "The court," said his lordship, "held that the legal estate was in the trustees throughout, as it appears to me, for this reason, that there being various trusts for the separate use of married women after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end, and they relied on the non-repetition of a legal estate."<sup>(e)</sup> In a recent case, however before Vice-Chancellor Wigram, his honor appears to have considered himself bound by *Harton v. Harton*,<sup>(f)</sup> and in a still later case the Court of \*Queen's Bench [\*256] recognised its authority, at least to a limited extent.<sup>(g)</sup>

But if a devise be to trustees and their heirs upon a trust that cannot be executed without an absolute control over the property, as upon trust to lease for an indefinite number of years,<sup>(h)</sup> or to raise a sum of money by sale,<sup>(i)</sup> and subject thereto to uses in strict settlement, the trustees will not be held to take a mere power so as to let in the statute to execute the uses, but will be construed to take the legal estate in fee, and the uses that are limited will stand as equitable interests.

It has been observed in the *Treatise of Powers*,<sup>(k)</sup> that this rule was not attended to in the case of *Hawker v. Hawker*.<sup>(l)</sup> The devise in that case was to three trustees and their heirs upon trust to sell the testator's lands at H. for payment of his debts, and, in case the proceeds should be insufficient, then as to his lands at F. upon trust to sell for the like purpose, and to dispose of the surplus moneys in manner therein-after directed, and, in case it should not be necessary to dispose of the said lands at F., then as to such his lands (*inter alia*) upon trust for the maintenance of his daughter till twenty-one, and, on her attaining twenty-one, to the use of the trustees during her life, and after her decease to the use of her children; and the court certified as to the lands at F., that the trustees did not take a larger estate than for the life of the daughter. The devise was probably considered to be of a double aspect, viz. to the trustees and their heirs upon trust to sell, &c., if one event happened, and upon trust for the daughter, &c., if another event happened. The latter series of limitations took effect, and therefore, as no power of sale was to be exercised by the trustees, it was not necessary under the circumstances to arm them with the inheritance.

(e) *Hawkins v. Luscombe*, 2 Sw. 391.

(f) *Brown v. Whiteway*, 8 Hare, 145.

(g) *Toller v. Attwood*, 15 Q. B. Rep. 951.

(h) *Doe v. Willan*, 2 B. & Ald. 84; but see *Heardson v. Williamson*, 1 Keen, 33; *Ackland v. Lutley*, 9 Ad. & Ell. 879.

(i) *Wright v. Pearson*, 1 Ed. 123; *Bagshaw v. Spencer*, 1 Ves. 142; *Glover v. Monckton*, 3 Bing. 13; *Bale v. Coleman*, 2 Eq. Ca. Ab. 309, note (e); *Sanford v. Irby*, 3 B. & Ald. 654; *Jones v. Morgan*, 1 B. C. C. 206; for a correct report of the will, see *Fearne's C. R. Appendix*, No. 3.

(k) 1 Sug. Pow. 127, 6th edit.

(l) 3 B. & Ald. 537.



\*The case of *Warter v. Hutchinson*(*m*) is more difficult to be reconciled with the rule we are discussing. The limitations so far as they concern the present subject, were to trustees and their heirs to the following uses, viz. to the trustees, their heirs and assigns, until A. attained twenty-one, upon trust as soon as convenient after the testator's decease to raise out of the rents and profits, or by sale or mortgage thereof, a sum sufficient for the payment of debts, funeral expenses, and the costs of the trustees, and also the sum of 2000*l.* to be applied in manner therein directed, the residue of the rents and profits, after payment of debts, funeral expenses, and the sum of 2000*l.*, to be paid to A. on his attaining twenty-one, and when A. shall attain twenty-one the testator devised the premises to the trustees and their heirs to uses in strict settlement; and the court certified that the trustees took a chattel interest, and not the fee simple. The construction appears to have been, that, as the limitation to the trustees and their heirs was expressly limited to the period *until A. attained twenty-one*; the estate was intended to be a chattel interest only, and the charges were to be raised either by sale or mortgage of that chattel interest, or out of the inheritance by virtue of an implied power.

Recent cases have established the following important qualification of the rule now under consideration, viz., that where an estate is in the first instance given to trustees and their heirs upon trusts which do not exhaust the equitable fee simple, and for which a particular estate short of the legal fee in the trustees would be sufficient, but discretionary powers are superadded, which cannot be exercised by the trustees without arming them with the means of passing the fee simple, there the courts have held that the trustees do not take a particular estate by way of vested interest with a power under the statute of uses or by a common law authority of passing the fee, but that they retain the legal fee simple given to them in the first instance, on the footing that they were meant to exercise the discretion given to them by virtue of their ownership and not by the mere operation of a \*power.(*n*) Baron Parke observed, in the leading case,(*o*) "It is certainly true that where the purposes of the trusts on which an estate is devised to trustees are such as not to require a fee in them, as, for instance, where the trust is to pay annuities or to pay over rents and profits to a party for life, there, if, subject to the specified trust, the estate is given over, the parties entitled under such devise over have been held to take legal estates, the gift to the trustees (even when given with words of inheritance) having been taken in such cases to have been meant to be co-extensive only with the trusts to be performed. This rule of construction has probably created much more difficulty than it has obviated. It is, however, now too well settled to be called in question.—But when an estate is given to trustees,

(*m*) 5 Moore, 143; S. C. 1 B. & C. 721.

(*n*) *Watson v. Pearson*, 2 Exch. Rep. 581; *Blagrove v. Blagrove*, 4 Exch. Rep. 550; *Davies v. Davies*, 1 Q. B. Rep. 430; *Doe v. Cadogan*, 7 Ad. & Ell. 636; *Rackham v. Siddall*, 1 Mac. & Gord. 607.

(*o*) *Watson v. Pearson*, 2 Exch. Rep. 593.

all the trusts which they are to perform must *prima facie* at least be performed by them by virtue and in respect of the estate vested in them.—The fee is in terms devised to them, and it would be a very strained and artificial construction to hold first that the natural meaning of the words is to be cut down, because they would give an estate more extensive than the trust requires, and then, when the trust does in fact require the whole fee simple, to hold that that must be supplied by way of power defeating the estate to the subsequent devisees, and not out of the interest of the trustees.”

The rule of construction laid down in this case has since been followed, even where the language of the subsequent limitations has been peculiarly applicable to a devise of the legal estate, as where after the primary devise to the trustees and their heirs upon limited trusts with discretionary powers the estate was expressed to be limited in strict settlement, by a declaration of uses to that effect.<sup>(p)</sup>

But the principle does not apply where the devise is to trustees and their heirs upon trust for a person for life, and after her death upon certain trusts during the minority of her \*children, with a mere [\*259] power of leasing, to be exercised during the continuance of the trust without any authority affecting the fee simple.<sup>(q)</sup>

The law upon the subject has now undergone some alteration from the provisions of the late act (1 V. c. 26,) for the amendment of the law of wills.

By the 30th section it is declared, “that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass *the fee simple*, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a *definite term of years*, absolute or determinable, or an *estate of freehold* shall thereby be given to him, *expressly* or by *implication*.”

And by the following section it is enacted, “that where any real estate shall be devised to a trustee *without any express limitation of the estate* to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee *the fee simple* or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied.”

The effect of these provisions is by no means clear, but it is conceived that a *definite* chattel interest, as a term of 99 years, or a simple freehold as an estate for the life of A., may still either be limited expressly to trustees or be raised by implication; and that in cases where before the act an *indefinite* chattel interest would have passed as in a devise to trustees (without the word “heirs”) to pay debts, or a freehold

(p) *Blagrove v. Blagrove*, 4 Exch. Rep. 550; *Rackham v. Siddall*, 1 Mac. & Gord. 607.

(q) *Doe v. Cafe*, 7 Exch. Rep. 675: and see *Adams v. Adams*, 6 Q. B. Rep. 860.

with an indefinite interest superadded as in *Doe v. Simpson*,<sup>(r)</sup> there the words of the will are in future made to pass the fee simple.<sup>(s)</sup>

## \*SECTION II.

[\*260]

## THE PROPERTIES AND DEVOLUTION OF THE LEGAL ESTATE.

This branch of our subject we propose to consider, First, with reference to the common law; and, Secondly, with reference to the construction of particular statutes.

I. As regards the common law, it may be stated as a general rule, that the legal estate in the hands of the trustee has precisely the same properties and incidents as if the trustee were the usufructuary owner. Thus, if real estate be put in trust it is still subject at law in the hands of the trustee to curtesy,<sup>(t)</sup> dower,<sup>(u)</sup> and freebench,<sup>(v)</sup> and until a late act was liable to forfeiture,<sup>(w)</sup> and on the decease of the trustee descended to his heir, and, failing the heir, fell by escheat to the lord;<sup>(x)</sup> but now by 13 & 14 V. c. 60, ss. 15, 46, substituted for 4 & 5 W. 4, c. 23, trust property is protected from forfeiture and escheat.<sup>(y)</sup>

So chattels real and personal held upon trust were forfeitable until the late act, which extends to personal as well as real estate, for the offence of the trustee,<sup>(z)</sup> but in the case of two joint trustees, a moiety only was forfeited, and the king and the other trustee were tenants in common.<sup>(a)</sup> So on the decease of the trustee the chattel, as part of his personal estate at law, will devolve on the executor or administrator. And if the executor die having appointed an executor, the chattel will devolve on that executor.

If the lands comprised in a trust term be situate in a \*different diocese from that in which the trustee was domiciled, it seems [\*261] a prerogative probate will be necessary before the term can be legally transferred.<sup>(b)</sup> The chattel is of no value beneficially to the testator's estate; but ecclesiastical courts do not take cognizance of trusts.

And perhaps the better opinion is, that a chattel interest held upon trust may at law be taken in execution for the debt of the trustee; for, so soon as the writ of execution reaches the sheriff's office, it binds the goods and chattels of which the debtor is then possessed, and a trust

(r) 5 East, 162.

(s) See the observations on the above clauses, H. Sugden on Wills, p. 119; 2 Jarm. on Wills, 263.

(t) Bennet v. Davis, 2 P. W. 319.

(u) Noel v. Jevon, Freem. 43; Nash v. Preston, Cr. Car. 190.

(v) Hinton v. Hinton, 2 Ves. 631, 638; Bevant v. Pope, Freem. 71; and see Brown v. Raindle, 3 Ves. 256.

(w) Pawlett v. Attorney-General, Hard. 466, per Lord Hale; Geary v. Bearcroft, Cart. 67, per Cur.; King v. Mildmay, 5 B. & Ad. 254.

(x) Jenk. 190, c. 92.

(y) See infra, pp. 285, 286, 287.

(z) Pawlett v. Attorney-General, Hard. 466, per Lord Hale; Wikes's case, Lane, 54; Scounden v. Hawley, Comb. 172, per Dolben, J.; Jenk. 219, c. 66; ib. 245, c. 30.

(a) Wikes's case, Lane, 54.

(b) See Crosley v. Archdeacon of Sudbury, 3 Hagg. 201; 3 Vend. & Purch. 14.



estate, as well as a beneficial ownership, must be subject to the *lien*, for the common law can scarcely operate differently where it recognizes no distinction. The *sheriff* is a mere instrument for the execution of the legal process, and property, which the common law holds liable, the sheriff can have no discretion to exempt upon grounds of equity. The mere officer of the court cannot have *ligandi et non ligandi potestatem*.<sup>(c)</sup> It was said, however, by Mr. Justice Ashurst, "Suppose a person has goods as a trustee for certain purposes, which was made known to the sheriff before the sale, if the sheriff persists in selling, it would in my opinion be a tortious act in him."<sup>(d)</sup> On the other hand, Lord Thurlow seems to acknowledge the *legal right* against the trustee, by observing, that, if a creditor of the trustee take the goods in execution, he will himself become a trustee by construction of equity.<sup>(e)</sup>

Assets in the hands of an *executor* are regarded even by the common law as a species of trust property, and in respect of them has ingrafted upon itself a *quasi* equitable jurisdiction: thus, if an executrix marry, she may by will, without the consent of her husband, appoint an executor in whom the assets will vest, and who will thus become the executor of the original testator;<sup>(f)</sup> and though the husband during the coverture has power to dispose of the assets in the course <sup>\*of</sup> administration,<sup>(g)</sup> he will not be entitled to them in his marital right by survivorship.<sup>(h)</sup> Nor can the assets be taken in execution for the debt of the executor;<sup>(i)</sup> and, if he commit felony or treason, they are exempted from forfeiture to the king;<sup>(k)</sup> and if the executor die intestate, instead of vesting in his administrator, they vest in the administrator *de bonis non* of the testator.<sup>(l)</sup>

A trust estate, whether real or personal, may *at law*, be conveyed, assigned, or incumbered by the trustee like a beneficial estate; and, if there be co-trustees, each may exercise the like powers of ownership over his own proportion.

And, as the trustee may dispose or the property in his lifetime, so he may devise or bequeath it at his death.

But a trust estate will not in all cases *pass by the same words* in a will as a beneficial ownership would, for wherever the estate does not pass by operation of law solely, but through the medium of the intention, it becomes necessary, in order to ascertain the effect of the instrument, to take into consideration the particular circumstances of the trust.

Whether a trust estate shall pass inclusively in a *general devise*, is a question that has been frequently under discussion. The rule as originally established was, that a general expression would carry a dry trust

(c) *Burdett v. Rockey*, 1 Vern. 58, per Cur.

(d) *Farr v. Newman*, 4 T. R. 647.

(e) *Foley v. Burnell*, 1 B. C. C. 278.

(f) *Scammell v. Wilkinson*, 2 East, 552; *Hodsden v. Lloyd*, 2 B. C. C. 543, per Lord Thurlow.

(g) *Thrustout v. Coppin*, 2 W. Black. Rep. 801.

(h) Co. Lit. 351 a, 351 b; *Stow v. Drinkwater*, Lofft, 83.

(i) *Farr v. Newman*, 4 T. R. 621.

(k) *Farr v. Newman*, 4 T. R. 628, per Grose, J.

(l) *Ib. per eundem*; *Rachfield v. Careless*, 2 P. W. 161, per Powis, J.

estate,<sup>(m)</sup> but afterwards there were some misgivings upon the subject;<sup>(n)</sup> (1) and the court at last acceded to the proposition, that general words would not pass trust estates, unless there appeared a positive \*intention that they should so pass.<sup>(o)</sup> The question was reconsidered before Lord Eldon, when the result of the cases, after a [\*263] careful examination of them, was declared to be, that, *where the will contained words large enough, and there was no expression authorising a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own* (as complicated limitations, or any purpose inconsistent with as probable intention to devise as to let it descend,) *in such a case, the trust estate would pass.*<sup>(p)</sup>

A charge of debts, legacies, annuities, &c., and a *fortiori*, a direction to sell, is considered a sufficient indication of an intention not to include a mere trust estate;<sup>(q)</sup> and so where a testator gave, devised, and bequeathed to trustees all such real estates as were then vested in him by way of mortgage, the better to enable his said trustees to recover, get in, and receive the principal moneys and interest which might be due thereon, it was ruled that the devise extended only to mortgages vested in the testator beneficially, and did not pass the legal estate of a mortgage in fee vested in him *upon trust* for another.<sup>(r)</sup> Even where a testator, having a trust estate and also estates of his own, gave and devised "all his real estate, whatsoever and wheresoever, to Grace Thompson, her heirs and assigns, for ever, charged with 50*l.* to his friend Watson," it was held that the trust estate did not pass.<sup>(s)</sup>

\*The expression "*my* real estates" will not restrict the meaning to those vested in the testator beneficially,<sup>(t)</sup> nor will a devise [\*264] to A., his heirs and assigns, "to and for his and their own use and

(m) Marlow v. Smith, 2 P. W. 198.

(n) See Braybroke v. Inskip, 8 Ves. 437.

(o) Attorney-General v. Buller, 5 Ves. 340.

(p) Braybroke v. Inskip, 8 Ves. 436; see Roe v. Reade, 8 T. R. 118; Ex parte Morgan, 10 Ves. 101; Langford v. Auger, 4 Hare, 313.

(q) Roe v. Reade, 8 T. R. 118; Duke of Leeds v. Munday, 3 Ves. 348; Attorney-General v. Buller, 5 Ves. 339; Ex parte Marshall, 9 Sim. 555; Ex parte Morgan, 10 Ves. 101; Sylvester v. Jarman, 10 Price, 78; Re Morley's Trust, 10 Hare, 293; see Wall v. Bright, 1 J. & W. 494.

(r) Ex parte Morgan, 10 Ves. 101; and see Sylvester v. Jarman, 10 Price, 78; Ex parte Brettell, 6 Ves. 577.

(s) Rackham v. Siddall, 16 Sim. 297, 1 Mac. & Gor. 607; Hope v. Liddell, 21 Beav. 183.

† (t) Braybroke v. Inskip, 8 Ves. 425.

(1) The doubt appears to have originated in part from an expression of Lord Hardwicke in Casborne v. Scarfe, 1 Atk. 605, that by a devise of all lands, tenements, and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed. But Lord Hardwicke was not speaking here of the legal estate, but of the beneficial interest in the mortgage. The same thing was said in the same sense in Strode v. Russel, 2 Vern. 625. Lord Hardwicke's authority has been cited on both sides of the question (compare Duke of Leeds v. Munday, 3 Ves. 348, with Ex parte Sergison, 4 Ves. 147); but that he approved of the old rule is evident from Ex parte Bowes, cited in Mr. Sanders's note to Casborne v. Scarfe, 1 Atk. 605. Lord Northington and Lord Thurlow are said to have entertained the same opinion. (See Ex parte Sergison, 4 Ves. 147; but, as to Lord Thurlow, see an *obiter dictum*, Pickering v. Vowles, 1 B. C. C. 198.)

*benefit*,"(u) nor a devise to A. and her heirs, to be disposed of by her by will or otherwise, as she may think fit;(v) though under a devise to a woman for her *separate use*, as the words import a beneficial enjoyment, a dry legal estate will not pass.(w) Again, a devise to A. and B., "to be equally divided between them as tenants in common and to their respective heirs," will pass the trust estate.(x) But where lands are limited in strict settlement, with a vast number of limitations, contingent remainders, executory devises, powers of jointuring, leasing, and raising sums of money, it cannot for an instant be supposed the testator meant to include any lands of which he had not the absolute disposition;(y) and the same construction will prevail even when the estate is devised to A. for life or in tail with remainder over.(z)

The question whether the legal estate in a mortgage in fee passes, requires a separate consideration. The mortgagee has a beneficial interest in the property, as a security, a distinction not always sufficiently adverted to, but which is strongly in favour of the legal estate passing to the person who is to receive the mortgage money.(a) Hence the decisions establishing that the legal estate passes by a general devise of *securities for money*,(b) and that in the case of such a bequest neither a [\*265] \*general trust to sell and convert,(c) nor a charge of debts,(d) will prevent it from passing; and it is conceived, notwithstanding a former decision of the court of exchequer.(e) that the case of a general devise and bequest of real and personal estate charged with debts admits of no substantial distinction.

The rule that trust estates will pass under a general devise assumes that a testator by making such a devise does not commit a breach of trust, otherwise general words would not have been construed to carry the trust estate. However, it was observed in one case by the late vice-chancellor of England that in his opinion it was not lawful for a trustee to dispose of the estate, but that he ought to permit it to descend; and that there was no substantial distinction between a conveyance *inter vivos*, and a devise, for the latter was nothing but a *post mortem* conveyance.(f) But Lord Langdale considered that there was a wide distinction between a conveyance in the trustee's lifetime and a devise by his will; for dur-

(u) *Ex parte Shaw*, 8 Sim. 159; *Bainbridge v. Lord Ashburton*, 2 Y. & C. 347; *Sharpe v. Sharpe*, 12 Jur. 598; and compare *Ex parte Brettell*, 6 Ves. 577, with *Braybrooke v. Inskip*, 8 Ves. 434.

(v) *Ex parte Shaw*, 8 Sim. 159.

(w) *Lindsell v. Thacker*, 12 Sim. 178. The marginal note of the Report is quite contrary to the decision.

(x) *Ex parte Whitacre*, at the Rolls, July 22, 1807, cited 1 Sand. Uses & Trusts, 359, 4th ed. See *Re Morley's Trust*, 10 Hare, 293.

(y) *Braybrooke v. Inskip*, 8 Ves. 434, per Lord Eldon.

(z) *Thompson v. Grant*, 4 Madd. 438; overruling *Ex parte Bowes*, cited in Mr. Sanders's note to *Casborne v. Scarfe*, 1 Atk. 605; *Re Horsfall*, 1 Maciel. & Younge, 292; *Galliers v. Moss*, 9 B. & Cr. 267.

(a) *Doe v. Bennett*, 6 Exch. 892; and comments of Vice-Chancellor Kindersley on this case, *Re Cantley*, 17 Jur. 124.

(b) *King's Mortgage*, 5 De Gex & Sm. 644, and cases there reviewed.

(c) *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115.

(d) *Field's Mortgage*, 9 Hare, 414, overruling *Renvoize v. Cooper*, 10 Price, 78; *Knight v. Robinson*, 2 K. & J. 503.

(e) *Doe v. Lightfoot*, 8 M. & W. 553. (f) *Cook v. Crawford*, 13 Sim. 98.



ing his life he had a personal discretion confided to him, which he could not delegate, but the settlor could not have reposed any personal confidence in the trustee's heir, for it could not be known beforehand who such heir would be; and that if the estate were allowed to descend, it might become vested in married women, infants, or bankrupts, or persons out of the jurisdiction; and he could not therefore hold it to be a breach of trust to transmit the estate by will to trustworthy devisees.<sup>(g)</sup> The propriety or impropriety of a devise of trust estates must evidently depend on all the circumstances of the case. If an estate be conveyed to A. and his heirs upon trust, that A. and his *heirs* shall execute the trust, it is considered that, in the absence of special circumstances, the trustee ought not to be break the natural devolution of the trust by passing the legal estate to a devisee, while the trust was confided to \*the heir; and [\*266] in such a case, the assets of the trustee might perhaps be held liable for the costs of restoring the trust to its proper channel.<sup>(h)</sup> But it is conceived that if the heir apparent or presumptive were an infant, bankrupt, insolvent, lunatic, *feme covert*, or out of the jurisdiction, it would be a proper act to transmit the estate to a devisee.

How far a devisee of the trust estate can execute the trust, will, of course, depend on the intention of the settlor. Thus, real or personal estate may be vested in A. upon trust, that A., personally, shall execute the trust; and in this case, the heir or executor of A., though he take the legal estate, cannot act as trustee.<sup>(i)</sup> *A fortiori* in that case the devisee would be a mere depository of the legal estate, without any authority to execute the trust.<sup>(k)</sup> So, if a settlor vest an estate in A. upon trust, that A. and his *heir* shall sell, &c.; a devisee being the *hares factus* only, and not the *hares natus*, cannot exercise the power.<sup>(l)</sup>

But it most frequently happens that an estate is vested in A. upon trust, that A., his heirs and assigns, shall hold upon the trusts: and the question then is, whether a devisee of A. may, as falling under the description of assigns, not only take the estate, but also execute the trust? In a late case, where the settlement contained no power of appointment of new trustees, it was held, that as a conveyance in the lifetime of the trustee to a stranger would have been a breach of trust, the word assign could mean only a devisee taking under a *post mortem* conveyance, when the personal confidence in the trustee necessarily ceased; and the court, on a bill filed by the *cestuis que trust* for the appointment of new trustees, refused the relief prayed on the ground that the devisees had not only the legal estate, but were properly trustees within the scope of the settlor's intention.<sup>(m)</sup>

(g) Titley v. Wolstenholme, 7 Beav. 435; and see Macdonald v. Walker, 14 Beav. 556; Wilson v. Bennett, 5 De Gex & Sm. 479.

(h) See Cook v. Crawford, 13 Sim. 98.

(i) See Mortimer v. Ireland, 11 Jur. 721.

(k) Mortimer v. Ireland, 11 Jur. 721; S. C. before Vice-Chancellor Wigram, 6 Hare, 196.

(l) Cook v. Crawford, 13 Sim. 91; Beasley v. Wilkinson, 13 Jur. 649; in which case a devise by a sole surviving devisee in trust of all estates, which at his decease might be vested in him as trustee, and which he could devise without breach of trust, was held by the vice-chancellor of England to pass trust estates.

(m) Titley v. Wolstenholme, 7 Beav. 425, referred to without disapprobation by Lord Cottenham in Mortimer v. Ireland, 11 Jur. 721.

[\*267] This case went to the utmost verge, and, indeed, cannot be \*implicitly relied upon; for even where there is no power of appointment, the word "assigns" may be satisfied by holding it to mean a dowress, tenant by the curtesy, or in a case prior to the act excepting trust estates from forfeiture, the lord taking by forfeiture, who are assigns in law. It is, however, at all events clear, that should the settlement contain a power of appointment of new trustees, the word assigns could then receive the construction of persons lawfully appointed under the power, and a devisee would be construed not to be a trustee. Thus, in *Fordyce v. Willis*(*n*) a discretionary trust was limited to trustees, their heirs and assigns; but the court held, that trustees appointed by the court were not assigns within the contemplation of the power.

In the recent case of *Wilson v. Bennett*,(*o*) the two devisees of the surviving trustee contracted to sell, and the title was held by Vice-Chancellor Knight Bruce to be too doubtful to be enforced. It was afterwards discovered that one of the devisees was also the heir of the surviving trustee; but Sir James Parker still held the title to be too doubtful, on the ground that the testator had never contemplated such an event as that the estate should vest in the successor and the power go to another. He added, that it would often be the duty of a trustee to take care that the legal estate did not vest in a lunatic, or a person out of the jurisdiction, or otherwise unfit, and for that purpose to devise it; but in every case the question was, whether the devise was in accordance with the title under which the trustee held. It will be borne in mind, in explanation of this case, that if an estate be limited to A. and his heirs upon trust, and A. devises the estate, there is in fact *no heir*; for the settlor must have meant the heir in respect of the trust estate, and by the devise the descent has been broken and there is no heir.

In another case,(*p*) where leaseholds were assigned to two trustees, *their executors and administrators*, upon trust; and the surviving trustee devised the leaseholds to A. and B. upon the same trusts, and appointed [\*268] A., B., and C. executors: on \*a petition by A. and B. to the court to have a trust fund, the proceeds of the leaseholds, paid out to them, Vice-Chancellor Kindersley refused, observing, that the surviving trustee had no authority to bequeath the execution of the trust, but could only pass the legal estate. The petition was then amended by joining C. as a co-petitioner, so that the petition was now that of the legatees, and also of the executors; but the vice-chancellor still refused, on the ground that the testator had himself declared, that his executors as such should not be trustees, and, therefore, since by the bequest, he had taken the legal estate from those who ought to have been trustees, there must be an appointment of new trustees.

A vendor, after the contract for sale, but before the completion of it, is a trustee for the purchaser *sub modo* only, and the estate will pass by a general devise in his will, where it would not have been included had the testator been a mere and express trustee. "A constructive and a naked trustee," said Sir T. Plumer, "for many purposes stand in differ-

(*n*) 2 Phil. 497.

(*o*) 5 De G. & Sm. 475.

(*p*) *Re Burt's Estate*, 1 Drew. 319.

ent situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could therefore never have contemplated a disposition of it for his own purposes. A vendor was at one time both the legal and beneficial owner, and may again become so if anything should happen to prevent the execution of the contract. It may turn out the title is not good, or the purchaser may be unable to pay, or he may become bankrupt. The purchaser is not entitled to the possession unless stipulated for, and if he should take possession it would be a waiver of any objections to the title. If the purchase-money has not been paid, a court of equity would restrain him at the instance of the vendor." And upon these grounds his honor held in the case that elicited the above remarks, that an estate which was the subject of a contract was included in a general devise to trustee though upon trust to sell.(q)

As the dry legal estate in the hands of the trustee is affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested \*in him beneficially, so it confers upon him all the *legal* privileges, and subjects him to all the *legal* burdens, that are incident to the usufructuary possession.(r) [\*269]

Thus the trustee can bring any action respecting the trust estate in a court of law, the *cestui que trust*, though the absolute owner in equity, being at law regarded, as a general rule, in the light of a stranger.(s) So the trustee of a manor is the person to appoint the steward of it,(t) and the trustee of an advowson to present to the church,(u) but in either case he has the mere legal right, and is bound in equity to observe the directions of his *cestui que trust*.(v)

So where a debtor to the trust estate becomes bankrupt, the trustee is the person to prove for the debt, and that without the concurrence of the *cestui que trust*,(w) unless it be such a simple trust as where A. is trustee for B. absolutely, and then it rests in the discretion of the commissioners to require the concurrence of the *cestui que trust*; for who knows but that B. may have already received the money?(x)

And originally the trustee as the legal proprietor had the right of voting for coroners;(y)(1) but by the 58 G. 3, c. 95, sect. 2, it was

(q) Wall v. Bright, 1 J. & W. 494.

(r) Burgess v. Wheate, 1 Ed. 251, per Lord Northington.

(s) See Allen v. Imlett, Holt, 641; Gibson v. Winter, 5 B. & Ad. 96; May v. Taylor, 6 M. & Gr. 261.

(t) Mott v. Buxton, 7 Ves. 201; and see Cary, 14.

(u) See in Re Shrewsbury School, 1 M. & Cr. 647; Hill v. Bishop of London, 1 Atk. 618.

(v) Attorney-General v. Parker, 3 Atk. 577, per Lord Hardwicke; Attorney-General v. Forster, 10 Ves. 338, per Lord Eldon; Attorney-General v. Newcombe, 14 Ves. 7, per *eundem*; Kenney v. Langham, Cas. t. Talb. 144, per Lord Talbot; Amburst v. Dawling, 2 Vern. 401; Barrett v. Glubb, W. Black. Rep. 1053, per De Grey, J.

(w) Ex parte Green, 2 Deac. & Chit. 116, per Cur. (x) Ex parte Dubois, 1 Cox, 310; and see Ex parte Battier, Buck, 426; Ex parte Gray, 4 D. & Ch. 778.

(y) Burgess v. Wheate, 1 Ed. 251, as to the right of the *cestui que trust* to vote for coroners, see pp. 592, 593.

(1) And Lord Northington added for "sheriffs," (Burgess v. Wheate, 1 Ed.



enacted, that "no person should be allowed to have any vote for or by reason of any trust estate or mortgage, unless such trustee or mortgagee [\*270] should be in actual possession \*or receipt of the rents and profits of the same estate, but that the mortgagor or *cestui que trust* in possession should vote for the same."

So the trustee was the person entitled at *common law* to vote for members of parliament; (z) but by the 8 H. 6, c. 7, it was enacted that every elector should have "a freehold of the value of forty shillings a year at the least, *above all charges*," and the sheriff was authorised to "examine every elector upon oath how much he might *expend by the year*," and "if he could not *expend forty shillings by the year*," he was disabled from voting. It can scarcely be doubted that from the time of this enactment a trustee, had the sheriff questioned his qualification, could not have satisfied the requisitions of the act; but the sheriff probably did not exercise this right of interrogation, and therefore the trustee, as he was the *freeholder*, though he could not expend the rents, was allowed to continue in the enjoyment of the franchise, particularly as the *cestui que trust*, who *had not the freehold*, was at all events excluded. The 7 & 8 Gul. 3, c. 25, s. 7, enacted, that "no person should vote for or by reason of any trust estate or mortgage, unless such trustee or mortgagee was in actual possession or receipt of the rents and profits of the same, but that the mortgagor or *cestui que trust* in possession should vote for the same. By the effect of this clause, the *cestui que trust*, if in possession, was now for the first time entitled to a vote, and the trustee in that case was expressly excluded from the privilege; if the trustee was in possession or in receipt of the rents and profits, the legislature, without any positive enactment, seems to have regarded the trustee as qualified by the trust estate to be an elector. The 10 Anne, c. 23, s. 2, declared, that "no person should vote who should not have received the rents or profits, or be entitled to have received the same to the full value of forty shillings or more *to his own use* for one year before such election." The statute of H. 6, had *apparently* excluded the trustee, the statute of William had *expressly* disabled him if not in actual possession or in receipt of the rents and profits; and now by this [\*271] last enactment of Anne he was incapacitated from \*giving a vote in any case. By the same statute, any candidate or voter was authorised to administer an oath to the elector at the time of polling, but, among the qualifications particularly enumerated in the oath, that of "receipt of the rents and profits *to his own use* for one year before the election" was by some oversight omitted. This defect was afterwards remedied by the 18 G. 2, c. 18, s. 1, which incorporated into the oath the declaration that the elector had been "*in the actual possession or receipt of the rents and profits to his own use* for two calendar months" before the election. It must be observed that the words "actual posses-

(z) Burgess v. Wheate, 1 Ed. 251, per Lord Northington.

251;) but the election of sheriffs had been transferred from the people to the chancellor, treasurer, and judges, by 9 E. 2, st. 2, before the establishment of trusts.

sion, or receipt of the rents and profits," correspond to the expression in the statute of Anne, "who shall not have *received the rents and profits* to his own use," and therefore the words "to his own use" in the statute of George must be taken to have applied to "actual possession" as well as to "the receipt of the rents and profits." The Reform Act, (a) by the 23rd section, re-enacted the provision of the statute of William 3, before referred to; and by the 26th section declared that, "notwithstanding anything thereinbefore contained, no person should be registered in any year in respect of his estate or interest in any lands or tenements as a freeholder, copyholder, &c., unless he should have been in the actual possession thereof, or in receipt of the rents and profits thereof *for his own use*, for six calendar months previous to the last day of July in such year;" thus, it would seem, leaving the law in respect of trustees precisely on the same footing as it stood before the act was passed. All doubt, however, was removed by the 6th Vict. c. 18, the 74th section of which enacts, that "no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the *cestui que trust* in actual possession or in the receipt of the rents and profits thereof, *though he may receive the same through the hands of the trustee*, shall and may vote for the same notwithstanding such trust."

Again, the trustees are liable to be rated for the property vested in them, (b) unless they are trustees *exclusively* for \*public purposes without any profit to themselves or a particular class. (c) [\*272]

The trustee of a copyhold must pay a fine on his admission, (d) and on his decease a heriot becomes due to the lord. (e) But, where two or more trustees have been admitted *jointly*, on the decease of *one* neither fine nor heriot is due; not a fine for admission, because, joint tenants being seised *per my et per tout*, the estate has vested in the survivors by the original grant, and not a heriot, because, however many in number the trustees may be, they all form but one tenant to the lord, and therefore no heriot is demandable until the death of the longest liver. (f) Where a number of trustees are admitted as the joint owners of the trust estate, the fine is to be assessed upon the following principle: for the first life is to be allowed the fine usually paid on the admission of a single tenant, on the second life one-half the sum taken for the first, and on the third one-half the sum taken for the second, &c.; the result of which will be, that, however great the number of the trustees admitted, the amount of the whole fine will never be double of that paid upon the first life. (g) And on every change of trustees the same fine is demandable: even where some of the surrenderees are the survivors of the old

(a) 2 Gul. 4, c. 45.

(b) Queen v. Sterry, 12 Ad. & Ell. 84.

(c) Regina v. Shee, 4 Q. B. Rep. 2; Mayor of Manchester v. Overseers of Manchester, 17 Q. B. Rep. 859; Queen v. Harrogate Commissioners, 15 Q. B. Rep. 1012.

(d) Earl of Bath v. Abney, 1 Dick. 260; S. C. 1 Bur. 206.

(e) Trinity College v. Browne, 1 Vern. 441; see Car v. Ellison, 3 Atk. 77.

(f) See 2 Watk. Cop. 147.

(g) Wilson v. Hoare, 2 B. & Ad. 350, see 360; 10 Ad. & Ell. 236, and 1 Scriven. Copyh. 393, 394, 3rd edit.

trustees, for they take a new estate.<sup>(h)</sup> Though the manorial burdens fall upon the trustee personally at law, he is of course entitled in equity to reimburse himself the expenditure out of the profits of the estate.<sup>(i)</sup>

If a trustee carry on a trade in the due execution of his trust, he makes himself amenable to the operation of the bankrupt law in the same manner as if he had traded for his own benefit,<sup>(k)</sup> and on his decease his lands were liable under \*Sir Samuel Romilly's Act<sup>(l)</sup> [\*273] to the discharge of simple contract debts.<sup>(m)</sup>

II. Of the legal estate in the trustee with reference to the construction of particular statutes.

1. By the 12 & 13 Vict. c. 106, ss. 141, 142, it is enacted, that "all the personal estate, present and future, of the bankrupt, whersoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all lands, tenements, and hereditaments, except copyhold or customaryhold, to which the bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate," shall vest in the assignees of such bankrupt.

The operation of the bankruptcy acts was thus commented upon by Lord Chief Justice Willes :—"The assignees," he said, "under a commission of bankruptcy, are not to be considered as *general assignees* of all the real and personal estate of which the bankrupt was seised and possessed, as *heirs* and *executors* are of the estate of their ancestors and testators, for nothing vests in the assignees even at law but such real [\*274] and \*personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts."<sup>(n)</sup>

It is clear, therefore, that, in the case of a *bare trust*, the property,

(h) Sheppard v. Woodford, 5 Mees. & Welsb. 608; but see Wilson v. Hoare, 10 Ad. & Ell. 236.

(i) Rivet's case, Moore, 890.

(k) Wightman v. Townroe, 1 M. & S. 412; Ex parte Garland, 10 Ves. 119, per Lord Eldon; Hankey v. Hammond, cited in marginal note to 1 Cooke's Bank. Law, 84, 3d ed.

(l) 47 G. 3, c. 74. Repealed, and re-enacted by 11 G. 4, and 1 Will. 4, c. 47. Now by 3 & 4 W. 4, c. 104, the lands of all persons, traders or otherwise, are liable to their simple contract debts.

(m) Longuet v. Hockley, Feb. 16, 1836, Exch. MS. Moss Levy, a trader in partnership with his brother Lewis Levy, and his cousin Walter Levy, devised and bequeathed all his real and personal estate to Hockley, upon trust to convert the same into money, and to stand possessed of the proceeds upon certain trusts in the will mentioned. Hockley, in breach of his duty, continued the business with the two co-partners in the name of the testator, and died indebted to the trust estate in the sum of 1100*l.*, and without leaving sufficient personal assets. Baron Alderson held clearly, that Hockley was a trader within the meaning of the statute, and that his lands were liable for the money due to the trust.

(n) Scott v. Surman, Willes, 402.



whether real(*o*) or personal(*p*) will not vest by the bankruptcy in the assignees, even *at law*. And the proposition applies not only to the case of *express trustees*, but also of *trustees virtute officii*, as executors, administrators, (*q*) factors, (*r*) &c.

And, where the trust estate or fund has been converted into property of a different character, the new acquisition will equally be protected against the effects of the bankruptcy; for the product or substitute of the original thing must follow the nature of the thing from which it proceeded. (*s*) Thus, if goods consigned to a factor be sold by him and reduced into money, so long as the money can be identified, as, where it has been kept in bags, the employer, and not the creditors, will have the benefit of that specific sum. (*t*) When money is said to have no ear-mark, the meaning is no more than this, that, being the currency of the country, it cannot be followed when once it has passed in circulation. (*u*)

So, if the factor sell the goods and take *notes* in payment, the value of the notes, notwithstanding the bankruptcy, may be recovered by action from the assignees; (*v*) for, though \*negotiable securities [*\*275*] are said, like money, to have no ear-mark, the expression does not intend that such securities in the hands of a bankrupt have run into the general mass of his property, and pass to his assignees, but only that negotiable securities, as a circulating medium in lieu of money, cannot be recovered from a person to whom they have been legally negotiated; and it is clear that notes, should they fall into possession otherwise than in a due course of circulation, do not become the property of the person into whose hands they come, but may be followed by the original possessor. (*w*)

So, if a factor sell the goods of his employer for money payable at a future day, and become bankrupt, and the assignees receive the money, they will be answerable for it to the merchant by whom the factor was employed. (*x*)

In another case the conversion had been in *breach of the factor's*

(*o*) Ex parte Gennys, 1 Mont. & Mac. 258; Houghton v. Kœnig, 18 Com. B. Re. 235.

(*p*) See Winch v. Keeley, 1 T. R. 619; Carpenter v. Marnell, 3 B. & P. 40; Gladstone v. Hawden, 1 M. & S. 517.

(*q*) Howard v. Jemmet, 3 Bur. 1369, per Lord Mansfield; Ex parte Butler, 1 Atk. 213, per Lord Hardwicke; Viner v. Cadell, 3 Espin. 88; Farr v. Newman, 4 T. R. 629, per Grose, J.; see Ex parte Ellis, 1 Atk. 101.

(*r*) Godfrey v. Furzo, 3 P. W. 186, per Lord King; Tooke v. Hollingworth, 5 T. R. 226, per Lord Kenyon; L'Apostre v. Le Plaistrier, cited Copeman v. Gallant, 1 P. W. 318; Delauney v. Barker, 2 Stark. 539; Boddy v. Esdaile, 1 Car. & P. 62; see Ex parte Dumas, 2 Ves. 582; S. C. 1 Atk. 232; Paul v. Birch, 2 Atk. 623; Ryall v. Rolle, 1 Atk. 172; Ex parte Chion, note (A) to Godfrey v. Furzo, 3 P. W. 187.

(*s*) See Taylor v. Plumer, 3 M. & S. 575; Scott v. Surman, Willes, 404.

(*t*) Tooke v. Hollingworth, 5 T. R. 227, per Lord Kenyon; see Taylor v. Plumer, 3 M. & S. 571.

(*u*) Miller v. Race, 1 Bur. 457, per Lord Mansfield; see Taylor v. Plumer, 3 M. & S. 571.

(*v*) Anon. case, cited Ex parte Dumas, 2 Ves. 586.

(*w*) Hartop v. Hoare, 3 Atk. 50, per Lee, C. J.; Miller v. Race, 1 Burr. 457.

(*x*) Ryall v. Rolle, 1 Atk. 172, per Burnet, J.; Taylor v. Plumer, 3 M. & S. 577; Zinck v. Walker, 2 W. Bl. 1154; Garrat v. Cullum, Bull. N. P. 42.

*duty*;(y) and it was argued, that, as the principal would not have been bound to accept the property which the agent had wrongfully purchased, the court ought to give a *lien* to the principal upon the tortious acquisition; but the court said, it was impossible that an abuse of trust could confer any right on the person abusing it, or those claiming in privity with him.(z)

Where the legal property does not pass, any action against the assignees must be brought by the bankrupt himself, for he is the person possessed of the legal right;(zz) but, in the case of a *factor*, an action may also be brought by the principal, for the absolute property remains with the employer, and a special property only vests in the agent.(a) But, if *bills* be remitted to a factor, and made payable to him or his order, it has been doubted whether the property does not so vest in the [\*276] *factor* that no action of *trover* can be maintained by the principal.(b)

If the property possessed by the bankrupt in his character of trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has then no other remedy but to come in as a general creditor, and prove for the amount of the loss.(c) But, in one case, though the trust money had got *into* the general fund, it was held, but under very particular circumstances, that it had subsequently *got out again*.(d)

As a general rule, where the bankrupt has a substantial beneficial interest, however small, in property legally vested in him, such property passes to the assignees, who take as trustees for the creditors and other parties interested.(e) It is conceived, however, that the rule would not apply to a case where a bankrupt is clearly and expressly a trustee, though he may himself have some partial beneficial interest, for his act ought not to work a prejudice to others. And there can be little doubt that the court would, in a case of express trust, appoint new trustees, either under the 130th section of the Bankrupt Consolidation Act(f) or its general jurisdiction. Where the trust is constructive and the equity doubtful the court has sometimes directed the assignees to concur in conveying.(g) And where the *legal* property passes, the *cestuis que trust* may have the same relief in equity against the assignees, as they would have been entitled to against the bankrupt himself.(h)

(y) *Taylor v. Plumer*, 3 M. & S. 562; see *Ryall v. Rolle*, 1 Atk. 172.

(z) *Taylor v. Plumer*, 3 M. & S. 574, per Lord Ellenborough.

(zz) *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40.

(a) *L'Apostre v. Le Plaistrier*, cited *Copeman v. Gallant*, 1 P. W. 318; *Delaney v. Barker*, 2 Stark. 539; *Boddy v. Esdaile*, 1 Car. 62.

(b) *Ex parte Dumas*, 2 Ves. 583.

(c) *Ex parte Dumas*, 1 Atk. 234, per Lord Hardwicke; *Ryall v. Rolle*, 1 Atk. 172, per Burnet, J.; *Scott v. Surman*, Willes, 403, 404, per Willes, C. J.

(d) *Ex parte Sayers*, 5 Ves. 169.

(e) *Carpenter v. Marnell*, 3 Bos. & Pull. 40; *Parnham v. Hurst*, 8 M. & W. 743; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *D'Arnay v. Chesneau*, 13 M. & W. 809.

(f) *Ex parte Cousen*, 1 De Gex, 451; in which particular case, however, the wording of the section created a difficulty.

(g) *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Ex parte Gennys*, Mont. & Mac. 258.

(h) *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Mitford v.*

\*By the 12 & 13 V. c 106, s. 125, it is enacted, that "if any bankrupt, at the time he becomes bankrupt, shall by the [\*277] consent and permission of the true owner thereof have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy."

It has been decided that this enactment does not apply where the possession of the goods by the bankrupt can be satisfactorily accounted for by the circumstances of the title, as, if a trustee be in possession of effects upon trust for payment of debts, and become bankrupt,<sup>(i)</sup> or if goods be vested in A. upon trust to permit B. to have the enjoyment during his life, and B. becomes bankrupt while in possession under his equitable title;<sup>(k)</sup> but if a residue be given to trustees upon trust to sell with all convenient speed, and to invest the proceeds in the purchase of an annuity for the lives of A. (one of the trustees) and her children, the amount to be paid to A. for the benefit of the children: if, instead of selling, the trustees permit A. to retain possession for a length of time, the goods are forfeited, such possession being contrary to the title.<sup>(l)</sup>

The enactment does not extend to a lawful and necessary possession *en auter droit*, as that by executors and administrators;<sup>(m)</sup> but there will be no exemption from the forfeiture if the executor can be proved to have dismissed the character of personal representative, and to have assumed that of absolute owner.<sup>(n)</sup>

\*Whether the permission of a bare trustee can be said to be that of the "true owner," to the prejudice of innocent *cestuis* [\*278] *que trust*, is a question of some difficulty, but which upon principle should, it is conceived, be answered in the negative.<sup>(o)</sup> It has been decided that a *cestui que trust* absolutely entitled is a true owner within the meaning of the clause.<sup>(p)</sup>

Upon the same principle must be excepted from the operation of the clause the possession of goods by factors in the ordinary course of trade.<sup>(q)</sup>

Mitford, 9 Ves. 100, per Sir W. Grant; Ex parte Dumas, 2 Ves. 585, per Lord Hardwicke; Hinton v. Hinton, 2 Ves. 633, per *eundem*; Grant v. Mills, 2 V. & B. 309, per Sir W. Grant; Tyrrell v. Hope, 2 Atk. 558; Bowles v. Rogers, 6 Ves. 95, note (a); Ex parte Hanson, 12 Ves. 349, per Lord Eldon; Ex parte Coysegame, 1 Atk. 192; see Mestaer v. Gillespie, 11 Ves. 624; Ex parte Herbert, 13 Ves. 188; Waring v. Coventry, 2 M. & K. 406. (i) Copeman v. Gallant, 1 P. W. 314.

(k) Ex parte Martin, 19 Ves. 491; S. C. 2 Rose, 331; see Ex parte Horwood, 1 Mont. & Mac. 169; Mont. 24; Jarman v. Wooloton, 3 T. R. 618; Ex parte Massey, 2 Mont. & Ayr. 173; Ex parte Elliston, 2 Mont. & Ayr. 365; Ex parte Greaves, 2 Jur. N. S. 651; Re Bankhead's Trust, 2 Kay & Johns. 560.

(l) Ex parte Moore, 2 Mont. D. & De G. 616; and see Fox v. Fisher, 3 B. & A. 135; Ex parte Thomas, 3 Mont. D. & De G. 40.

(m) Ex parte Marsh, 1 Atk. 158; Joy v. Campbell, 1 Sch. & Lef. 328.

(n) Fox v. Fisher, 3 B. & A. 135; Ex parte Moore, 2 Mont. Deac. & De G. 616; Ex parte Thomas, 3 Mont. Deac. & De G. 40; see Quick v. Staines, 1 B. & P. 293; Whale v. Booth, cited Farr v. Newman, 4 T. R. 625, note (a).

(o) Compare Ex parte Dale, Buck, 365; Ex parte Richardson, Buck, 480; Ex parte Horwood, 1 Mont. & Mac. 169, Mont. 24; Viner v. Cadell, 3 Esp. 88.

(p) Ex parte Burbridge, 1 Deac. 131, 4 Deac. & Ch. 87.

(q) Mace v. Cadell, Cowp. 232; Ex parte Pease, 19 Ves. 46, per Lord Eldon;



2. By the Insolvent Act the real and personal estates of insolvents are made to vest in the assignees, and where goods or chattels are in the possession of an insolvent at the time of his arrest or other commencement of his imprisonment by the consent of the true owner, they are made to pass to the assignee as if they were the insolvent's own property.<sup>(r)</sup>

Upon this enactment of the Insolvent Act we have only to remark, that, as it substantially follows the provisions of the Bankruptcy Act, it must in the analogous cases be governed by the same construction.

3. Judgments, at least so far as they affect *lands* (for execution against goods and chattels is by common law,) derive their effect from certain statutory enactments.<sup>(s)</sup>

Had trusts been established at the time these statutes were passed, the construction would probably have been the same as in the case of the bankruptcy and insolvency acts, that is, judgments would have been held to bind those lands only of which the conusee was seised beneficially, but trusts at the period of which we are speaking had not made their appearance, and therefore judgments have been held to bind all lands [\*279] \*of the conusee, whether vested in him beneficially, or in the character of trustee. But of course the *cestui que trust* will be protected from the legal process by application to a court of equity.<sup>(t)</sup>

### SECTION III.

#### WHAT PERSONS TAKING THE LEGAL ESTATE WILL BE BOUND BY THE TRUST.

THE universal rule, as trusts are now regulated, is, that all persons who take through or under the trustee shall be liable to the execution of the trust.

On the death of the trustee, the *heir*, *executor*, or *administrator*, becomes the *legal* owner of the property; but as he merely represents the ancestor, testator, or intestate, he takes it in the same character, and is therefore bound by the same equity.

So, if a trustee devise the estate, the *devisee* takes the estate subject to the trust.<sup>(u)</sup>

So all *assigns* of the trustee by acts *inter vivos* (except *purchasers for valuable consideration without notice*,) will be bound by the trust.<sup>(v)</sup>

During the system of uses, and even for a short time subsequently to

L'Apostre v. Le Plaistrier, cited Copeman v. Gallant, 1 P. W. 318; Whitfield v. Brand, 16 M. & W. 282.

(r) 1 & 2 Vict. c. 110, ss. 37, 57; and see 5 & 6 Vict. c. 116, s. 1; 7 & 8 Vict. c. 96, ss. 4, 17.

(s) 11 E. 1; 13 E. 1, st. 1, c. 18; 13 E. 1, st. 3; 27 E. 3, st. 2, c. 9; see Co. Lit. 289, b.

(t) Finch v. Earl of Winchelsea, 1 P. W. 277; Burgh v. Francis, 1 Eq. Ca. Ab. 320; Medley v. Martin, Finch, 63; Prior v. Penpraze, 4 Price, 99; Langton v. Horton, 1 Hare, 560, per Sir. J. Wigram.

(u) Marlow v. Smith, 2 P. W. 201, per Sir J. Jekyll; Lord Grenville v. Blyth, 16 Ves. 231, per Sir W. Grant.

(v) See *infra*.

the statute of H. 8, assigns of the trustee in the *per* only, that is, by the immediate act of the trustee, as by assignment, were made liable to the trust; but now assigns in the *post*, or by operation of law, are also invested with the character of trustees; as if a trustee marry, the wife is at *law* entitled to her dower, and if a female trustee marry, the husband is at *law* entitled to his curtesy, but in *equity* both the *dowress*(*w*) and *tenant by the curtesy*(*x*) are compellable to recognise the right of the *cestui que trust*. So a *creditor* of the \*trustee extending the trust estate under an *elegit*,(*y*) or taking a trust chattel by writ of execution,(*z*) and, by the same rule, the *assignees* of a bankrupt or insolvent(*a*) are made subject to the equity. [\*280]

And if the trustee commit a *forfeiture*, the lord, as he succeeds to the identical estate of the forfeitor, must take the property with all the engagements and incumbrances attached to it, and is therefore liable to the trust.(*b*) In the case of a forfeiture to the *king*, it was formerly held there was no equity against the crown;(c) but in modern times the equity has been fully admitted, though the precise nature of the remedy has never been distinctly ascertained.(*d*)

A lord taking by *escheat* stands on a somewhat different footing, for he is not an *assign* of the trustee either in the *per* \*or *post*; nor does he, as in forfeiture, succeed to the place of the trustee, but [\*281] claims by a title paramount of his own, by virtue of a condition originally annexed to the land, and wholly independent of the creation of the trust.

(*w*) *Pawlett v. Attorney-General*, Hard. 469, per Lord Hale; *Noel v. Jevon*, Freem. 43; *Hinton v. Hinton*, 2 Ves. 634, per Lord Hardwicke.

(*x*) *Bennet v. Davis*, 2 P. W. 319.

(*y*) *Pawlett v. Attorney-General*, Hard. 467, per Lord Hale; *Kennedy v. Daly*, 1 Sch. & Lef. 373, per Lord Redesdale; *Finch v. Earl of Winchelsea*, 1 P. W. 277; *Burgh v. Burgh*, Rep. t. Finch, 28. In the late case of *Whitworth v. Gaugain*, 1 Cr. & Phil. 325, where a person made a deposit of title deeds, and then a judgment was entered up against him, Lord Cottenham expressed a doubt whether the judgment creditor, if he had no notice, would be bound by the prior equity. However, such a doctrine was not tenable, for a judgment creditor is *not* a *purchaser for valuable consideration*. *Brace v. Duchess of Marlborough*, 2 P. W. 491. He advances money, but not on the security of this estate. He may take the person of his debtor, or his goods and chattels, and if he is put in possession of the lands, it is not as purchaser of them, but by course of law. The cause was afterwards heard, and Lord Cottenham's doubts were displaced by a decision the other way, 3 Hare, 416; 1 Phil. 728. In *Watts v. Porter*, Q. B. 1 Jur. N. S. 134, three of the four judges, while approving of *Whitworth v. Gaugain*, refused to apply the principle of it to a case of stock. The remaining judge differed, and held that in personal as in real estate, the specific incumbrancer, though he gives no notice to the trustee, prevails over the judgment creditor, though he has obtained a charging order. It is conceived that the single judge took the clearer view. Those who determined the other way, seem to have assumed that notice was necessary for the transfer of an equitable interest, which is not true, as between assignor and assignee, but only as between two contending assignees. The case has since been disapproved by the highest authorities, *Beavan v. Lord Oxford*, 2 Jur. N. S. 121.

(*z*) *Foley v. Burnell*, 1 B. C. C. 278, per Lord Thurlow.

(*a*) See *supra*, p. 276.

(*b*) *Burgess v. Wheate*, 1 Ed. 203, per Sir T. Clarke; *ib.* 252, per Lord Henley.

(*c*) *Wikes's case*, Lane, 54, agreed.

(*d*) *Burgess v. Wheate*, 1 Ed. 252; and see *Pawlett v. Attorney-General*, Hard. 467, which was a case of forfeiture, though treated by Lord Hale as a case of escheat. And see *supra*, p. 30.

Lord Mansfield was of opinion, in *Burgess v. Wheate*, that a trust ought to be binding on the lord; whether the escheat was to be looked upon as a reversion, which it once was, or as a caducary possession *ab intestato*, which his lordship conceived it to be in his day.<sup>(e)</sup> Considering the escheat as a reversion, his lordship contended that every alienation for creating a trust supposed a concomitant investiture to which the assent of the lord was implied, and therefore it followed that, on failure of heirs of the alienee in trust, the lord could not claim to his own use against the terms of the grant. But to this it may be answered—first, that, since the Statute of *Quia Emptores*, it is doubtful, whether any such assent of the lord can be supposed; for, should it be optional with the lord to accept the alienee as his tenant or not, it would abridge the subject of that free power of alienation which the statute was intended to confer upon him. On the execution of the conveyance the alienee holds of the lord above, not by the lord's consent, but by the operation of law. But even admitting the lord to have assented by implication to the transfer of the land, it scarcely seems to follow that he is bound by the terms of the trust; for if A. convey to B. and his heirs in trust for C. and his heirs, the assent of the lord to the alienation appears to amount only to this—that B. and his heirs shall be tenants of the estate, and shall, as such tenants, hold in trust for C. and his heirs, not that the lord himself will execute the trust, should his own title commence by the determination of B.'s estate. But even supposing the lord to have *expressly* agreed to execute the trust in the event of an escheat, still, as on failure of heirs of the trustee the *legal estate* of the property becomes vested in the lord, could equity, consistently with established principles, enforce a conveyance against him on a mere voluntary contract? The verbal agreement [\*282] of the lord could in no wise be construed a declaration of trust, for, \*by the Statute of Frauds, every such declaration must be in writing and signed. Considering the escheat in the light of a caducary possession *ab intestato*, his lordship's argument was, that, as the lord can only take the estate *ab intestato absolutely*, he cannot assert a claim so far as the tenant has aliened, and inasmuch as the trustee by a declaration of trust makes a valid disposition of the estate in equity, it follows that a court of equity cannot suffer the land to vest in the lord, as if no disposition had been made. But to this it may be answered, that a disposition *by way of trust* is of a totally different character from a disposition of the *legal estate*. The latter is binding upon all, whether in the *per* or *post*, whether with notice or without, whether the grantee be a purchaser or volunteer; but the existence of a trust depends on the equity against the legal tenant personally; as, if the estate be purchased for a valuable consideration without notice, the trust is determined, and the *cestui que trust* is without remedy. It follows that, as the lord claims by a title of his own paramount to the creation of the trust, the court cannot take from him a lawful possession upon the ground of a trust declared by a stranger, and that subsequent to the commencement of the lord's right. A trust is binding only *as between the cestui que trust and*

(e) *Burgess v. Wheate*. 1 Ed. 229.



*the trustee, and all claiming by and under them*, and does not affect the interest of a *third person*.<sup>(f)</sup> If an estate were settled on A. and his heirs, with a springing use on a certain event to B. and his heirs, a declaration of trust in fee by A. could not possibly, on the determination of A.'s estate, bind the interest of B.; yet such a limitation over is hardly to be distinguished from the case of the lord's title by escheat. The only authorities adduced by his lordship in support of his position were the opinions said to have been expressed by Lord Chief Justice Bridgman and Sir John Trevor;<sup>(g)</sup> but the words attributed to the former appear, from his own note-book, never to have been spoken;<sup>(h)</sup> and the observation of Sir John Trevor was at the utmost a mere *obiter dictum*. Sir Thomas \*Clarke, who assisted with Lord Mansfield in the case of *Burgess v. Wheate*, declared that *cestui que trust* was no more relievable against the lord by escheat, than against a sale by the trustee to a purchaser without notice;<sup>(i)</sup> and Lord Northington's inclination was apparently the same way, though, as the point was not necessarily involved in the question before him, he refused to conclude himself by any express and direct opinion.<sup>(k)</sup> Trusts also are shaped after the pattern of uses, and it is clear that the lord was not bound by a use.

On the other hand it may be said that, whatever may be right on dry technical reasoning, there is an old authority for holding that the lord taking by escheat is liable to the trust,<sup>(l)</sup> and that in modern times the courts have acted on more liberal principles, and have decided that, where the fee out of which a mortgage term had been carved escheated to the lord, he was allowed to redeem,<sup>(m)</sup> and if the lord take a benefit through the tenant why shall he not sustain an onus? Indeed an opinion to that effect has recently fallen from the bench in Ireland,<sup>(n)</sup> and should the point, notwithstanding the 13 & 14 Vict. c. 60, to be noticed presently, ever call for a decision, it is not unlikely that the court may adopt that view.

In *copyholds* there is, properly speaking, no such thing as escheat. The freehold and inheritance are vested in the lord of the manor, and the tenant has no claim but as the lord signifies his pleasure by the entry on the court roll. If the tenant be a trustee, and no trust appears on the roll, there can be no pretence for charging the lord with an equity to which he never assented;<sup>(o)</sup> but if a surrender be made upon a trust either *expressed* or *referred to* on the roll, the lord is estopped by this evidence of his will, and cannot afterwards claim in contradiction to his grant.<sup>(p)</sup>

(f) *Burgess v. Wheate*, 1 Ed. 251, per Lord Northington. See Introduction. pp. 12, 13.

(g) *Burgess v. Wheate*, 1 Ed. 230.

(h) See *ib.* 230, note (a); and see Sir T. Clarke's observations, *ib.* 202.

(i) *Burgess v. Wheate*, 1 Ed. 203.

(k) *Burgess v. Wheate*, 1 Ed. 246.

(l) *Eales v. England*, 1 Eq. Ca. Ab. 384.

(m) *Viscount Downe v. Morris*, 3 Hare, 394.

(n) *White v. Baylor*, 10 Ir. Eq. Rep. 54.

(o) *Attorney-General v. Duke of Leeds*, 2 M. & K. 343; and see *Peachey v. Duke of Somerset*, 1 Str. 454; *Burgess v. Wheate*, 1 Ed. 231.

(p) *Burgess v. Wheate*, 1 Ed. 231, per Lord Mansfield; *Weaver v. Maule*, 2 R. & M. 97.

[\*284] Customary freeholds have often been treated on the same footing with copyholds,<sup>(g)</sup> but perhaps upon principle a clear distinction may be taken. In customary freeholds the *tenure* is copyhold, but in respect of *interest* the freehold and inheritance are in the tenant, and, on failure of his heirs, the lord takes in the strict sense of the word by escheat. The lands are passed by the bargain and sale, and the subsequent surrender and admittance operate merely as notice to the lord of the transfer, and acceptance by him of the grantee as tenant.<sup>(r)</sup> If a surrender therefore be made to A. and his heirs upon trust for B. and his heirs, and the trust be entered on the roll, the effect would be the same as on the alienation of a freehold; the lord merely assents that A. shall be his tenant, and shall, as tenant, hold the land upon certain trusts, not that the lord himself will be a trustee, should his own title commence by escheat. And even should the construction be carried to that extent, the *cestui que trust* would still not be relievable in equity, the agreement being merely a voluntary one, and not in writing and signed as required by the Statute of Frauds.

A distinction was taken by Lord Hale between a *trust* and an *equity of redemption*. "A trust," said his lordship, "is created by the contract of the party, and he may direct it as he pleaseth, and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it, who come in in privity of estate; but a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise,<sup>(s)</sup> because it is an ancient right which the party is entitled to in equity."<sup>(t)</sup> But upon this distinction it must be observed, that even a trust will at the present day bind persons who take derivatively from the trustee, though in the *post*; and notwithstanding an equity of redemption amounts to what Lord Hale calls a *title*,<sup>(u)</sup> there [\*285] \*seems to be no reason why in the case of escheat the lord, who takes by title paramount, should be bound by an equity of redemption more than by a simple trust.<sup>(v)</sup>

In a late case,<sup>(w)</sup> however, the distinction between an equity of redemption and a trust was observed upon, and the court manifested an opinion that a lord who was in by escheat would be bound by an equity of redemption, if not by a trust. And in the same case was decided the point before referred to, that a lord who is in by escheat is entitled to redeem a mortgage term created by the party whose estate has escheated.<sup>(x)</sup>

(g) Weaver v. Maule, 2 R. & M. 100, per Sir John Leach.

(r) Bingham v. Woodgate, 1 R. & M. 32.

(s) *Seem* not a purchaser without notice; see Harding v. Hardrett, Rep. t. Finch, 9; Spurgeon v. Collier, 1 Ed. 55.

(t) Pawlett v. Attorney-General, Hard. 469; and see Bacon v. Bacon, Tothill, 133; Burgess v. Wheate, 1 Ed. 206; Tucker v. Thurstan, 17 Ves. 133.

(u) See Pawlett v. Attorney-General, Hard. 467.

(v) See Burgess v. Wheate, 1 Ed. 255; Attorney-General v. Duke of Leeds, 2 M. & K. 344. Pawlett v. Attorney-General, Hard. 465, in which Lord Hale and Baron Atkins thought the king was bound by an equity of redemption, was not a case of *escheat*, as called by Lord Hale, but of *forfeiture*.

(w) Viscount Downe v. Morris, 3 Hare, 394.

(x) Ibid.

According to the actual state of the decisions, the 3 & 4 W. 4, c. 104, (which subjects a person's real estate to the payment of his simple contract debts,) annexes the quality of assets to the estate itself, and, subject to the right of alienation in the heir or devisee,<sup>(y)</sup> creates a charge on the estate for the benefit of the creditors.<sup>(z)</sup> It has been held, therefore, that a debtor's estate is assets even in the hands of the lord taking by escheat.<sup>(a)</sup>

The law relating to the forfeiture and escheat of trust estates, except so far as it illustrates general principles, became, upon the passing of the 4 & 5 Will. 4, c. 23, of little importance. By sect. 2 of that act, it was enacted, that where any person seised of any lands upon any *trust*, or by way of *mortgage*, *died without an heir*, it should be lawful for the Court of Chancery (on application as directed by the act) to appoint a person to convey. And by the following section it was declared, that "no land, chattels, or stock, vested in any person upon any *trust* or by way of *mortgage*, or any profits \*thereof, should escheat or be [286] forfeited to his majesty, his heirs or successors, or to any corporation, lord of a manor, or other person, by reason of the *attainder* or *conviction* for any offence of such *trustee* or *mortgagee*, but should remain in such trustee or mortgagee, or survive to his co-trustee, or descend to or vest in his representative, as if no such attainder or conviction had taken place." And by the last section it was provided, that "where before the passing of the act any person possessed of land, chattels, or stock, as trustee thereof, should have died without an heir, or should have been convicted of any offence, whereby the said land, chattels, or stock, had escheated or been forfeited, the said land, chattels, or stock should be subject to the order of the Court of Chancery for the use of the party beneficially interested therein, the proviso not to affect any grant made subsequently to the escheat or forfeiture, and not to operate where more than twenty years have occurred since the escheat or forfeiture."

This act was repealed by 13 & 14 Vict. c. 60, whereby it was enacted by the 15th sect. that "when any person seised of any lands upon any trust, should have died intestate as to such lands without an heir, or it should not be known who was his heir or devisee, it should be lawful for the Court of Chancery to make an order vesting such lands in such person or persons, in such manner and for such estate as the court should direct;" and by the 19th sect. it was enacted that, "when a mortgagee should have died without having entered into possession, and the mortgage money should have been paid to a person entitled to receive the same, or such person should consent to the order, it should be lawful for the Court of Chancery to make an order vesting such lands in such person or persons, in such manner and for such estate as the court

(y) *Spackman v. Timbrell*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Pimm v. Insall*, 7 Hare, 193, 1 Mac. & Gor. 449.

(z) *Evans v. Brown*, 5 Beav. 116. N. B. This case was appealed and compromised. *Hamer's Devisees*, 2 De Gex, M. & G. 306; *Beale v. Symonds*, 16 Beav. 406; *Kinderley v. Jervis*, 2 Jur. N. S. 602.

(a) *Evans v. Brown*, 5 Beav. 116; and see *Viscount Downe v. Morris*, 3 Hare, 394.



should direct, in any case where the mortgagee had died intestate as to such lands, and without an heir, or should have died and it should not be known who was his heir or devisee;" and by the 46th sect. it was enacted that, "no lands, or stock, chose in action, or any profits thereof, should escheat or be forfeited to the crown, or to any corporation, lord of the manor, or \*any other person by reason of the attainder or conviction for any offence of such trustee or mortgagee." Thus of trust property in future there will be no forfeiture by the *attainder* or *conviction of the trustee*, and no *escheat by his attainder*; and in case of *escheat for failure of heirs* the court will have authority, upon summary application, to transfer the legal estate.

If a trustee be *outlawed*, and the outlawry be for *treason* or *felony*, it amounts to conviction,<sup>(b)</sup> and escheat and forfeiture of lands, and chattels, though held upon trust, would, until the above acts, have ensued, but is now expressly saved by it. If the outlawry be on an indictment for a *misdemeanor* or in a *personal action*, it is not a conviction, but merely a contempt of court,<sup>(c)</sup> and punishable with forfeiture of the profits of the outlaw's lands, and of his chattels, real and personal, absolutely. In this case, therefore, the statute not applying, the forfeiture remains the same as at common law.

If the trustee become *bankrupt*, and do not surrender himself, &c., he is guilty of felony,<sup>(d)</sup> and the consequence is, that his lands and goods escheat and are forfeited as in felony generally. But he must first be convicted of the offence by a proper court, either in fact by verdict or in law by outlawry, and then the above statute saves the forfeiture as regards trust estates.

A *disseisor* is not an assign of the trustee either in the *per* or the *post*, but holds by a wrongful title of his own, and adversely to the trust. The first resolution in Sir Moyle Finch's case, was, that "a disseisor was subject to no trust, nor any *subpoena* was maintainable against him, not only because he was in the *post*, but because the right of inheritance or freehold was determinable at the common law, and not in chancery, neither had the *cestui que use* (while he had his being) any remedy in that case."<sup>(e)</sup> And we may add the authority of Lord St. Leonards, who, in his edition of Gilbert on Uses, observes, "At this day every one [<sup>\*288</sup>] is bound by a trust who obtains the \*estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui que trust* with him, although I had notice of the trust;"<sup>(f)</sup>(1) and the

(b) Co. Lit. 390 b.; Holloway's case, 3 Mod. 42; King v. Ayloff, ib. 72.

(c) Rex v. Tippin, Salk. 494.

(d) 12 & 13 V. c. 106, s. 251.

(e) Sir Moyle Finch's case, 4 Inst. 85.

(f) Gilb. on Uses, Sugd. ed. 429.

(1) And an outstanding term in a trustee will attend the inheritance gained by the disseisin. Reynolds v. Jones, 2 Sim. & Stu. 206; and see Turner v. Buck, 22 Vin. Ab. 21; Doe v. Price, 16 M. & W. 603.

same may be inferred from the terms of the section of the late Limitation Act relating to express trusts.(g)

## \*CHAPTER XII.

[\*289]

### GENERAL PROPERTIES OF THE OFFICE OF TRUSTEE.

FROM the *estate* of the trustee we pass to the consideration of his *office*, and upon this subject we may, in the first place, investigate the *general* properties annexed to the office, as, First. A trustee having once accepted cannot afterwards renounce it. Secondly. He cannot delegate it. Thirdly. In the case of co-trustees the office must be exercised by all the trustees jointly. Fourthly. On the death of one trustee the trust will pass to the survivors or survivor. Fifthly. One trustee shall not be liable for the acts of his co-trustee. Sixthly. A trustee shall derive no personal benefit from the trusteeship.

I. It is a rule, without any exception, that a person who has once undertaken the office, either by actual or constructive acceptance, cannot discharge himself from liability by a subsequent *renunciation*. The only mode by which he can obtain a release is either under the sanction of a court of equity, *or* by virtue of a special power in the instrument creating the trust, *or* with the consent of all the parties interested in the estate.(a)

Thus, where A. was named executor, and acted in behalf of some particular legatees, but disclaimed the intention of interfering generally, and then renounced, and B. obtained letters of administration *cum testamento annexo*, and possessed himself of assets, and died insolvent, it was held that A. having acted, could not afterwards discharge himself, and was responsible for the *devastavit* committed by B.(b)

\*So, in another case, where A., having possessed himself of assets, renounced the administration, and the same day B. proved [\*290] the will, and A. handed over part of the assets to him, and afterwards A., having received other assets by authority from B., handed them over in like manner, Sir Thomas Clarke delivered his opinion, that, as A. had administered, though without having proved the will, the attempt at renunciation was void, and he ought to be charged with all the subsequent receipts.(c)

Though a trustee may have given a bond for the due execution of the trust, and the *cestui que trust* may have recovered upon the bond, and been paid the money, yet if the *cestui que trust* afterwards bring his bill to compel a conveyance, the trustee cannot divest himself of his fiduciary character by pleading that the penalty of the bond was a stated damage

(g) 3 & 4 W. 4, c. 27, s. 25, compare subsequent observations at p. 722.

(a) See Doyle v. Blake, 2 Sch. & Lef. 245; Chalmer v. Bradley, 1 J. & W. 68.

(b) Doyle v. Blake, 2 Sch. & Lef. 231; see Lowry v. Fulton, 9 Sim. 123.

(c) Read v. Truelove, Amb. 417.

for the breach of trust, and that on payment of the penalty the trustee was to be released. A conveyance, however, will not be decreed without an allowance to the trustee of the penalty recovered upon the bond, with interest at the usual rate.(d)

II. The office of trustee, being one of personal confidence, cannot be *delegated*. "Trustees," said Lord Langdale, "who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons; and if they do so they remain subject to responsibility towards their *cestuis que trust* for whom they have undertaken the duty."(e) If a trustee, therefore, confide the application of the trust fund to the care of another, whether a stranger,(f) or his own [ \*291 ] attorney,(g) or even co-trustee or co-executor,(h) \*he will be personally responsible for any loss that may result.

The case of *Balchen v. Scott*,(i) though the ultimate result arrived at is opposed to later decisions, *the executor having in fact proved*, is no exception to this rule; for there an executor had received a bill of exchange by the post from a debtor to the estate, and transmitted it to his co-executor, and it was held, that by this proceeding the executor had *not acted* in the trust,(k) and therefore was no more answerable for the application of the money by the co-executor, than any stranger would have been under similar circumstances.

In *Churchill v. Hobson*,(l) an executor had paid 500*l.* into the hands of his co-executor, who misapplied it, and it was ruled by the court that he was not bound to make it good; but the decision is universally considered as having turned upon the circumstance that the co-executor was a *banker*, and had been trusted by the testator in his lifetime, besides being made his executor at his death.(m) Lord Harcourt, in his judgment, observed, "The co-executor having been the cashier with whom the testator in his lifetime chose to intrust his money, the executor ought not to suffer for having trusted him whom the testator himself in his life trusted."

But trustees cannot be answerable, if they merely follow the testator's directions. Thus a testator recommended his executors to employ A. (who had been in the employment of the testator himself,) as their clerk

(d) *Moorecroft v. Dowding*, 2 P. W. 314.

(e) *Turner v. Corney*, 5 Beav. 517.

(f) *Adams v. Clifton*, 1 Russ. 297; *Hardwick v. Mynd*, 1 Anst. 109; case cited by Sir J. Jekyll, *Walker v. Symonds*, 3 Sw. 79, note (a); *Char. Corp. v. Sutton*, 2 Atk. 405; *Kilbee v. Sneyd*, 2 Moll. 199, per Sir A. Hart; *Douglas v. Browne*, Mont. 93; *Ex parte Booth*, id. 248; *Turner v. Corney*, 5 Beav. 515.

(g) *Chambers v. Minchin*, 7 Ves. 196, per Lord Eldon; *Ex parte Townsend*, 1 Moll. 139; *Ghost v. Waller*, 9 Beav. 497.

(h) *Langford v. Gascoyne*, 11 Ves. 333; *Harrison v. Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, note (y), 6th ed.; *Davis v. Spurling*, 1 R. & M. 66, per Sir J. Leach; *Kilbee v. Sneyd*, 2 Moll. 200, 212, per Sir A. Hart; *Lane v. Wroth*, and *Stanley v. Darington*, cited in Anonymous case, Mos. 36; *Marriott v. Kinnersley*, Taml. 470; *Ex parte Winnall*, 3 D. & C. 22; Anon. Mos. 35; *Clough v. Bond*, 3 M. & Cr. 497, per Lord Cottenham; *Dines v. Scott*, T. & R. 361, per Lord Eldon; *Trutch v. Lamprell*, 20 Beav. 116; *Thompson v. Finch*, 22 Beav. 316.

(i) 2 Ves. jun. 678.

(l) 1 P. W. 241.

(k) See *supra*, p. 240.

(m) See *Harrison v. Graham*, 3 Hill's MSS., cited 1 P. W. 241, note (y), 6th ed.; *Chambers v. Minchin*, 7 Ves. 198.



or agent, which they did, and A. misapplied part of the assets. The *cestuis que trust* contended that executors were answerable for the default of their servant. Sir A. Hart said, "That is the rule. It is hard occasionally, where the executor has acted with good faith; but it is established, \*and it is beneficial in general. The rule, however, is governed by circumstances; and if a testator points out an agent [\*292] to be employed by the executor, I think if such employee received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money. But the excuse of reasonable diligence is still required. The effect of a recommendation is to discharge executors to the extent of selecting, but still the person recommended is the agent of the executors, and they are bound to use diligence in looking after him: the question then becomes one of wilful default, not concluding the executor by the mere fact of loss arising from such employee: nor does the diligence which is required demand that he should institute a suit against the agent; but only that he should have been vigilant, and have called upon him to account: he may be able to show some discreet and reasonable ground for not having sued him."(*o*)

And an executor cannot be answerable for having handed over money which he had no legal right to retain. Thus, a testator appointed A., B., and C. his executors, and empowered A. to sell certain freehold premises, and directed the proceeds of the sale to be applied and disposed of in the same manner as his personal estate. A. employed B. to make the sale, who, having disposed of the property, paid the proceeds to A., by whom the money was misapplied. It was held that B. was not answerable for this, the money having come to his hands, not in the character of executor, but of agent.(*p*)

And trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it. "There are," said Lord Hardwicke in *Ex parte Belchier*, "two sorts of necessity: first, *legal* necessity; and, secondly, *moral* necessity. As to the *first* a distinction prevails. Where two executors join in \*giving a discharge for money, and one of them only receives it, they are both answerable for it; because [\*293] there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as if a trustee appoints to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable: so in the employment of stewards and agents; for none of these cases are on account of necessity, but

(*o*) *Kilbee v. Sneyd*, 2 Moll. 199, 200; and see *Doyle v. Blake*, 2 Sch. & Lef. 239, 245.

(*p*) *Davis v. Spurling*, 1 R. & M. 64; *S. C.* Taml. 199; and see *Crisp v. Spranger*, Nels. 109; *Keane v. Roberts*, 4 Mad. 332, see 356, 359.

because the persons acted in the usual method of business.”(q) And Lord Loughborough in very similar terms observed, “If the business was transacted in the *ordinary* manner, unless there were some circumstance to create suspicion, surely the allowance is fair.”(r) “Necessity,” said Lord Cottenham, “which includes the *regular course of business*, will exonerate.”(s) And Lord Redesdale, in the same spirit observed, “An executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts : he is considered to do this of necessity : he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India and another in England, the assets being in India but to be applied in England : there the co-executor is appointed for the purpose of carrying on such transaction, and the executor is not responsible : for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence.”(t)

[\*294] \*Again, where A. and B. were assignees of a bankrupt, and A. signed the dividend cheques upon the bankers in favor of the creditors, and delivered them to B., who undertook to affix his signature, and deliver them to the creditors, and B. accordingly signed the cheques, and placed them in his desk, whence they were stolen, and presented at the bank, and paid ; on an application to the court to make A. answerable, Sir J. Leach said, “It is true that assignees are trustees who have only a joint and not a separate authority, and if by the act of one assignee, out of the course of his duty, the trust property is placed within the single power of the other, both are liable. But here it was not to be expected that the assignees were to meet upon the application of every creditor, for the purpose of signing and delivering his dividend cheque. Such a course of proceeding would have been highly inconvenient to the creditors themselves. It is not the practice of bankers to receive the dividend cheques from the assignees, and pay to each creditor upon his application ; the trouble is greater than they are willing to undertake. Of necessity, therefore, some single person is to be selected for the distribution of these cheques, and it is obvious that there is greater security if one of the assignees will undertake the office than if it be entrusted to an agent, because there may be cases in which circumstances of convenience would not require that the joint cheques should be signed by that assignee until the application of the creditor, and the time of delivering the cheques. Upon the whole, I am of opinion that the delivery of these cheques by A. to B. as his co-assignee, was an

(q) Ex parte Belchier, Amb. 219.

(r) Bacon v. Bacon, 5 Ves. 335.

(s) Clough v. Bond, 3 M. C. 497.

(t) Joy v. Campbell, 1 Sch. & Lef. 341 ; and see Bacon v. Bacon, 5 Ves. 331, and compare Chambers v. Minchin, 7 Ves. 193, and Langford v. Gascoyne, 11 Ves. 335 ; and see Davis v. Spurling, 1 R. & M. 66 ; Munch v. Cockerell, 5 M. & Cr. 214.

act done in the proper execution of his duty of a trustee, and that he is not responsible for the subsequent loss of these cheques.<sup>(u)</sup>

But where the assignees of a bankrupt employed an attorney to recover debts due to the estate, and the attorney received the money, and absconded, Sir A. Hart distinguished the case from *Ex parte Belchier*, on the ground that there was no necessity for permitting the attorney to receive one shilling of the money recovered further than his costs. "The assignee," \*he observed, "has two modes of relieving himself [\*295] from the responsibility. He may call a meeting of the creditors to approve of an agent, or he may petition the chancellor, and have an agent approved of by the master; otherwise he acts *suo periculo*, and to this extent, that if the attorney whom he employs to recover debts receives the money one day and becomes insolvent the next, the assignee is liable, although there is hardly a shadow of negligence, much less of fraud." And his lordship said the same point had been decided in an unreported case before Lord Eldon.<sup>(v)</sup> Trustees, undoubtedly, must not let the money *lie* in the hands of the attorney, but that they must not suffer it to pass through his hands in the ordinary course of business, in the recovery of a debt by *action*, was beyond any previous decision; it is probable that the case before Lord Eldon contained some particular and distinguishing circumstance.

A trustee or executor is not called upon to take any security from the agent; for to do that upon every occasion would tend greatly to the hindrance of business.<sup>(w)</sup>

Where trust money is to be transmitted to a distance, the trustee may do it most conveniently and securely through the medium of a responsible bank, or he may take bills drawn by a person of undoubted credit, and payable at the place whither the money is to be sent. Thus in *Knight v. The Earl of Plymouth*,<sup>(x)</sup> a receiver, in order to bring money to London, took bills which at the time they were obtained there was no ground to suspect, but which, as it afterwards happened, were protested in London, and the money lost. Lord Hardwicke said, "The method the receiver took was highly prudent; it was well intended, and the only way he could take, unless he had himself carried the money in *specie*, the hazard of which would have been great; and if a loss had then incurred, in my opinion he would have been, if not answerable, highly blameable."

\*But the money must be paid in to the account of the *trust estate*, and the bills must be taken in favour of the trustee *in that* [\*296] *character*, and if he neglect these precautions, then, if the bank break, or the bills be dishonoured, the trustee will be held responsible for the loss to the *cestuis que trust*.<sup>(y)</sup>

The rule applied to executors in a court of law is somewhat different from that established in courts of equity. An executor once become

(u) *Ex parte Griffin*, 2 Gl. & J. 114; and see *Wackerbath v. Powell*, Buck. 495; S. C. 2 Gl. & J. 151; *Kilbee v. Sneyd*, 2 Moll. 186.

(v) *Ex parte Townsend*, 1 Moll. 139; see *Anon. case*, 12 Mod. 560.

(w) *Ex parte Belchier*, Amb. 220, per Lord Hardwicke.

(x) 1 Dick. 120; S. C. 3 Atk. 480; recognized *Ex parte Belchier*, Amb. 219, and *Routh v. Howell*, 3 Ves. 566; and see *Wren v. Kirton*, 11 Ves. 380, 385.

(y) See *Wren v. Kirton*, 11 Ves. 380, 381; *Massey v. Banner*, 1 J. & W. 247.



responsible by actual receipt of any part of the assets, cannot at law found his discharge in respect thereof as against a creditor, either by a plea of reasonable confidence disappointed, or a loss not occasioned by any negligence or default; as if an executor transmit a sum to his co-executor under circumstances that in equity would justify the confidence, a court of law would still hold him responsible for any misapplication by the co-executor, and could not allow him to plead *plene administravit*.(z)

If the trust be of a *discretionary* character, not only is the trustee answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be actually void.(a)

Thus an advowson was vested in twenty-five of the principal inhabitants of a parish upon trust to elect and present a proper preacher, and, some of the trustees having deputed proxies to vote at the election, Lord Hardwicke said, "It is true a trustee who has a legal estate in him may make an attorney to do legal acts; but here is a personal trust, and there is no instance where a trustee is allowed to make a proxy to vote in a personal trust of this kind. The trustees were themselves to judge of the qualifications of the candidates, and could not delegate that judgment to others, but ought to exercise it themselves." And his lordship [\*297] held, that, as the election \*had been conducted in this manner, it could not be supported.(b)

And a discretionary trust can no more be delegated to a *co-executor* or *co-trustee* than to a stranger.(c) Thus, where a sum of money was given to three executors upon trust to distribute in charity at their discretion, and the executors assumed each the independent control of one third, Lord Hardwicke said, "I am of opinion the executors could not divide the charity into three parts, and each executor nominate a third absolutely, because the determination of the property of *every* object was left by the testator to the direction of *all* the executors."(d)

Of course, if a trustee convey the estate, the mere transfer of the estate will not have the effect of investing the grantee with the power.(e) And so if a trustee devise the estate, the devisee cannot administer a discretionary trust unless the original settlement contemplate such an event and annex the powers to the estate in the hands of the devisee.(f)

It must be noticed that the appointment of an *attorney* or *proxy* is not in all cases a *delegation* of the trust. When the trustee has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence if he merely execute the deed by attorney, or signify his will by proxy. Thus, in the case before cited,(g) where the trust was to elect and present a proper clerk to a

(z) *Crosse v. Smith*, 7 East, 246; and see *Jones v. Lewis*, 2 Ves. 241.

(a) See *Alexander v. Alexander*, 2 Ves. 643; *Bradford v. Belfield*, 2 Sim. 264; *Hitch v. Leworthy*, 2 Hare, 200.

(b) *Attorney-General v. Scott*, 1 Ves. 413, see 417; *Wilson v. Dennison*, Amb. 82; S. C. 7 B. P. C. 296.

(c) *Crewe v. Dicken*, 4 Ves. 97. (d) *Attorney-General v. Gleg*, 1 Atk. 356.

(e) *Crewe v. Dicken*, 4 Ves. 97, see 100; *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Bradford v. Belfield*, 2 Sim. 264; *Cole v. Wade*, 16 Ves. 47, per Sir W. Grant.

(f) *Re Burt's Trust*, 1 Drewry, 319; and see ante, pp. 266, 267.

(g) *Attorney-General v. Scott*, 1 Ves. 413; and see *Ex parte Rigby*, 19 Ves. 463.

benefice, Lord Hardwicke had no doubt that, so far as related to the mere act of presentation, the trustees, having themselves fixed upon the object, might have signed the presentation by proxy; a trustee who had a legal estate might make an attorney to do legal acts.

III. Where the administration of the trust is vested in *\*co-trustees*, they all form as it were but one collective trustee, and [\*298] therefore must execute the duties of the office in their *joint* capacity.<sup>(h)</sup> It is not uncommon to hear one of several trustees called the *acting* trustee, but the court knows no such distinction; all who accept the office are acting trustees. If any one refuse to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the court.<sup>(i)</sup>

Thus, a receipt for money must receive the joint authentication of the whole body, and not of the majority merely, or it will not be valid.<sup>(k)</sup> But where the trustees are numerous it is common in orders of the court to direct the payment of moneys to any two or more of them.<sup>(l)</sup>

Again, if a debtor to the trust become bankrupt, *all* the trustees must join in the proof,<sup>(m)</sup> unless under particular circumstances the court make an order for *some* of the trustees to prove, and even then the court has inserted the direction that the dividends should be made *payable* to *all* the trustees.<sup>(n)</sup>

But when there are several trustees, and the trust is of a *public* character, the act of the *majority* is held to be the act of the whole number.<sup>(o)</sup> In *Wilkinson v. Malin*, Lord Lyndhurst observed, "In this case there were seven trustees; those seven met for the purpose of electing a schoolmaster; at that meeting five of the trustees concurred in the appointment, two dissented, but did nothing upon that dissent. We are of opinion that, in a case of this description, where all the trustees were assembled for the purpose of making the election, and the majority of them so assembled concurred in the appointment, the act of the majority in that respect is to be considered the act of the whole body. This is a trust of *\*a public nature*, viz. to apply funds for the [\*299] repair of the church and other objects in which the whole parish are interested; and we are of opinion that where trustees are appointed for the purpose of performing a trust of such a public and general nature, the act of the majority is the act of the whole. It was said at the bar that the principle only applies to cases where the trustees are appointed under some public authority as under an Act of Parliament, or some public body; but we are of opinion that it is not subject to that limitation. The objects of the trust would be defeated if one dissenting trustee could prevent the application of the funds in the manner directed. Considering the nature of the trusts, we are of opinion it was the intention

(h) See *Ex parte Griffin*, 2 Gl. & J. 116.

(i) *Doyley v. Sherratt*, 2 Eq. Ca. Ab. 742, marginal note to (D).

(k) See *infra*.

(l) See *Attorney-General v. Brickdale*, 8 Beav. 223.

(m) *Ex parte Smith*, 1 Deac. 391, per Sir T. Erskine.

(n) *Ex parte Smith*, 1 Deac. 385.

(o) *Wilkinson v. Malin*, 2 Tyr. 544; and see *Attorney-General v. Shearman*, 2 Beav. 104; *Attorney-General v. Cuming*, 2 Y. & C. Ch. Ca. 139; *Younger v. Welham*, 3 Sw. 180.

of the founder, and fairly to be collected from the objects he had in view, that the act of the majority should bind the rest. *(p)*

Where a numerous body are appointed trustees by the court, as in cases of charity, the court sometimes annexes to the order that a part of them shall form a *quorum*.

Where stock is standing in the name of several co-trustees, any one of them may receive the *dividends*, though all must join in the sale of the *corpus*; and where there are co-trustees of lands, any one of them may receive the rents, though all must concur in a conveyance. *(q)*

#### IV. On the death of one trustee the joint office *survives*.

It is a well-known maxim that a *bare authority* committed to several persons is determined by the death of any one; but, if coupled with an interest, it passes to the survivors. *(r)* Thus, the committees of a lunatic's estate are regarded in the light of mere bailiffs without a spark of interest, and if one of them die, the office is immediately extinguished. *(s)* An executorship \*or administratorship survives; *(t)* for "if," says [\*300] Lord Talbot, "a joint estate at law will survive, why shall not a joint administration, when they both have a joint estate in it?" *(u)* So a testamentary guardianship vests in the survivors, for, as guardians may bring actions and avow in their own names, may grant leases during the minority of the ward, and demise copyholds even in reversion as lords *pro tempore*, it is evident they have an interest. *(v)* It follows that as co-trustees have an authority coupled with an interest, their office also must be impressed with the quality of survivorship: *(w)* as if an estate be vested in two trustees upon trust to sell and one of them die, the other may sell; *(x)* and if an advowson be conveyed to trustees upon trust to present a proper clerk, the survivors or survivor may present. *(y)* Otherwise, indeed, the more precaution a person took by increasing the number of the trustees, the greater would be the chance of the abrupt determination of the trust by the death of any one. Even where the trust was to

*(p)* Wilkinson v. Malin, 2 Tyr. 572.

*(q)* See Townley v. Sherborne, Bridg. 35; Williams v. Nixon, 2 Beav. 472; Gouldsworth v. Knight, 11 M. & W. 337.

*(r)* Co. Lit. 113 a, 181 b; Butler v. Bray, Dyer, 189 b; Attorney-General v. Gleg, 1 Atk. 356; S. C. Amb. 584; Goulds. 2, pl. 4; Peyton v. Bury, 2 P. W. 628; Mansell v. Vaughan, Wilm. 49; Eyre v. Countess of Shaftesbury, 2 P. W. 108, 121, 124.

*(s)* Ex parte Lyne, Rep. t. Talb. 143.

*(t)* Adams v. Buckland, 2 Vern. 514; Hudson v. Hudson, Rep. t. Talb. 127.

*(u)* Hudson v. Hudson, Rep. t. Talb. 129.

*(v)* Eyre v. Countess of Shaftesbury, 2 P. W. 102. But if joint guardians be appointed by the court, the office, on the death of one, is at an end; Bradshaw v. Bradshaw, 1 Russ. 528; Hall v. Jones, 2 Sim. 41.

*(w)* Hudson v. Hudson, Rep. t. Talb. 129, per Lord Talbot; Co. Lit. 113 a; Attorney-General v. Glegg, Amb. 585, per Lord Hardwicke; Gwilliams v. Rowell, Hard. 204; Billingsley v. Mathew, Toth. 168.

*(x)* See Co. Lit. 113 a; Warburton v. Sandys, 14 Sim. 622; Watson v. Pearson, 2 Exch. Rep. 594.

*(y)* See Attorney-General v. Bishop of Litchfield, 5 Ves. 825; Attorney-General v. Cuming, 2 Y. & C. Ch. Ca. 139. If two trustees employ a solicitor, the surviving trustee may file a bill against the solicitor for an account, without making the representative of the deceased trustee a party; Slater v. Wheeler, 9 Sim. 156.



raise the sum of 2000*l.* out of the testator's estate "by sale or otherwise, at the discretion of his *trustees*, who should invest the same in the names of the said trustees upon trust," &c., and one of the two trustees died, and the survivor sold; Vice-Chancellor Wood decided that the survivor could make a good title. "I find," he said, "a clear estate in the vendor, and a clear duty to perform. He has executed his duty, and I am asked to say that he has committed a breach of trust. Can I do that? He has a duty imposed upon him to raise the \*money: [\*301] he has the necessary estate given to him for that purpose. Is it to be said that this is a breach of trust because the co-trustee is dead? If I were to lay down such a rule it would come to this, that wherever an estate was vested in two or more trustees to raise a sum by sale or mortgage, you must come to the court on the death of one of the trustees." (z)

The survivorship of the trust will not be defeated because the settlement contains a power for restoring the original number of trustees by new appointments; (a) unless there be something in the instrument that specially manifests such an intention. (b) Even in an act of parliament, which declared in very strong terms that the survivors *should*, (c) and *they were thereby required* to appoint new trustees, the court said the proviso was analogous to the common one in settlements, and expressed an opinion (for the decision was upon another point,) that the clause was not imperative, but merely of a directory character. (d)

The case of Attorney-General v. The Bishop of Litchfield, (e) may be cited as touching upon this subject. A testator had devised to eight persons and their heirs the donation and parsonage of a rectory, and "desired their care to present from time to time a learned, *painful* preacher, honest in life and conversation, whereby souls might be gained to Christ;" and directed that "the three last survivors should make choice of new trustees to be added to them successively to present." The representative of the last surviving trustee conveyed to one Hodgets and his heirs; Eliza, the wife of Foley, was the heiress-at-law of Hodgets, and, the advowson \*having descended upon her, Foley presented [\*302] a clerk. An injunction was applied for to stay the institution, and Lord Eldon said, "Upon what ground am I to interfere to prevent the bishop from instituting upon a presentation under the legal title? It is said with great foundation this trust ought to be filled up; but, if an avoidance happens before the trust is filled up, the trustee executes the duty by presenting a proper person. If there is any objection to the clerk presented by him, as, if he presented for emolument to himself, the court should interfere; but it would be very inconvenient if I were

(z) Lane v. Debenham, 17 Jur. 1005.

(a) See Doe v. Godwin, 1 D. & R. 259; Warburton v. Sandys, 14 Sim. 622; compare Townsend v. Wilson, 1 B. & Ald. 608, with Hall v. Dewes, Jac. 193; and see Attorney-General v. Floyer, 2 Vern. 748; Jacob v. Lucas, 1 Beav. 436; Attorney-General v. Cuming, 2 Y. & C. Ch. Ca. 139.

(b) Foley v. Wontner, 2 Jac. & Walk. 245; and see Jacob v. Lucas, 1 Beav. 436.

(c) As to the force of the words "shall and may" in the Act of Parliament, see Attorney-General v. Lock, 3 Atk. 166; Stamper v. Millar, id. 212; Rex v. Flockwood, 2 Chit. Rep. 252.

(d) Doe v. Godwin, 1 D. & R. 259.

(e) 5 Ves. 825.

to hold that there can be no presentation till the number is filled up, when by negligence it has happened that the number is not filled up. If three trustees remained, I could not prevent their choice of new trustees to be added to them to present. The filling up the trustees might take a considerable time, and a lapse might incur; but I agree this is not a proper act of Mr. Foley, when the trust is reduced to his wife."

V. One trustee shall not be *liable for the acts or defaults of his co-trustee*, whether a proviso to that effect be inserted in the original settlement or not. (f) This point appears to have been first clearly established by the decision of *Townley v. Sherborne* (g) in the reign of Charles the First, and is ushered in by the reporter with no little solemnity.

A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances*; but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands? "The Lord Keeper Coventry (says the reporter) considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise \*thereof, and desired the [303] lords the judges assistant to take the same into their serious consideration, whereby some course might be settled that parties trustees might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side. And the lord keeper and the lords the judges assistant afterwards conferring together, and upon mature deliberation conceiving the case to be of great importance, his lordship was pleased to call unto him also Mr. Justice Crook, Mr. Justice Barclay, and Mr. Justice Crawley, for their assistance also in the same, and *appointed precedents to be looked over* as well in the Court of Chancery as in other courts, if any could be found touching the point in question; whereupon several precedents were produced before them, some in the Court of Chancery and some in the Court of Wards, where parties trustees were chargeable only according to their several and respective receipts, and not one to answer for the other, but no precedent to the contrary was produced to them. Whereupon his lordship, after *long and mature deliberation on the case, and serious advice with all the said judges*, did this day in open court declare the resolution of his lordship and the said judges—That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for, they being by law joint tenants or tenants in common, every one by law may receive either all or*

(f) *Leigh v. Barry*, 3 Atk. 584, per Lord Hardwicke; Anon. case, 12 Mod. 560.

(g) *Bridg.* 35.

as much of the profits as he can come by. And it being the case of most men in these days that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate to make up the same, either by the sale or the perception of the profits thereof; and if such of their friends who carry themselves without fraud should be \*chargeable out of their own estate for the faults and deficiencies of their [\*304] co-trustees who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them wastes all or any part of the estate, the *devastavit* shall by law charge him only, and not the co-executor. And in that case *aquitas sequitur legem*, there being many precedents resolved in chancery, that one executor shall not answer nor be chargeable for the act or default of his companion. And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands and are put in trust out of other respects than to be troubled with the receipt of the profits. And albeit, in all presumption, this case had often happened, yet no precedent had been produced to his lordship or the judges, that in any such case the co-trustee had been charged for the act or default of his companion; and therefore it was to be presumed that the current and clear opinion had gone that he was not to be charged, it having not till of late been brought into question in a case that by all likelihood had often happened. But his lordship and the said judges did resolve, that if upon the proofs or circumstances the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."

Co-trustees, (h) however, as was determined in *Townley v. Sherborne*, were formerly considered responsible for money if they joined in *signing the receipt* for it; but in latter times the rule has been established, that a trustee who joins in a receipt for mere conformity's sake, shall not be answerable for a misapplication by the trustee who receives. (i) Where \*the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated [\*305] by the signature of all the trustees in this their joint capacity; it would

(h) *Townley v. Sherborne*, Bridg. 35; *Spalding v. Shalmer*, 1 Vern. 303; *Sadler v. Hobbs*, 2 B. C. C. 114; and see *Bradwell v. Catchpole*, cited *Walker v. Symonds*, 3 Sw. 78, note (a); but said by Lord Cowper, *Fellowes v. Mitchell*, 2 Vern. 516, to be contrary to natural justice.

(i) *Brice v. Stokes*, 11 Ves. 324, per Lord Eldon; *Harden v. Parsons*, 1 Ed. 147, per Lord Northington; *Westley v. Clarke*, 1 Ed. 359, per *eundem*; *Heaton v. Marriott*, cited *Aplyn v. Brewer*, Pr. Ch. 173; *Ex parte Belchier*, Amb. 219, per Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, per *eundem*; *Fellowes v. Mitchell*, 1 P. W. 81; *Gregory v. Gregory*, 2 Y. & C. 316, per Baron Alderson; *Sadler v. Hobbs*, 2 B. C. C. 117, per Lord Thurlow; *Chambers v. Minchin*, 7 Ves. 198, per Lord Eldon; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 479, per *eundem*; *Harrison v. Graham*, 3 Hill's MSS. 239, per Lord Hardwicke, cited 1 P. W. 241, 6th ed. note (y); *Carsey v. Barsham*, cited *Joy v. Campbell*, 1 Sch. & Lef. 344, per *eundem*; *Anon. case*, Mose. 35; *Ex parte Wackerbath*, 2 G. & J. 151; *Webb v. Ledsam*, 1 Kay & Johns. 388, per V. C. Wood.



be tyranny, therefore, to punish a trustee for an act which the very nature of his office will not permit him to decline.

But it lies upon the trustee who joins in the receipt for mere conformity, to prove that his co-trustee was the person by whom the money was actually received. In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in solido*; (k) as if a mortgage be devised to three trustees, and the mortgagor with his witness meets them to pay it off, and the money is laid on the table, and the mortgagor having obtained a reconveyance and receipt for his money, withdraws, each of the trustees in this case will be answerable for the whole. (l) A joint receipt at law is *conclusive* evidence that the money came to the hands of both, but in equity, which rejects estoppels and pursues truth, the court will decree according to the justice and verity of the fact. (m) "Where," said Lord Cowper, "it cannot be distinguished how much was received by one trustee and how much by the other, it is like throwing corn or money into another man's heap, where there is no reason that he who made this difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part." (n)

[\*306] Of course a trustee will not be exempt from liability if he \*sign a receipt where the purposes of the trust do not require the money to be raised; for there can be no legal necessity for his joining when the money itself ought never to have been called for. Thus in *Hanbury v. Kirkland*, (o) Kaye, one of three trustees of a marriage settlement with a power of varying the securities, applied to his co-trustees to sign a warrant of attorney for sale of the stock, on the ground that he had an opportunity of investing the trust fund upon good landed security at five per cent. interest. The co-trustees signed the warrant of attorney, and Kaye sold out the stock and misapplied the proceeds. The following year one of the co-trustees wrote to Kaye to inquire if he had procured an eligible mortgage, when Kaye replied, he had failed in obtaining the mortgage he had originally contemplated, but he was in hopes of investing the fund on another security equally desirable. Two years after, Kaye absconded, and the money was lost. It was held the co-trustees were responsible, and principally on the ground that, "it being their duty to inquire what was the security and who was the mortgagor, they had executed the power of attorney without exercising a single act of discretion, relying entirely upon the representation made to them by Kaye."

And though a trustee joining in a receipt may be safe in merely permitting his co-trustee to be the receiver in the first instance, yet he will not be justified in allowing the money to remain in his hands for a longer period than the circumstances of the case may reasonably require. (p)

(k) *Brice v. Stokes*, 11 Ves. 234, per Lord Eldon; *Scurfield v. Howes*, 3 B. C. C. 95, per Lord Thurlow.

(l) *Westley v. Clarke*, 1 Ed. 359, per Lord Henley.

(m) *Harden v. Parsons*, 1 Ed. 147, per *eundem*.

(n) *Fellows v. Mitchell*, 1 P. W. 83.

(o) 3 Sim. 265, and see *Marriott v. Kinnarsley*, Taml. 470; *Broadhurst v. Balguy*, 1 Y. & C. Ch. Ca. 16; *Rowland v. Witherden*, 3 Mac. & Gord. 568.

(p) *Bone v. Cook*, M'Clel. 168; *Gregory v. Gregory*, 2 Y. & C. 313; *Lincoln v.*

Thus, in *Brice v. Stokes*,<sup>(q)</sup> the leading case upon this subject, Mooring and Fielder, two trustees with a power of sale, conveyed the estate in 1784 to a purchaser, and both signed the receipt, but Fielder alone actually received. In 1794 Fielder died insolvent without having accounted for the money \*paid to him, and it was proved in evidence that Mooring was cognisant of the misemployment of the fund, though he took no active measures for recovering it out of Fielder's hands. Lord Eldon said, "Though a trustee is safe if he does no more than authorise the receipt and retainer of the money so far as the act is within the due execution of the trust, yet if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, admits that, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it or lent it in opposition to the trust, and the other trustee permits that for ten years together, the question then turns upon this, not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse. As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it." The conclusion was that Mooring was to be made answerable.

*Walker v. Symonds*<sup>(r)</sup> involved great particularity of circumstances; but, Lord Eldon having described it as a case of great importance to trustees in general,<sup>(s)</sup> it may be useful to present it to the reader so far as it bears upon the present subject.

A sum of money secured by mortgage had been assigned to Donnythorne, Griffith, and Symonds, upon certain trusts. On the 12th of January, 1791, the mortgage was paid off and the estate re-conveyed, and a joint receipt signed, and the money, with the approbation of the co-trustees, was put into the hands of Donnythorne. The money was shortly afterwards invested by Donnythorne, with the sanction of his co-trustees, in bills or notes of the East India Company payable at the end of two years. In 1795 the bills were paid off by the company, and the money received by Donnythorne. Intelligence to that effect having been transmitted to the co-trustees, Symonds \*the same year wrote to Donnythorne, requesting him to invest it in the public funds in the joint names of the trustees. Donnythorne begged that the money might remain in his hands, and proposed to secure the repayment of it by a mortgage from himself and his son of their settled estates in Cornwall, and until the mortgage could be prepared, to secure it by their joint bond. The co-trustees, conceiving the security would be ample, expressed their consent, and the joint bond was accordingly executed. Donnythorne not having sent the mortgage as he promised, Symonds made several applications to him upon the subject, earnestly desiring him

Wright, 4 Beav. 427. This doctrine appears to have been very little regarded in the time of Lord Talbot. See *Attorney-General v. Randall*, 21 Vin. Ab. 534.

(q) 11 Ves. 319.

(r) 3 Sw. 1.

(s) Id. 74.

either to invest the money in the funds, or to give them landed security. In September, 1796, Donnythorne died insolvent, and without having executed the mortgage. Sir W. Grant observed, "The money in 1791 was paid in without any act of the trustees: they were obliged to receive it: so far they were blameless. It came to Donnythorne's hands, and the trustees were not to blame in letting it come to his hands; but they might have afterwards made themselves responsible by merely not doing what was incumbent on them; by permitting the money to remain a considerable time in the hands of their co-trustee they might without any positive act on their part, have made themselves liable. That will depend on the degree and extent of their *laches* in suffering the money to remain in the hands of Donnythorne. The trustees being authorised to put the money out on mortgage, it would be rather hard to say that they were guilty of *laches* by giving Donnythorne a little time to find a mortgage, taking his bond in the meantime. What passed in the interval between to the death of Donnythorne does not appear. If it were necessary to decide the point, an inquiry before the master must be directed."<sup>(t)</sup> Sir W. Grant dismissed the bill, which was one to set aside (as having been fraudulently obtained) a compromise of the alleged breach of trust, but did so on grounds foreign to the subject under discussion; Lord Eldon, however, before whom the cause was brought upon appeal, reversed Sir W. Grant's decree, and directed an inquiry by the master [\*309] as to the conduct \*of the trustees from January, 1791, when the mortgage was paid off, to 1796, the time of Donnythorne's death. It then appeared by the master's report made in pursuance of the order, that the money had been invested by Donnythorne, soon after he had received it, in East India bills *payable to himself*; that the money due on the bills had been discharged in 1793, and the money paid to Donnythorne; that the co-trustees had made no inquiry about the trust fund from January, 1791, till May, 1795, which was the time when Symonds wrote the letter and made the applications already stated. On the hearing of the cause upon further directions, Lord Eldon said, "The cause comes back with a report stating a clear breach of trust in leaving the trust fund in the situation represented from 1791 to 1793, and from 1793 to 1795. The money was laid out in 1791 with the consent of the trustees on India bills payable to Donnythorne, a palpable breach of trust by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 Donnythorne would be paid the money due on the bills, and it would be lodged in his hands; and although the court will proceed as favourably as it can to trustees who have laid out the money on a security from which they cannot with activity recover it, yet no judge can say they are not guilty of a breach of trust, if they suffer it to lie out on such a security during so long a time."<sup>(u)</sup> The trustees were guilty of a breach of trust in permitting the money to remain on bills payable to Donnythorne alone, and in leaving the state of the funds unascertained for five years.<sup>(v)</sup> I agree with the master of the rolls that inquiry *might*, on the

(t) 3 Sw. 41.

(u) 3 Sw. 65.

(v) Ib. 67.



principles of this court, have discharged the trustees in given circumstances from a breach of trust. If without previous participation, they, in June, 1795, had found that, being themselves implicated in no breach of trust, they had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts instead of filing a bill in this court, which perhaps might have destroyed his means of giving security, \*I should have hesitated long before [\*310] I charged then, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee.”(w) The result of his lordship’s judgment was, that, under the circumstances disclosed by the master’s report, the trustees were clearly to be held responsible for the loss of the money.

*Co-executors* also, like co-trustees, are generally answerable each for his own acts only and not for the acts of any co-executor.(x) But in respect of receipts, the case of *co-executors* is materially different from that of co-trustees. An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator. If an executor join with a co-executor in a receipt, he does a wanton and unnecessary act; he interferes when the nature of the office lays upon him no such obligation, and therefore it was a rule very early established, that, if executors joined in receipts, they should be answerable, each *in solido*, for the amount of the money received.(y)

In *Westley v. Clarke*(z) Lord Northington expressed an opinion that aimed at breaking down the rule; and by his decision of that case he succeeded in establishing a qualification of it.

Thompson, one of three co-executors, had called in a sum of money secured by a mortgage for a term of years, and received \*the [\*311] amount, and *afterwards*, but the same day, sent round his clerk to his co-executors with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. Thompson afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said, “The rule that executors joining in a receipt are all liable amounts to no more than this, that a joint receipt given by executors is a *stronger* proof that

(w) 3 Sw. 71.

(x) *Hargthorpe v. Milforth*, Cro. El. 318; *Anon. Dyer*, 210 a; *Wentw. Off. Ex* 306, 14 Edn.; *Williams v. Nixon*, 2 Beav. 472.

(y) *Aplyn v. Brewer*, Pr. Ch. 173; *Murrell v. Cox*, 2 Vern. 560; *Ex parte Belchier*, Amb. 219, per Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, per *eundem*; *Harrison v. Graham*, 3 Hill’s MSS. 239, per *eundem*, cited 1 P. W. 241, 6th ed. note (y); *Darwell v. Darwell*, 2 Eq. Ca. Ab. 456; *Gregory v. Gregory*, 2 Y. & C. 316, per Baron Alderson.

(z) 1 Ed. 357; S. C. 1 Dick. 329; and see *Harden v. Parsons*, 1 Ed. 147. 148. Yet in *Churchill v. Hobson*, 1 P. W. 241, note (1) by Mr. Cox, his lordship is reported to have said, according to a note of the case by Sir L. Kenyon, that in *Westley v. Clarke* he should have thought the co-executors liable if they had been present at the time the money was paid; and Lord Redesdale, in *Doyle v. Blake*. 2 Sch. & Lef. 242, 243, seemed to think that Lord Northington had no intention of *breaking down*, but only of *qualifying* the rule.

they actually joined in a receipt, because generally they have no occasion to join for conformity. But, if it appears plainly that one executor only received and discharged the estate indebted and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to control the act of their co-executor either before or after that act was done, what grounds has any court in conscience to charge him? Equity arises out of a modification of *acts*, where a very minute circumstance may make a case equitable or iniquitous: and though former authorities may and ought to bind the determination of subsequent cases with respect to *rights*, as in the right of curtesy or dower, yet there can be no rule for the future determination of this court concerning the *acts* of men. The only act that affected the assets was the first that discharged the debt, and, according to the sense of the bar, transferred the legal estate of the lands. Then *that* the co-executors are not to answer for, and the second is nugatory." His lordship was therefore of opinion that the co-executors were not liable for the misapplication by the co-executor.

The doctrine propounded in this case, that the joint receipt of co-executors is merely a stronger proof of the actual receipt than in the instance of co-trustees, and that an executor as well as a trustee may rebut the presumption by positive evidence, has since been repeatedly contradicted both by *dicta* and decisions.<sup>(a)</sup> The simple point determined, viz. that an \*executor who signs shall not be answerable [\*312] when the act of signature is nugatory, may be considered as now settled.

Lord Thurlow, indeed, is reported to have questioned the decision in *Westley v. Clarke*:<sup>(b)</sup> but Lord Alvanley said, "he must enter his dissent against the rule, that executors joining in a receipt were both liable, for he did not hold that an executor could not *in any case* be discharged from a receipt given for conformity: he did not find fault, for instance, with the case of *Westley v. Clarke*."<sup>(c)</sup> And, again, he said, "he perfectly concurred in the decision of that case; and the joining in a receipt, though not perhaps absolutely necessary, he would not consider *conclusive*."<sup>(d)</sup> Lord Eldon, in evident allusion to the case of *Westley v. Clarke*, admitted the old rule had been *pared down*, at the same time expressing his opinion that the notion upon which the later cases had proceeded, viz. that the old rule had a tendency to discourage executors from acting, was very ill-founded. A plain general rule, he thought, which once laid down was easily understood and might be generally known, was much more inviting to executors than a rule referring every thing to the particular circumstances.<sup>(e)</sup>

(a) *Scurfield v. Howes*, 3 B. C. C. 90; *Sadler v. Hobbs*, 2 B. C. C. 114; *Langford v. Gascoyne*, 11 Ves. 333; and see *Doyle v. Blake*, 2 Sch. & Lef. 243; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 325; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Walker v. Symonds*, 3 Sw. 64; *Re Fryer*, 3 Jur. N. S. 485; decided by Vice-Chancellor Wood; which supports Lord Northington's view.

(b) *Sadler v. Hobbs*, 2 B. C. C. 117.

(c) *Scurfield v. Howes*, 3 B. C. C. 94.

(d) *Hovey v. Blakeman*, 4 Ves. 608.

(e) See *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 325; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Walker v. Symonds*, 3 Sw. 64.

The present doctrine of the court was thus enunciated by Lord Eldon:—"Though one executor has joined in a receipt, yet whether he is liable shall depend upon his *acting*. The former was a simple rule that *joining* should be considered as *acting*, but now *joining alone* does not impose responsibility."<sup>(f)</sup> The same rule was laid down by Lord Redesdale, and in his usual clear and forcible language. "The distinction," he said, "with respect to mere signing appears to be this; that if a receipt be given for the purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the \*control of both, such receipt shall charge; and the true question in all these cases seems to have [\*313] been, whether the money was under the control of both executors: if it was so considered by the person paying the money, then the joining in the receipt by the person who did not actually receive amounted to a direction to pay to his co-executor (for it could have no other meaning,) and he became responsible for the money, just as if he had actually received it."<sup>(g)</sup> Thus, where two executors join in a receipt to a debtor, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid them to them both. His requiring the discharge of the executor who has not received the money amounts to saying, "I make this payment to you both, and not to him only who actually receives the money."<sup>(h)</sup>

In *Churchill v. Hobson*,<sup>(i)</sup> Lord Harcourt took a distinction between creditors and legatees;<sup>(k)</sup> that in the case of creditors, who were entitled to the utmost benefit of the law, the joining of the executors in the receipt might make each liable for the whole; but when legatees were concerned, who had no remedy for their demand except in equity, it was altogether unequitable, that one executor should answer for the receipt of the other. But this refinement of Lord Harcourt has by subsequent authorities been clearly overruled.<sup>(l)</sup> The comment of Lord Northington, though it may not express faithfully the distinction intended by Lord Harcourt, is too ingenious not to be here mentioned. "At law," he said, "a joint receipt is conclusive evidence that the money came to them both, and is not to be contradicted; but a court of equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact; and what is said by Lord Harcourt as to the distinction between a receipt of this kind as to a legatee and a creditor seems to have this meaning—that a creditor may at law charge both executors on a joint receipt, but \*that in a court of equity, [\*314] where alone legacies are received, such receipt should not be conclusive, but the court will see who actually received, and charge that person accordingly."<sup>(m)</sup>

(f) *Walker v. Symonds*, 3 Sw. 64.

(g) *Joy v. Campbell*, 1 Sch. & Lef. 341.

(h) *Doyle v. Blake*, 2 Sch. & Lef. 242.

(i) 1 P. W. 241.

(k) See *Gibbs v. Herring*, Pr. Ch. 49.

(l) See *Sadler v. Hobbs*, 2 B. C. C. 117; and see *Doyle v. Blake*, 2 Sch. & Lef. 239.

(m) *Harden v. Parsons*, 1 Ed. 147.



Lord Redesdale has rightly observed, that "there *may* be a case, where executors would be charged as against creditors, though not as against legatees, for legatees are bound by the terms of the will, creditors are not; and therefore, if the testator direct the executors to collect the assets, and pay the proceeds into the hands of A., which is done accordingly, and A. fails, if a creditor remain unpaid, he may charge the executors; but, as regards a legatee, the executors may justify themselves by the directions of the will."<sup>(n)</sup>

On the same principle that an executor is liable for joining in a receipt he is responsible for any act by which he reduces any part of the testator's property into the possession of his co-executor,<sup>(o)</sup> as if an executor join in drawing,<sup>(p)</sup> or indorsing,<sup>(q)</sup> a bill, or invest a sum in the joint names of himself and his co-executors, so that on his own death the entire control of the fund devolves on the co-executor.<sup>(r)</sup> So it is laid down in an old case, that "if by agreement between the executors one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both."<sup>(s)</sup> So an executor is answerable, if he give a power of attorney, or other authority, to his co-executor to collect the assets.<sup>(t)</sup>

But under particular circumstances the joining of an executor is as absolutely necessary as the joining of a trustee, and of course in such cases executors and trustees are put upon the same footing in respect of liability.

[\*315] \*Thus, if a bill of exchange be remitted two agents payable to them personally, who on the death of their principal are made his executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, will not operate to charge him who does not actually receive.<sup>(u)</sup>

And so where the joining of both executors is necessary to the transfer of stock.<sup>(v)</sup>

But even where the joining of an executor is absolutely indispensable, it is still incumbent on the executor to see that the act in which he joins is perfectly consistent with the due execution of the trust.<sup>(w)</sup>

And the executor will not be excused if he rely on the mere repre-

(n) Doyle v. Blake, 2 Sch. & Lef. 239, 245.

(o) Townsend v. Barber, 1 Dick. 356; Moses v. Levi, 3 Y. & C. 359.

(p) Sadler v. Hobbs, 2 B. C. C. 114.

(q) Hovey v. Blakeman, 4 Ves. 608, per Lord Alvanley.

(r) Clough v. Dixon, 8 Sim. 594; 3 M. & C. 490.

(s) Gill v. Attorney-General, Hard. 314; see Moses v. Levi, 3 Y. & C. 359.

(t) Doyle v. Blake, 2 Sch. & Lef. 231; Lees v. Sanderson, 4 Sim. 28; Kilbee v. Sneyd, 2 Moll. 200, per Sir A. Hart; see Moses v. Levi, 3 Y. & C. 359.

(u) Hovey v. Blakeman, 4 Ves. 608, per Lord Alvanley.

(v) Chambers v. Minchin, 7 Ves. 197, per Lord Eldon; Shipbrook v. Hinchinbrook, 11 Ves. 254; S. C. 16 Ves. 479, per *eundem*; see Murrell v. Cox, 2 Vern. 570, and compare Scurfield v. Howes, 3 B. C. C. 94; (note, the doctrine at the period of the last case had not been settled;) and see Moses v. Levi, 3 Y. & C. 359.

(w) Chambers v. Minchin, 7 Ves. 186; Shipbrook v. Hinchinbrook, 11 Ves. 252; Underwood v. Stevens, 1 Mer. 712; Bick v. Motley, 2 M. & K. 312; Williams v. Nixon, 2 Beav. 472; Hewett v. Foster, 6 Beav. 259.

sentation of his co-executor as to the necessity or propriety of the act, for the executor has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true.(x)

And if, at a period when in the ordinary course of administration the debts should long since have been discharged, an executor is applied to by his co-executor to join in a transfer of stock for the purpose of payment of debts, and the executor does inquire, and ascertains there are such debts, but afterwards it turns out that the co-executor had in his hands a fund sufficient for the payment of the debts, in such a case the executor who joins in the receipt is liable to the imputation of negligence for not having acquainted himself how the co-executor had dealt with the assets during the preceding period, and is liable for the application of the money he enables the co-executor to receive.(y)

\*And the executor will be answerable if he leave the money, as for two years, in the hands of the co-executor, when by the [\*316] terms of the trust it ought to have been invested on proper securities.(z) But, of course, an executor will not be called upon to replace so much of the fund as it can be proved the co-executor *bona fide* expended toward the purposes of the trust.(a)

A notion was very commonly entertained, until recent decisions, that if an executor merely proved the will and remained passive, he incurred no liability for a *devastavit* by the co-executors; but the contrary has now been established. Thus, in *Styles v. Guy*,(b) a testator appointed three executors, all of whom proved the will; but one of them, viz., Guy, was the acting executor. Guy, at the death of the testator, had large assets in his hands, with which he eventually absconded. The two co-executors were held responsible for the loss; and though free from blame morally, had to pay upwards of 20,000*l.* out of their own pockets. They knew, or ought to have known, that Guy was a debtor to the estate; and having by probate accepted the executorship, it was their duty to have recovered the debt from Guy as from any other debtor to the estate, and this they neglected to do for a period of six years.

The rules respecting co-executors are equally applicable to co-administrators. Lord Hardwicke once expressed an opinion, that joint administrators resembled rather co-trustees, and that any one of them could not exercise the office without the concurrence of the rest;(c) but it was afterwards determined in the Court of King's Bench, that joint administrators and co-executors stood in this respect precisely on the same footing.(d)

(x) *Shipbrook v. Hinchinbrook*, 11 Ves. 252, see 254; *Underwood v. Stevens*, 1 Mer. 712; *Hewett v. Foster*, 6 Beav. 259.

(y) *Shipbrook v. Hinchinbrook*, 11 Ves. 254, per Lord Eldon; *Bick v. Motley*, 2 M. & K. 312.

(z) *Scurfield v. Howes*, 3 B. C. C. 91; and see *Lincoln v. Wright*, 4 Beav. 427.

(a) *Shipbrook v. Hinchinbrook*, 11 Ves. 252; S. C. 16 Ves. 477; *Williams v. Nixon*, 2 Beav. 472; *Kilbee v. Sneyd*, 2 Moll. 213, per Sir A. Hart; *Underwood v. Stevens*, 1 Mer. 712; and see *Brice v. Stokes*, 11 Ves. 328; *Hewett v. Foster*, 6 Beav. 259.

(b) 1 Mac. & Gor. 422; and see *Scully v. Delany*, 2 Ir. Eq. Rep. 165.

(c) *Hudson v. Hudson*, 1 Atk. 460.

(d) *Willand v. Fenn*, cited *Jacomb v. Harwood*, 2 Ves. 267.

To return to the liabilities of co-trustees, if one trustee be [\*317] \*cognisant of a breach of trust committed by another, and either industriously conceal it,<sup>(e)</sup> or do not take active measures for the protection of the *cestui's que trust* interest,<sup>(f)</sup> he will himself become responsible for the mischievous consequences of the act. A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction,<sup>(g)</sup> and, if a breach of trust has been *already committed*, to file a bill for the restoration of the trust fund to its proper condition,<sup>(h)</sup> or, at least, to take such other active measures, as, with a due regard to all the circumstances of the case, may be considered the most prudent.<sup>(i)</sup>

An express clause is usually inserted in trust-deeds, that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informs the trustee of the general doctrine of the court, adds nothing to his security against the liabilities of the office. In *Wesley v. Clarke*<sup>(k)</sup> Lord Northington was inclined to attach some importance to the clause. "The testator," he said, "might direct the condition of his executors so as not to be questioned by his volunteers. The proviso, therefore, that one executor should not be answerable for the acts of another, though not very frequent in wills, was a good proviso between executors and legatees who took under the will." But equity infuses such a proviso into every trust-deed,<sup>(l)</sup> and a party can have no better right from the expression of that which, if not expressed, had been virtually implied.<sup>(m)</sup> It is clear, that, in later cases, the court has considered it an immaterial circumstance whether the instrument creating the trust contained such a proviso or not.<sup>(n)</sup>

\*VI. It is a general rule established to keep trustees in the [\*318] line of their duty, that they shall not derive any personal advantage from the administration of the property committed to their charge.<sup>(o)</sup> It was upon this principle that Lord Eldon once directed an inquiry, whether the liberty of *sporting* over the trust estate could be let for the benefit of the *cestuis que trust*, and, if not, he thought the game should belong to the heir; the trustee might appoint a gamekeeper, if necessary for the preservation of the game, but not to keep up a mere establish-

<sup>(e)</sup> *Boardman v. Mosman*, 1 B. C. C. 68.

<sup>(f)</sup> *Brice v. Stokes*, 11 Ves. 319; and see *Walker v. Symonds*, 3 Sw. 41; *Oliver v. Court*, 8 Price, 166; *In re Chertsey Market*, 6 Price, 279; *Attorney-General v. Holland*, 2 Y. & C. 699; *Booth v. Booth*, 1 Beav. 125; *Williams v. Nixon*, 2 Beav. 472; *Blackwood v. Borrowes*, 2 Conn. & Laws. 477.

<sup>(g)</sup> See *In re Chertsey Market*, 6 Price, 279.

<sup>(h)</sup> *Franco v. Franco*, 3 Ves. 75; *Earl Powlet v. Herbert*, 1 Ves. jun. 297.

<sup>(i)</sup> See *Walker v. Symonds*, 3 Sw. 71.

<sup>(k)</sup> 1 Ed. 360.

<sup>(l)</sup> See *Dawson v. Clarke*, 18 Ves. 254.

<sup>(m)</sup> *Worrall v. Harford*, 8 Ves. 8.

<sup>(n)</sup> *Brice v. Stokes*, 11 Ves. 319; *Bone v. Cook*, M'Clel. 168; S. C. 13 Price, 332; *Hanbury v. Kirkland*, 3 Sim. 265; *Moyle v. Moyle*, 2 R. & M. 710; *Sadler v. Hobbs*, 2 B. C. C. 114; *Mucklow v. Fuller*, Jac. 198; *Pride v. Fooks*, 2 Beav. 430; *Williams v. Nivon*, 2 Beav. 472.

<sup>(o)</sup> *Burgess v. Wheate*, 1 Ed. 226, per Lord Mansfield; *ib.* 251, per Lord Henley; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 126, per Lord Redesdale; *Ex parte Andrews*, 2 Rose, 412, per Sir T. Plumer; *Middleton v. Spicer*, 1 B. C. C. 205, per Lord Thurlow; *Docker v. Somes*, 2 M. & K. 664, per Lord Brougham; *Gubbins v. Creed*, 2 Sch. & Lef. 218, per Lord Redesdale; and see *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Bentley v. Craven*, 18 Beav. 75; *Sugden v. Crossland*, 3 Sm. & Giff. 192.



ment of pleasure.(p) So, if an advowson be devised to trustees upon trust to sell, and, before the sale has been effected, a vacancy occurs, the right of presentation is not to be exercised by the trustee at his own pleasure, but he must adopt the nomination of the testator's heir at law.(q)

So, if trustees or executors buy in any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the other creditors or legatees shall have the advantage of it; and if there be no such claimants, it shall go to the party who is entitled to the surplus.(r)

Mortgagees are to some though not to all intents and purposes trustees, and in one case, the authority of which, however, \*has been doubted, where a mortgagor in fee died, and the mortgagee [\*319] bought in the mortgagor's wife's right of dower it was decreed that the heir of the mortgagor, on bringing his bill to redeem, might take the purchase at the price paid.(s)

Again, if trust money be laid out by a trustee in buying and selling land, and a profit be made by the transaction, that shall go, not to the trustee who has so applied the money, but to the *cestui que trust* whose money has been applied.(t) So where a trustee or executor has used the fund committed to his care in stock speculations, though any loss must fall exclusively upon himself, he must account to the trust estate for every farthing of profit. If he lay out the trust money in any commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person from which he is to derive certain stipulated gains,(u) or if he employ it himself for the purposes of his own business, in all these cases he must account to the *cestui que trust* for the profits.(v)

As the trustee of an estate cannot receive any advantage from it, he cannot be appointed the *receiver* at a salary;(w) and even should he offer

(p) *Webb v. Earl of Shaftesbury*, 7 Ves. 480, see 488; and see *Hutchinson v. Morritt*, 3 Y. & C. 547.

(q) *Hill v. Bishop of London*, 1 Atk. 618; In re *Shrewsbury School*, 1 M. & Cr. 647; *Martin v. Martin*, 12 Sim. 579; *Sherrard v. Lord Harborough*, Amb. 165; *Cooke v. Cholmondeley*, 3 Drewry, 1; and see *Hawkins v. Chappell*, 1 Atk. 621; *Gubbins v. Creed*, 2 Sch. & Lef. 218.

(r) *Robinson v. Pett*, 3 P. W. 251, note (A); *Darcy v. Hall*, 1 Vern. 49; Ex parte *Lacey*, 6 Ves. 628, per Lord Eldon; *Morrett v. Paske*, 2 Atk. 54, per Lord Hardwicke; Anon. 1 Salk. 155; *Carter v. Horne*, 1 Eq. Ca. Ab. 7; *Dunch v. Kent*, 1 Vern. 260; *Fosbrooke v. Balguy*, 1 M. & K. 226.

(s) *Baldwin v. Banister*, cited *Robinson v. Pett*, 3 P. W. 251, note (A), and see comments thereon; *Dobson v. Land*, 8 Hare, 220; and compare *Arnold v. Garner*, 2 Phil. 231; *Mathison v. Clarke*, 3 Drewry, 3.

(t) *Fosbrooke v. Balguy*, 1 M. & K. 226.

(u) *Docker v. Somes*, 2 M. & K. 664, per Lord Brougham.

(v) S. C. id. 665; *Wedderburn v. Wedderburn*, 2 Keen, 722; S. C. 4 M. & Cr. 41; but see S. C. 2 Jur. N. S. 674; *Willett v. Blandford*, 1 Hare, 253; and see *Portlock v. Gardner*, 1 Hare, 603; *Cummings v. Cummings*, 8 Ir. Eq. Rep. 723; *Parker v. Bloxam*, 20 Beav. 295; *Wedderburn v. Wedderburn*, reported on the late hearing before the master of the rolls, 22 Beav. 84. It appears from a note by the reporter at page 124, that the decision was appealed from, but that the suit was compromised.

(w) *Sutton v. Jones*, 15 Ves. 584; *Sykes v. Hastings*, 11 Ves. 363; — v. *Joland*, 8 Ves. 72; Anon. 3 Ves. 515; and see *Morison v. Morison*, 4 M. & C. 215.

his services gratuitously, he would not be appointed except under particular circumstances, for it is the duty of the trustee to superintend the receiver and check the accounts with an adverse eye;(x) but if a person be merely a trustee to preserve contingent remainders, the reasons for excluding him are held not to be applicable.(y)

[\*320] So a trustee or executor who is a factor,(z) broker,(a) \*commission agent,(b) or auctioneer,(c) can make no profit from the trust estate in the way of his business.

So a trustee who is a solicitor cannot charge the estate for his professional labours, but will be allowed merely his costs out of pocket,(d) unless there be a special contract to that effect,(e) nor can the charge be made by a firm of which the trustee is a partner,(f) even though the business be done by one of the partners who is not a trustee;(g) but a country solicitor defending a suit in chancery as executor, through a town agent, will be allowed such proportion of the agent's bill in respect of the defence as such agent is entitled to receive.(h)

In one case the principle of the rule was held not to apply where several co-trustees were made defendants to a suit, this being a matter thrust upon them and beyond their own control. One of the trustees, who was a solicitor, was allowed to act for himself and the others, and to receive the full costs, it not appearing that they had been increased through his conduct.(i) But this decision is open to comment. If the distinction be made between costs out of court and costs in court, because, as regards the latter, the conduct of the trustee is under the cognisance of the court, and the costs are to be taxed, the rule would equally apply to the case of a single trustee defending himself; yet it is difficult to conceive any other ground for the distinction.(k) The exception made appears to stand by itself, and is not likely to be extended. Indeed where a single trustee defended himself by his partner, the professional profits were disallowed.(l)

The foregoing principles affect not only express trustees, but also all such [\*321] as are clothed with the same character by \*construction of law, as if a person purchase an estate with *another's money*, or invest *another's property* in some trade or speculation.(m) So, an attorney,

(x) *Sykes v. Hastings*, 11 Ves. 364, per Lord Eldon.

(y) *Sutton v. Jones*, 15 Ves. 587, per Lord Eldon.

(z) *Scattergood v. Harrison*, Moseley, 128.

(a) *Arnold v. Garner*, 2 Phil. 231.

(b) *Sheriff v. Axe*, 4 Russ. 33.

(c) *Mathison v. Clarke*, 3 Drewry, 3.

(d) *New v. Jones*, Exch. Aug. 9, 1833, 9 Bythew. by Jarm. 338; *Moore v. Frowd*, 3 M. & Cr. 46; *Fraser v. Palmer*, 4 Y. & C. 515; *York v. Brown*, 1 Coll. 260; *Broughton v. Broughton*, 5 De Gex, Mac. & Gor. 160.

(e) *In re Sherwood*, 3 Beav. 338.

(f) *Collins v. Carey*, 2 Beav. 128; *Lincoln v. Windsor*, 9 Hare, 158.

(g) *Christophers v. White*, 10 Beav. 523.

(h) *Burge v. Burton*, 2 Hare, 373.

(i) *Craddock v. Piper*, 1 Mac. & Gor. 664; S. C. 1 Hall. & Tw. 617; overruling *Bainbrigge v. Blair*, 8 Beav. 588.

(k) See *Broughton v. Broughton*, 2 Sim. & Gif. 422; 5 De Gex, Mac. & Gor. 160.

(l) *Lyon v. Baker*, 5 De Gex & Sm. 622.

(m) *Docker v. Somes*, 2 M. & K. 665; *Crawshay v. Collins*, 15 Ves. 218; S. C. 1 J. & W. 267; S. C. 2 Russ. 325.

guardian, or other person invested with a fiduciary character, must account for all profits to the client, or infant, or other party whose confidence he has abused.<sup>(n)</sup>

However, a trustee may by *possibility* derive a benefit from the trust estate, not from any positive right in himself, but from the want of right in any other; as if lands be vested in A. and his heirs upon trust for B. and his heirs, and B. die without an heir, the equitable interest in this case can neither escheat to the lord,<sup>(o)</sup> nor, if the trust was created by conveyance from B. whose *seisin* or *title* was *ex parte paternâ*, can the lands, upon failure of heirs in that line, descend to the heir *ex parte maternâ*; <sup>(p)</sup> but the trustee, no person remaining to sue a *subpœna*, must as the legal proprietor, himself enter upon the beneficial enjoyment. Lord Hale was clearly of this opinion, and compared it to the case of the grantee of a rent charge in fee dying without heirs, when the tenant of the land should hold it discharged of the rent.<sup>(q)</sup> In *Burgess v. Wheate*, Sir Thomas Clarke said he would give no opinion on the *right* of the trustee, but at the same time admitted the trustee must hold until a better right appeared.<sup>(r)</sup> Lord Henley seemed to entertain no doubt upon the subject, and considered Lord Hale's illustration by the extinguishment of a rent as a sufficient answer to the objection of want of title in the trustee,<sup>(s)</sup> and the point must now be considered as clearly settled.<sup>(t)</sup>

But if an estate be held by A. upon trust for B., and B. die without leaving an heir, but having devised the estate to C. and D. upon trust, which fail or do not exhaust the beneficial \*interest; A. cannot insist on retaining the estate upon offering to satisfy the charges, [\*322] if any, but will be bound to convey the estate to C. and D. as the nominees in the will, and entitled as against A., the bare trustee, and the court as between those parties will not inquire into the nature of the trust or how far it can be executed.<sup>(u)</sup>

It seems to follow from the principles laid down in *Burgess v. Wheate*, that, where a purchaser has paid the consideration money, and then dies without an heir before the execution of the conveyance, the vendor must keep both the estate and the money.<sup>(v)</sup>

In the same case, and in reference to the supposed event of a mortgagor in fee dying and leaving no heir, the questions were asked: first, should the mortgagee hold the estate absolutely? and, secondly, if the mortgagee demanded his debt of the personal representative, should he take to himself both the land and the debt? "If the mortgagor," observed Sir Thomas Clarke, "dies without heir or creditor, I see no inconvenience if the mortgagee do hold the estate absolutely; and as to

(n) See *Docker v. Somes*, 2 M. & K. 665.

(o) *Burgess v. Wheate*, 1 Ed. 177.

(p) See *id.* 186, 216, 256.

(q) *Attorney-General v. Sands*, Hard. 496; and see *Cary*, 14.

(r) 1 Ed. 212, 213.

(s) 1 Ed. 253.

(t) *Taylor v. Haygarth*, 14 Sim. 8; *Davall v. New River Company*, 3 De Gex & Sm. 394; *Cox v. Parker*, 2 Jur. N. S. 842; now reported 22 Beav. 168.

(u) *Onslow v. Wallis*, 1 Mac. & Gor. 506.

(v) 1 Ed. 211, per Sir T. Clarke.



the supposition that the mortgagee may demand his debt too, I think, if the mortgagee took his remedy against the personal representative, the court would compel him to reconvey, not to the lord by escheat, but to the personal representative, and would consider the estate reconveyed as coming in lieu of the personalty, and as assets to answer even simple contract creditors.”(w) Lord Mansfield said, “He could not state on any ground established what would be the determination in that case.”(x) Lord Henley observed, “The lord has his tenant and services in the mortgagee, and he has no right to anything more. Perhaps it would not be difficult to answer what would be the justice of the case, but it is not to the business in hand.”(y) A recent decision of the present master of the rolls establishes that the mortgagee holds absolutely, subject only to the qualification that the equity of redemption is assets for the payment of the mortgagor’s debts.(z)

[\*323] \*But a failure of inheritable blood may happen not only for want of an heir, (as in the case of an illegitimate person dying without issue,) but through the corruption of blood caused by attainder, under the old law for *felony*, or now for *petit treason* or *murder*; and in the case of such attainder, the question arises, shall the trustee hold against the person attainted if pardoned, or against his heir where attainder is followed by execution? Sir Thomas Clarke said, “The detaining the estate against the crown where the *cestui que trust* dies without leaving a relation is different from detaining it against the *cestui que trust* himself. The court would go as far as it could, and he thought the trustee would be estopped from setting up such a claim.”(a) Lord Mansfield said, “He could not resolve the case upon principle, for he could find no clear and certain rule to go by.”(b) But Lord Henley agreed with Sir Thomas Clarke, and asked, “If the king thinks proper to pardon the felon, what hinders him from suing his trustee?—what hinders him from instantly assigning his trust for the benefit of his family?”(c) If trusts were to follow the analogy of uses, the *heir* of the attainted person could not sue his *subpona* by reason of the corruption of blood;(d) but trusts at the present day are administered on much more liberal principles than uses formerly were.

A question was put by Lord Mansfield in *Burgess v. Wheate*, but was neither answered at the time, nor received any notice from the bench afterwards, viz. whether the right to the estate might not, in particular cases, result to the *author* of the trust.(e) As, if A. enfeoff B. and his heirs upon trust for C. and his heirs, and C. die without heirs, why may not the equitable interest result in favour of A.? Such a case has never occurred, and there is no authority upon the subject; but the claim of A. appears at least to have some plausibility.

As the trustee in these cases advances not a positive, but merely a

(w) 1 Ed. 210.

(x) Id. 236.

(y) Id. 256; and see *Viscount Downe v. Morris*, 3 Hare, 394.

(z) *Beale v. Symonds*, 16 Beav. 406.

(a) 1 Ed. 210.

(b) Id. 236; and see id. 184.

(c) Id. 255; as to the necessity for the pardon containing words of *restitution*, see *Bullock v. Dodds*, 2 B. & Ald. 277.

(d) *Br. Feff. al. Us.* 34; *Cary*, 14.

(e) 1 Ed. 185.

negative claim, he has no ground for coming into a court of equity for the establishment of his right.<sup>(f)</sup> Thus \*where A. devised a copyhold estate to B. and his heirs in trust for C. and his heirs, [\*324] and C. died without heirs, and then B. died, having entered upon the lands, and applied the rents to the trust, but never having been admitted, and the heir of B. filed a bill against the lord for compelling him to grant him admission, Lord Loughborough said, "The ground for the court's acting between the lord and tenant is, that the lord *de jure* may call upon the tenant to be admitted if he stands out, for he has a right to the fine and his services; and the court would not let the parties stand in this situation, that the lord who had his remedy against the tenant should, by refusing to call upon him, prevent him from having evidence of his title under the lord upon the rolls, which are in the lord's keeping. The court acts in this case upon the ground of the tenant's having the beneficial interest in the land, but is there any instance of a bill sustained upon a mere legal title for an accessory to the legal estate? If the admission be a legal duty, I do not know what I have to do with it. *Burgess v. Wheate*, supposing it well decided, established, that, if a man had got the legal estate, the court would not take it from him, except for some person who had a claim; but does it follow that the court will give him the legal estate?"<sup>(g)</sup>

As courts of law have no cognisance of any but legal rights, it should seem that a *mandamus* might be issued from the Queen's Bench for compelling the admission even of a bare trustee.<sup>(h)</sup>

If the *cestui que trust of chattels*, whether real or personal, die without leaving any *next of kin*, the beneficial interest will not, in this case, remain with the trustee, but like all other *bona vacantia* will vest in the king by his prerogative. However, this doctrine will only take effect where the *cestui que trust* dies *intestate*,<sup>(i)</sup> or has appointed an *executor*, who by the language of the will itself is excluded from any beneficial interest;<sup>(k)</sup> for an executor not expressly made a trustee by \*the will, was before the late act,<sup>(l)</sup> entitled *prima facie* to the sur- [\*325] plus for his own benefit, and that statute has now converted him into a trustee for the *next of kin* only, and does not seem to have altered the old law, as between him and the *crown*, in case there be no next of kin.

We may conclude this head with the general proposition, that a trustee is, under no circumstances, allowed to set up a title adverse to his *cestui que trust*.<sup>(m)</sup> But though he may not claim against his own

(f) See 1 Ed. 212; and see *Onslow v. Wallis*, 1 Mac. & Gor. 506.

(g) *Williams v. Lord Lonsdale*, 3 Ves. 752; see 756, 757.

(h) See *King v. Coggan*, 6 East, 431; *S. C.* 2 Smith, 417; *King v. Wilson*, 10 B. & C. 80.

(i) *Jones v. Goodchild*, 3 P. W. 33; *Rutherford v. Maule*, 4 Hagg. 213.

(k) *Middleton v. Spicer*, 1 B. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8; *Russell v. Clowes*, 2 Collyer, 648; *Powell v. Merrett*, 1 Sm. & Gif. 381; and see *Barclay v. Russell*, 3 Ves. 424; *Henchman v. Attorney-General*, 2 S. & S. 498; *S. C.* 3 M. & K. 485; *Cave v. Roberts*, 8 Sim. 214.

(l) 11 G. 4 & 1 W. 4, c. 40.

(m) See *Attorney-General v. Munro*, 2 De Gex & Smale, 163; *Stone v. Godfrey*, 5 De Gex, Mac. & Gor. 76; *Ex parte Andrews*, 2 Rose, 412; *Kennedy v. Daly*, 1 Sch. & Lef. 381; *Shields v. Atkins*, 3 Atk. 560; *Pomfret v. Windsor*, 2 Ves. 476;

*cestui que trust*, yet he is not bound to deliver over the property to his *cestui que trust* if he cannot safely do so by reason of notice of title in another which is paramount to the trust.<sup>(n)</sup>

[\*326]

## \*CHAPTER XIII.

## THE DUTIES OF TRUSTEES OF CHATELS PERSONAL.

WE next advance to the *duties* of trustees, and as trusts of chattels personal are of the most frequent occurrence, we may first advert to trustees of property of this description. We may consider this branch of our subject under five heads:—1. The reduction of the chattel into the possession of the trustee. 2. The safe custody of it. 3. The proper investment of the trust fund. 4. The liability of trustees to payment of interest in cases of improper detainer: and, 5. The distribution of the trust fund.

## SECTION I.

## OF REDUCTION INTO POSSESSION.

The first duty of trustees is to place the trust property in a state of security. Thus if the trust fund be an equitable interest of which the legal estate cannot be at present transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for otherwise the party who created the trust might incumber the interest he has settled in favor of a purchaser without notice.<sup>(a)</sup>

If the trust-fund be a *chose en action*, which may be reduced into possession, it is the trustees' duty to be active in getting it in; and any unnecessary delay in this respect will be at their own personal risk.

[\*327] Thus, in *Caffrey v. Darby*,<sup>(b)</sup> a woman, in contemplation of \*a second marriage, had assigned a leasehold interest with stock in trade, household goods, &c., to trustees upon trust to raise 800*l.* to be applied to the purposes in the settlement mentioned, with a proviso that, so long as her intended husband should pay 100*l.* *per annum* until the whole 800*l.* should be discharged, the trustees should allow him to remain in possession of the premises. In the course of the first four years the trustees were paid to the amount of 250*l.*, but by small instalments and at irregular periods, and received nothing afterwards. At the end of eight years the husband became bankrupt, and a great part of the 800*l.*

*Conry v. Caulfield*, 2 B. & B. 272; *Langley v. Fisher*, 9 Beav. 90; *Reece v. Trye*, 1 De Gex & Sm. 279.

(n) *Neale v. Davies*, 5 De Gex, M. & G. 258.

(a) See *Jacob v. Lucas*, 1 Beav. 436.

(b) 6 Ves. 488; and see *Platel v. Craddock*, C. P. Cooper's Cases, 1837-8, 481; *McGachen v. Dew*, 15 Beav. 84; *Wiles v. Gresham*, 2 Drewry, 258; *Waring v. Waring*, 3 Ir. Ch. Rep. 335.



was lost. Sir W. Grant said, "This was money payable by instalments, not a sum to be paid at once as a mortgage is, and secured, too, partly upon an estate daily diminishing in value, a short lease for twenty-five years commencing three years before the settlement, and upon stock in trade, &c., a sort of property very uncertain in its nature. From these two considerations, the diminishing value of the property and the mode of payment by instalments, I am of opinion the trustees were not justified in any great indulgence, for it was evident the debtor's inability would be constantly augmenting. If he was unable to pay the first instalment, he must be still less able to pay the sums accumulated from permitting them to run together. The cases of payment by instalments and at once are quite different. In the latter the debtor may be able to pay that sum to-morrow, or next year; but the chance of receiving money by instalments depends upon its being regularly received. Therefore, even though the trustees might not have been under the necessity of exacting from the husband the money on the precise day, yet they ought not to have given great latitude. They were hardly justifiable in permitting two instalments to become due; still less three; still less four. But here they permit him to remain four years in possession without receiving a shilling. That is evidence he was not prosperous: it did not turn out as well as he expected. It might be supposed that he was running in debt with other people. The trustees might have expected a controversy with the creditors. They ought therefore to have taken some step for the security of the infant *cestuis que trust*, particularly when that is combined with the other circumstance \*that the property was diminishing in value." And his honour decreed [\*328] the trustees to make good the deficiency.

Again, a testator had directed the money arising from his rents to be invested by his executors in the 3 per cent. annuities for the purpose of accumulation. Arrears were allowed to run to the amount of 1500*l.*, and from the tenor of the master's report it was evident, that, by the employment of proper means, the whole of the arrears might have been recovered. The executors produced no evidence in justification of their conduct. Sir Thomas Plumer said, "I am anxious not to discourage persons from acting as executors by throwing difficulties in their way, and I am willing to make every proper allowance; but I must not forget the established doctrine of this court. *If persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer infants to be injured by their negligence. If there be CRASSA NEGLIGENTIA, and a loss sustained by the estate, it falls upon the executors.* Here, for want of evidence, I cannot say that all this rent could not have been recovered; and I am reluctantly obliged to assume that no exculpatory evidence could be produced, and therefore they must be charged with these arrears. Interest upon the arrears was but faintly pressed for, and ought not to be given." (c)

An executor is not to allow the assets of the testator to remain outstanding upon *personal* security, (d) though the debt was a loan by the

(c) *Tebbs v. Carpenter*, 1 *Mad.* 290.

(d) *Lowson v. Copeland*, 2 *B. C. C.* 156; *Caney v. Bond*, 6 *Beav.* 486; *Bailey*

testator himself on what he considered an eligible investment.(e) And it will not justify the executor, if he merely apply for payment through his attorney, but do not follow it up by instituting legal proceedings.(f) Personal security changes from day to day, by reason of the personal responsibility of the party giving the security; and as a testator's means [\*329] of judging of the value of that responsibility \*are put an end to by his death, the executor who omits to get in the money within a reasonable time becomes himself the security.(g) An executor will be equally liable, as has lately been decided, if he knows that a *co-executor* is a debtor to the testator's estate, and does not take the same active steps for recovery of the amount from the co-executor, as it would have been his duty to take against a stranger. And it does not vary the case that the testator himself was in the habit of leaving money in the hands of that co-executor, and treating him as a private banker.(h) Nor will an executor be excused for not calling in money on personal security by a clause in the will, that the executors are to call in "securities not approved by them;" for such a direction is construed as referable to securities upon which a testator's property may allowably be invested, and not as authorising an investment which the court will not sanction.(i) If, however, it appears, or there is reasonable ground for believing, that had legal steps been taken they would have produced no result, the executor or trustee is not liable.(k)

But where a great part of the assets was outstanding on *Mexican bonds*, and the executors sold in the course of the *second year* from the testator's decease, it was held by Lord Cottenham, that, if executors were bound at once to convert the assets without considering how far it was for the interest of the persons beneficially entitled, there would of necessity be always an immediate sale, and often at a great sacrifice of property; that executors were entitled to exercise a *reasonable discretion* according to the circumstances of the particular case. The will had directed the trustees to convert "with all convenient speed," but this, observed his lordship, was the ordinary duty implied in the office of every executor.(l)

Money outstanding upon good *mortgage* security an executor is not [\*330] called upon to realise until it be wanted in the course of \*administration.(m) "For what," said Lord Thurlow, "is the executor to do? Must the money lie dead in his hands, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction, but on any new securities it will be at his own

v. Gould, 4 Y. & C. 221; and see *Attorney-General v. Higham*, 2 Y. & C. Ch. Ca. 634.

(e) *Powell v. Evans*, 5 Ves. 839; *Bullock v. Wheatley*, 1 Coll. 130; and see *Tebbs v. Carpenter*, 1 Mad. 298; *Clough v. Bond*, 3 M. & Cr. 496.

(f) *Lowson v. Copeland*, *supra*.

(g) *Bailey v. Gould*, 4 Y. & C. 226, per Baron Alderson.

(h) *Styles v. Guy*, 1 Mac. & Gor. 422.

(i) *Styles v. Guy*, 1 Mac. & Gor. 428; and see *Scully v. Delany*, 2 Ir. Eq. Rep. 165.

(k) *Clack v. Holland*, 19 Beav. 262; *Maitland v. Bateman*, 16 Sim. 233, note.

(l) *Buxton v. Buxton*, 1 M. & C. 80; *Hughes v. Empson*, 22 Beav. 181.

(m) *Orr v. Newton*, 2 Cox, 274; and see *Howe v. Earl of Dartmouth*, 7 Ves. 150.

peril.”(n) But the trustee is bound to ascertain that there is no reason to suspect the goodness of the security.(o)

When the property is reduced into possession by actual payment, as both trustees cannot receive, but both must join in signing the receipt, the money may be paid to one without responsibility on the part of the other. But a trustee will not be justified in allowing the co-trustee to retain the money in his hands for a longer period than the particular circumstances of the case may necessarily require. And, indeed, the safer course, where practicable, is, that the money should not be handed to either of the trustees personally, but should, in the first instance, be paid into some bank of credit to their joint account.(p)

The powers of trustees to sign receipts will be considered more at large hereafter, but we may here observe that if money be payable to A., who is simply a trustee for B., it would clearly be a breach of trust to pay it to the trustee against the wishes of the *cestui que trust* ;(q) on the other hand, if the nature of the trusts be such that the person having the money in his hands could not reasonably be expected to see to the application, he may pay safely to the trustee.(r) Some recent cases in Ireland have gone further, and taken a distinction between moneys being pure personalty and moneys payable on sales or mortgages. Thus where the owner of a policy assigned it to a trustee for a minor without a power of signing receipts, the master of the rolls expressed an opinion (for a decision was not then called for,) that if the insurance company were released from the debt by the person to whom they were liable at \*law, and whom the owner of the policy had constituted the trustee of it, they would not be answerable in equity for the exe- [\*331] cution of the trusts, and he did not understand how the rules applicable to purchasers of real property could be extended to debtors so as to implicate them in trusts created by their creditors.(s) And in another case,(t) where the insurer effected a policy in 700*l.*, and then assigned it to a trustee to pay 400*l.* to one, and 300*l.* to another, without an express power of signing receipts, and a *bonus* of 33*l.* was added to the policy, and the insurer being dead without a personal representative, and one of the *cestuis que trust* being also dead without a sufficient personal representative, and the other *cestui que trust* being in America, the company instituted an interpleader suit,—the Lord Chancellor of Ireland laid down the same distinction as the master of the rolls between a personal debt and money arising out of real estate, and held that the trustee could sign a discharge, and that the interpleader suit could not be sustained. In the case of a debt, he said, the person indebted was bound and compellable to pay to some one; but in the case of realty, the purchaser or mortgagee was a voluntary intervenient, and could pay or not at his own free will. The decision of the lord chancellor may have been correct, for the circumstance of one *cestui que trust* being abroad, and the other dead

(n) Orr v. Newton, 2 Cox, 276.

(o) See Ames v. Parkinson, 7 Beav. 384.

(p) See post, pp. 332, 333.

(q) Pritchard v. Langher, 2 Vern. 197.

(r) Glynn v. Locke, 3 Dru. & War. 11.

(s) Fernie v. Maguire, 6 Ir. Eq. Rep. 137.

(t) Ford v. Ryan, 4 Ir. Ch. Rep. 342.



without a personal representative, as was also the insurer himself, may have justified the company in paying to the trustee, but the principles laid down went far beyond any previous authority, and it remains to be seen whether they will be adopted by the English courts. In the mean time the suggested distinction between pure personalty and money raised out of realty cannot be relied upon.

Where the holder of the money knows that the trustee intends to commit a breach of trust, it would not be safe to pay to the trustee, whether he has an express power of signing receipts or not. But, of course, the fact of such knowledge must be brought home to the person paying, so as to make him *particeps criminis*, a privy to the fraud.(u)

[\*332]

## \*SECTION II.

## OF THE SAFE CUSTODY OF THE CHATTEL.

Lord Northington once observed, "No man can require or with reason expect that a trustee should manage another's property with the same care and discretion that he would his own;(v) but the maxim has never failed, as often as mentioned, to incur strong marks of disapprobation, A trustee is called upon to exert precisely the *same* care and solicitude in behalf of his *cestui que trust* as he would do for himself; but *greater* measure than this a court of equity will *not* exact.(w)

A trustee, in an old case, had kept 40*l.* of trust money in his house, and 200*l.* belonging to himself, and was robbed of both by his servant, and was held not to be responsible.(x) An administratrix had left goods with her solicitor to be delivered to the party entitled. The articles were stolen, and the court said it was the same as if they had been in the custody of the administratrix, and it was too hard to charge her with the loss.(y)

An executor has been held not to be answerable for having omitted to insure leasehold premises against fire.(z)

If the subject of the trust be money, it may safely and most properly be deposited for temporary purposes in some responsible banking-house;(a)

(u) See *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137.

(v) *Harden v. Parsons*, 1 Ed. 148.

(w) *Morley v. Morley*, 2 Ch. Ca. 2, per Lord Nottingham; *Jones v. Lewis*, 2 Ves. 241, per Lord Hardwicke; *Massey v. Banner*, 1 Jac. & Walk. 247, per Lord Eldon; *Attorney-General v. Dixie*, 13 Ves. 534, per *eundem*.

(x) *Morley v. Morley*, ubi supra; and see *Jones v. Lewis*, 2 Ves. 241; *Ex parte Belchier*, Amb. 220; *Ex parte Griffin*, 2 Gl. & J. 114.

(y) *Jones v. Lewis*, 2 Ves. 240.

(z) *Bailey v. Gould*, 4 Y. & C. 221; and see *Ex parte Andrews*, 2 Rose, 410; *Dobson v. Land*, 8 Hare, 216.

(a) *Rowth v. Howell*, 3 Ves. 565; *Jones v. Lewis*, 2 Ves. 241, per Lord Hardwicke; *Adams v. Claxton*, 6 Ves. 226; *Ex parte Belchier*, Amb. 219, per Lord Hardwicke; *Attorney-General v. Randall*, 21 Vin. Ab. 534, per Lord Talbot; *Massey v. Banner*, 1 Jac. & Walk. 248, per Lord Eldon; *Horsley v. Chaloner*, 2 Ves. 85, per Sir J. Strange; *France v. Woods*, Taml. 172; *Lord Dorchester v. Earl of Effingham*, id. 279; *Freem v. Woods*, Taml. 172; *Johnson v. Newton*, 11 Hare, 160; *Wilks v. Groom*, 3 Drewry, 584.

but the trustee will make himself \*liable for the failure of the bank, if he pay the money to his own credit and not to the separate account of the trust estate.<sup>(a)</sup> [\*333]

Thus a receiver transmitted two bills to a banker to be placed to his account, and in each bill the receiver's own money was mixed up with the trust-fund. The bank failed, and Lord Eldon decreed the receiver to make good the loss. "A receiver," he said, "cannot be allowed to say he is transmitting the money of the estate as such, if he permit it to stand with his own money to his own credit; for, in that case, if any intermediate failure of the receiver happen, *his* estate gets the benefit of the remittance, and the trust estate none. Then, on the failure of the bank, I will not permit him to say he shall not suffer the loss, but the trust estate shall suffer it."<sup>(b)</sup>

And in the more recent case of *Massey v. Banner*,<sup>(c)</sup> where A. and B. were trustees for creditors, and C. acted for them in collecting the debtor's estate, and paid the assets into a bank to his own account, and, on the failure of the bank, A. and B. filed a bill against C. to compel him to account for the loss, Lord Eldon said, "C. is liable in the same manner as other persons acting as trustees, executors, receivers, or assignees; and the principle applying to all these classes of persons is properly expressed in these terms—That the court does not expect them to take *more* care of the property entrusted to them than they would do of their own. If a receiver of the court undertake to receive rents in the country he cannot send them in cash, and if he collect them in paper, taking the same care with respect to it as a reasonable attention to his own affairs would dictate to him if it was for himself, if he remits what he has collected by the best bills he can find by the same means that would be reasonable if it were on his own account, then I should say that it would be very difficult to charge him, for he has done the best he could for his employers. But I cannot persuade myself that the principle is satisfied, unless the result is as beneficial to them as it \*would be to himself. If an assignee pays money into his banker's hands as money belonging [\*334] to the estate, and the banker fails, the assignee is undoubtedly clear from the loss; but if instead of distinguishing it, he pays it all into his own account, then it is his account there; there is nothing like a declaration of trust of it, and it is familiar to consider him as having it in the banker's hands for himself, making him liable for it, and charging him with interest at the rate (since the late statute) of 20*l.* per cent. This is because, if he had become bankrupt, it would have gone to the credit of his estate; for it is clear in that case, that, if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid in to his account; they have no notice that it belongs to the estate: the account is between him and them. The same has been the case with executors and trustees; and

(a) *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Mad. 73; *Macdonnell v. Harding*, 7 Sim. 178; *Matthews v. Brise*, 6 Beav. 239.

(b) *Wren v. Kirton*, 11 Vesey, 380.

(c) 1 Jac. & Walk. 241. See observations of L. J. K. Bruce and L. J. Turner on this case; *Pennell v. Deffell*, 4 De Gex, Mac. & Gor. 386, 392.

I apprehend, that, for the safety of mankind, the principle must be, that, if you desire to deal for me as you would for yourself, it must be so that the dealing for me, if unfortunate, shall not be more so to me than it would have been to you, if it had been for yourself. In the case of the assignee, if he fails, his estate has all the benefit of the money: the parties for whom he acts have none: he does not therefore deal for them as he would for himself." His lordship therefore held that C. was responsible.

And a trustee must not lodge the money in such a manner as to *put it out of his own control*, though it be not under the control of another. White, a receiver appointed by the court, in order to induce Adams and Burlton to become his sureties, entered into an arrangement with them, that the rents, as received, should be deposited in a bank in the joint names of the sureties, and that all drafts should be in the *handwriting* of Anderson, who was Adams's partner, and should be *signed* by White. An account was opened upon this footing: the bank failed; and a considerable loss was incurred. Sir J. Leach held that the receiver and his sureties were not to be answerable; <sup>(d)</sup> but his honor's decision was reversed on \*appeal by the lord chancellor; <sup>(e)</sup> and this reversal [\*335] was afterwards affirmed on the final appeal, by the house of lords. <sup>(f)</sup> On the latter occasion Lord Brougham observed, "It is clearly the duty of a receiver, as an officer of the court, to keep in his own hands the control over the fund. It is admitted, that, if he had parted altogether with that control, he would have been answerable, whether the loss actually incurred could be traced to and connected with that severance and that want of power over the fund or not. Does it make any difference, that instead of *entirely* parting with the control, he gave a *veto* on all his dealings with it to a mere stranger? Anderson was wholly unknown to the court, which reposed its confidence in its own officer, and looked only to him: the acts of a stranger it had no power over, and could in no respect control. Consider the position of the fund, had a sudden run come upon the bank. White, on hearing it, would be bound, in the discharge of his official duty, instantly to draw the whole balance, and put it in a place of greater safety; but the arrangement which he had made prevented him from doing this without the concurrence of Anderson, who lived at some distance, and who, even had he lived in the same town, might have been absent, or unable from illness to act, and who, had he been both on the spot and able to write the cheques, might have been unwilling and refused. He might have been disposed to court the favour of his bankers at the risk of the estate; he might have drawn all his own money out and recompensed the banker by leaving that of the receivership, and this without incurring the least risk himself; for he was not surety, nor in any way bound either to the court or the receiver. Let us ask ourselves how any individual would like, during a run upon his banker, to have his hand paralysed by such a *veto* as was given to Anderson? What anxiety would he feel during the delay that must elapse in the interval between the run beginning and the

(d) *Salway v. Salway*, 4 Russ. 60.

(f) *Id.* 220.

(e) 2 R. & M. 215.



messenger returning with the cheques filled up for his signature! Is a receiver entitled to place the custody or administration of the fund in a situation which, in the case of any individual dealing with his own estate, would \*be the source of such anxiety? No person in his own [\*336] case would make such an engagement without extreme necessity or ample equivalent; and the least that can be required by the court of its officers is that degree of diligence and care which any man would use in the conduct of his own affairs.”(g)

In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he had placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the *joint* account of the co-executors, but the bank was in the habit of answering the cheques of either co-executor *singly*. “It is the custom of bankers,” said Lord Chancellor Hart, “that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and for convenience of business, it is necessary this risk should be incurred, for it would be very hard to transact business if every cheque should be signed by all the executors. The mode in which the account has been kept, brings it, in effect, I admit, almost to the same thing as paying it directly to the co-executor; but each executor has full dominion and may deal with the general fund as he thinks proper, without making his co-executor chargeable for a *devastavit*.”(h) However, his lordship admitted that “if there were any fraud or collusion, wilful default, or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case would be altered.”(i) But even with this qualification the doctrine is so contrary to the principle of other cases that no trustee or executor could be advised to rely upon it in practice.(k)

The trustee will also be answerable for the failure of the bank, if he deposited the money there for safe custody when it was his clear duty to have invested it in the funds for improvement,(l) or if when the purposes of the trust do not require a balance to be kept in hand he lend a sum to the bank at interest upon no other security than their notes, for \*this in effect cannot be distinguished from an ordinary loan [\*337] on personal security, which the court never sanctions.(m)

The trustee in the custody of the trust property, wherever it may be placed, must always be careful not to amalgamate it with his own, for, if he do, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own.(n)

(g) MS.

(h) Kilbee v. Sneyd, 2 Moll. 186; see 200, 213.

(i) Id. 203, 213.

(k) See Clough v. Dixon, 8 Sim. 594; 3 M. & Cr. 490.

(l) Moyle v. Moyle, 2 R. & M. 710; Johnston v. Newton, 17 Jur. 826.

(m) Darke v. Martyn, 1 Beav. 525.

(n) Lupton v. White, 15 Ves. 432; and Panton v. Panton, cited ib. 440; Chedworth v. Edwards, 8 Ves. 46; White v. Lincoln, 8 Ves. 363; Fellowes v. Mitchell, 1 P. W. 83; Duke of Leeds v. Earl Amherst, 20 Beav. 239.

## SECTION III.

## OF INVESTMENT.

Where the trust-money cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust* by the *investment* of it on some proper security.

It was the opinion of Lord Northington that a trustee might be justified in lending on personal credit. "The true touchstone," he said, "by which such cases are to be tried is, whether the trustee has been guilty of a breach of trust or not. If he has been guilty of a gross negligence, it is as bad in its consequences as a fraud, and is a breach of trust. The lending money on a note is not a breach of trust, without other circumstances *crasse negligentiæ*."(*o*) But the case from which this *dictum* is taken has been called by Lord Eldon, from the extraordinary doctrines contained in it, "a curious document in the history of trusts;"(*p*) and certainly it is now indisputably settled that a trustee [*\*338*] *cannot* lend on personal security.(*q*) \*Lord Hardwicke said, "a promissory note is *evidence* of a debt, but no *security* for it;"(*r*) and Baron Hotham observed, that "lending on personal credit for the purpose of gaining a larger interest was a species of *gaming*;"(*s*) and Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it ought to be *run*g in the ears of every one who acted in the character of trustee."(*t*) And it will not alter the case that the money is lent on the *joint* security of several obligors,(*u*) or to a person to whom the testator himself had been in the habit of advancing money on personal security.(*v*)

Of course a trustee may lend on personal security, where he is expressly empowered to do so by the instrument creating the trust.(*w*) But no such authority is communicated by a direction to place out the money at interest *at the trustee's discretion*,(*x*) or *on such good security as the trustee can procure, and may think safe*.(*y*) And if joint trustees be empowered to lend on personal security, they *may not* lend to one of

(*o*) *Harden v. Parsons*, 1 Ed. 148.

(*p*) *Walker v. Symonds*, 3 Sw. 62.

(*q*) *Adye v. Feuilliteau*, 1 Cox, 24; *Darke v. Martyn*, 1 Beav. 525; *Holmes v. Dring*, 2 Cox, 1; *Terry v. Terry*, Pr. Ch. 273; *Ryder v. Bickerston*, cited *Harden v. Parsons*, 1 Ed. 149, note (*a*), and more fully *Walker v. Symonds*, 3 Sw. 80, note (*a*); *Vigrase v. Binfield*, 3 Mad. 62; *Walker v. Symonds*, 3 Sw. 63; *Anon. case*, Loft. 492; *Keble v. Thompson*, 3 B. C. C. 112; *Wilkes v. Steward*, Coop. 6; *Clough v. Bond*, 3 M. & Cr. 496, per Cur.; and see *Pocock v. Reddington*, 5 Ves. 799; *Collis v. Collis*, 2 Sim. 365; *Blackwood v. Borrowes*, 2 Conn. & Laws. 477; *Watts v. Girdlestone*, 6 Beav. 188.

(*r*) *Ryder v. Bickerston*, cited *Walker v. Symonds*, 3 Sw. 81, note (*a*).

(*s*) *Adye v. Feuilliteau*, 1 Cox, 25.

(*t*) *Holmes v. Dring*, 2 Cox, 1.

(*u*) S. C.

(*v*) *Styles v. Guy*, 1 Mac. & Gor. 423.

(*w*) See *Forbes v. Ross*, 2 B. C. C. 430; S. C., 2 Cox, 113

(*x*) See *Pocock v. Reddington*, 5 Ves. 794.

(*y*) *Wilkes v. Steward*, Coop. 6; *Styles v. Guy*, 1 Mac. & Gor. 422; *Attorney-General v. Higham*, 2 Y. & C. Ch. Ca. 634; and see *Mills v. Osborne*, 7 Sim. 30; *Westover v. Chapman*, 1 Coll. 177.

*themselves*, for the settlor must be taken to rely upon the united vigilance of *all* the trustees with respect to the solvency of the *borrower*.<sup>(z)</sup> And when the court has assumed the administration of the estate by the institution of a suit, it will not direct an investment on personal security, though there be a power to lay out on either personal or government security, but will order all future investments to be made on government security.<sup>(a)</sup>

And where the trustees of a sum of money for A. for life, [\*339] \*remainder for her children, were authorized by the settlement to lend the trust fund upon real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in trade whom A. had married, and the money was lost, they were made responsible for the amount. Sir William Grant said, "The authority did not extend to an *accommodation*: it was evident the trustees had, upon the marriage, been induced to *accommodate* the husband with the sum, which they had no power to do."<sup>(b)</sup> In one case, where trustees were empowered to lend money to the husband on his personal security, to be used by him in business, and the trustees advanced 600*l.* to the husband, and he became insolvent, and the trustees received a dividend of 70*l.*, and they afterwards lent this sum to the husband on his recommencing business upon the security of his bond, and the money was lost, it was held that the trustees were not to be punished for the discretion they had exercised, for it did not follow, that, if a person once became insolvent, he was never again to be trusted.<sup>(c)</sup> In another case, however, where a trustee was *required* at the request of the wife to advance money to the husband upon his bond, and the husband took the benefit of the Insolvent Act, and the wife requested the trustee to advance 80*l.* to the husband upon his bond, and the trustee refusing, the wife filed her bill to have the trustee removed, the court said, "that so total a change had taken place in the circumstances and position of the husband that the clause in question became no longer applicable to him and ceased to have any effect, and the trustee had done his duty when he refused to lend the money."<sup>(d)</sup>

No applications from *cestuis que trust* to their trustees are so frequent as for a more productive investment for the benefit of the tenant for life. In these cases the trustees must remember that the power was not given them for the purpose of favouring one party more than another, and that if they lend themselves improperly to the views of the tenant for life \*at the expense of the remaindermen, they will be held per- [\*340] sonally responsible.<sup>(e)</sup>

And in particular where there is the ordinary power of varying securities *with the consent of the tenant for life*, the trustees must consider the intention to be that as the control is given to the tenant for life for *his*

(z) — v. Walker, 5 Russ. 7; and see *Stickney v. Sewell*, 1 M. & C. 14; *Westover v. Chapman*, 1 Coll. 177.

(a) *Holmes v. Moore*, 2 Moll. 328.

(b) *Langston v. Ollivant*, Coop. 33.

(c) *Burt v. Ingram*, July 15, 1835, V. C. E. MSS.

(d) *Boss v. Godsall*, 1 Y. & C. Ch. Ca. 617. Compare cases, p. 349, *infra* note (b).

(e) *Raby v. Ridehalgh*, 1 Jur. N. S. 363; and see *Stuart v. Stuart*, 3 Bear. 430.



protection, so the trustees have a discretion reposed in them for the protection of the *remaindermen*. Thus the power would not authorise a conversion of the trust fund from three per cent. consolidated bank annuities into long annuities, for though the tenant for life would improve his income the capital by the terminable nature of the security would be gradually deteriorating; <sup>(f)</sup> nor even from three per cent. consolidated bank annuities into three and a quarter per cent. bank annuities, or any permanent annuities of a higher rate, for the latter annuities being more likely to be redeemed, and therefore less valuable, the gain, however small, of the tenant for life, would be at the expense of the remaindermen. <sup>(g)</sup>

All the conditions annexed to the power must be strictly observed, as if the authority be to lend to the husband *with the consent of the wife*, the trustees cannot make the advance on their own discretion, and take the consent of the wife at a subsequent period. <sup>(h)</sup>

A power "to place out at interest, or other way of improvement," will not authorise an investment of the money in any trading concern; <sup>(i)</sup> or in fact any other investment than a government or real security, <sup>(k)</sup> but otherwise it seems if the direction be not to "invest" but to "employ" the money, which has been thought to savour of a trading concern. <sup>(l)</sup>

[\*341] \*Upon a marriage the wife's portion was settled upon the intended husband and wife for their respective lives, remainder to the issue, and a power was given to the trustees to "call in and lay out the money at greater interest if they could." The trustees sold out stock to the amount of 400*l.*, and laid it out in the purchase of an *annuity* for one life, and had the life insured. Lord Manners said the purchase of the annuity was not a proper disposition of a trust-fund settled as this was. <sup>(m)</sup>

If trustees be authorised to invest *in stock or real security*, and they lend on *personal security*, and the *money* is lost, they shall be answerable, not for the amount of the stock which might have been purchased, but for the principal money lost, for if real security had been taken, the principal only would have been forthcoming to the trust, and the want of real security is all that is imputable to the trustees. <sup>(n)</sup>

A trustee may not invest the trust-fund in the *stock of any private*

(f) *Bate v. Hooper*, 5 De Gex, Mac. & Gor. 338.

(g) In reference to the new three per cent. annuities (formerly three and a quarter per cent.,) it is to be observed that, though specially exempt from further reduction until 1874, which the three per cent. consols are not, the latter are protected by a legislative provision requiring a year's notice to be given before redemption.

(h) *Bateman v. Davis*, 3 Mad. 98; and see *Cocker v. Quayle*, 1 R. & M. 535; *Norris v. Wright*, 14 Beav. 303; *Wiles v. Gresham*, 2 Drewry, 258; 5 De Gex, Mac. & Gor. 770.

(i) *Cock v. Goodfellow*, 10 Mod. 489.

(k) *Dickenson v. Player*, C. P. Cooper's Cases, 1837-8, 178.

(l) S. C.

(m) *Fitzgerald v. Pringle*, 2 Moll. 534.

(n) *Marsh v. Hunter*, 6 Mad. 295; *Shepherd v. Moulds*, 4 Hare, 500; *Rees v. Williams*, 1 De Gex & Sm. 314; *Robinson v. Robinson*, 1 De Gex, Mac. & Gor. 247, overruling *Hockley v. Bantock*, 1 Russ. 141; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379.

company as South Sea stock, bank stock,(o) &c., for the capital depends upon the management of the governors and directors, and is subject to losses. The South Sea company, for instance, might trade away their whole capital, provided they kept within the terms of their charter.(p) "Bank stock," said Lord Eldon, "is as safe, I trust and believe, as any government security; but it is not government security, and therefore this court does not lay out or leave property in bank stock; and what this court will decree it expects from \*trustees and executors."(q) [\*342] But if a trustee or executor make the mistake of investing in bank stock instead of bank annuities, he is not liable for the actual loss in sterling value, but only for the excess of the loss beyond that which would have resulted if the investment had been made in bank annuities.(r)

Where a trustee was authorised to invest in "the three per cent. consols, or three per cent. reduced, or any government securities," the court refused to allow an investment on exchequer bills as not within the power.(s) But where a trustee having engaged to lend a sum upon mortgage, which was authorised by the powers of the will, instead of leaving the money idle at his banker's, laid it out in exchequer bills as a temporary investment, and productive of interest with little fluctuation of value during the interval while the mortgage was in preparation, the court held that such a dealing with the fund was justifiable.(t) And it has since been expressly ruled that exchequer bills do fall within the description of government securities.(u)

And where a testator directed all his property, except ready money or moneys in the *funds*, to be converted, and the proceeds to be invested in three per cent. consols or *other government securities* in England, it was held, that Greek bonds, though guaranteed by this country, were not comprehended in the word "*funds*," and that they ought to be converted, though the court disavowed any intention of saying that bonds of that description might not, in other cases, be deemed government securities.(v)

With respect to investments upon *mortgage* Lord Harcourt said,

(o) *Hynes v. Redington*, 1 Jones & Lat. 589; 7 Ir. Eq. Rep. 405.

(p) *Trafford v. Boehm*, 3 Atk. 440, see 444; *Mills v. Mills*, 7 Sim. 501; *Adie v. Fenniliteau*, cited *Hancom v. Allen*, 2 Dick. 499, note; *Emelie v. Emelie*, 7 B. P. C. 259. The reporter speaks in the last case of South Sea *annuities*; but no doubt the investment had been made in South Sea *stock*. In *Trafford v. Boehm* the investment had been in South Sea *stock*, but the reporter cites the case by a similar mistake as one of investment in South Sea *annuities*. For the difference between the two, see *Trafford v. Boehm*, 3 Atk. 444. *Adie v. Fenniliteau*, or more correctly, *Feuilliteau*, has been examined in the registrar's book, but the point does not appear.

(q) *Howe v. Earl of Dartmouth*, 7 Ves. 150.

(r) *Hynes v. Redington*, 7 Ir. Eq. Rep. 405; 1 Jones & Lat. 589.

(s) *Ex parte Chaplin*, 3 Y. & C. 397.

(t) *Matthews v. Brise*, 6 Beav. 239. But the trustee having left the exchequer bills in the hands of the broker for more than a year, and without being earmarked, and the broker having disposed of the exchequer bills for his own purposes, and become bankrupt, the trustee was, on that ground, made responsible for the value of the bills at the date of the bankruptcy, with 4 per cent. interest.

(u) *Ex parte South Eastern Railway Company*, 9 Jur. 650.

(v) *Burnie v. Getting*, 2 Coll. 324.

[\*343] "The case of an executor's laying out money without the indemnity of a decree, if it were on a *real security* and one that there was no ground at the time to suspect, had not been settled; but it was his opinion the executor, under such circumstances, was not liable to account for the loss." (w) And Lord Hardwicke, (x) and Lord Alvanley, (y) appear likewise to have held that a trustee or executor would be justified in laying out the trust-fund upon well secured *real estates*. But at the present day, when there is such a facility of investing upon government security through the medium of the public funds, a trustee or executor could scarcely be advised to make an investment upon mortgage where no authority was expressly given him. The practice of the court, which ought to regulate the conduct of trustees, is now clearly established. Upon application to Lord Thurlow to have part of a lunatic's estate invested upon landed security, his lordship said, "Though he felt perfectly convinced by what was stated to him, that the security was unexceptionable, yet he would not permit such a precedent to be made. In latter times the court had considered it as improper to invest any part of the lunatic's estate upon *private security*." (z) And Sir John Leach refused a similar application with reference to the money of infants, at the same time expressing his surprise that any precedent could have been produced to the contrary. (a) Where there was no power of investing on mortgage, and the trustees intending to invest on government securities, afterwards, at the instance of the tenants for life, and to procure a higher rate of interest, invested on mortgages which proved deficient, they were liable for the difference to the *cestui que trust* in remainder. The ground of the decision was, that the trustees had consulted the benefit of the tenants for life at the expense of the remainderman. The [\*344] court gave no opinion upon the dry question, whether trustees without a power could safely invest on mortgage, but did not encourage the idea that they could. (b) Of course trustees would not be justified in lending upon *mortgage*, when they are directed by the testator to invest exclusively in the *funds*. (c)

Trustees may be, as they generally are, *expressly* empowered to invest on real security. Where this is the case, the trustees may sell out three per cent. bank annuities, and invest the proceeds on a mortgage; for, in this case, although the tenant for life may obtain a higher rate of interest, yet no injury is done to the remainderman, as the capital is a constant quantity, and if the tenant live long enough, he himself will have the benefit.

Under the ordinary power of varying securities, a trustee would not be

(w) *Brown v. Litton*, 1 P. W. 141; and see *Lyse v. Kingdon*, 1 Coll. 188.

(x) *Knight v. Earl of Plymouth*, 1 Dick. 126.

(y) *Pocock v. Reddington*, 5 Ves. 800.

(z) *Ex parte Cathorpe*, 1 Cox, 182; *Ex parte Ellice*, Jac. 234.

(a) *Norbury v. Norbury*, 4 Mad. 191; and see *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Ellice*, Jacob, 234; *Ex parte Fust*, 1 C. P. Cooper, T. Cott. 157, note (c); *Ex parte Franklyn*, 1 De Gex & Sm. 531; *Barry v. Marriot*, 2 De Gex & Sm. 491; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgway*, 1 Hog. 309.

(b) *Raby v. Ridehalgh*, 1 Jur. N. S. 363.

(c) *Pride v. Fooks*, 2 Beav. 430; *Waring v. Waring*, 3 Ir. Ch. Rep. 331.



justified in lending a sum of stock upon a mortgage of real estate, conditioned for the replacing of the specific stock at a future day, and the payment of half-yearly sums equal to the dividends in the mean time. For the exercise of the power must be supposed to be beneficial to the parties interested, or some of them; whereas, in this case, it is difficult to point out what possible advantage can accrue, though the dividends be repaid and the stock be replaced. Nothing more is secured to the trust than would have been by the effect of the original investment, had it remained in *statu quo*; while a government security is changed for the risk of a private security, and perhaps some expenses may be incurred and this for no purpose. In short, such an arrangement would look like an accommodation to some friend, rather than an investment in furtherance of the trust.

The case is not so objectionable when the stock is to be replaced, and in the mean time interest is to be paid on the amount produced by the sale; for here one of the persons whose interest is to be consulted, viz., the tenant for life, does receive a benefit *in presenti*, and the remainderman, if \*he outlive the tenant for life and the mortgage continue so long, will derive the same advantage. [\*345]

When trustees propose to lend upon mortgage, their attention should be directed to two leading topics of inquiry; viz., 1. The sufficiency of the value: and 2. The title of the borrower.(d)

They must be careful not to advance more than two-thirds of the actual value of the estate, if it be *freehold land*;(e) or if the property consist of *freehold houses* they should not lend so much as two-thirds,(f) but only half of the actual value.(g) The rule, however, of two-thirds, or one-half, is only a general one; and where trustees have lent on the security of property of less value, but have acted honestly, they have been protected by the court, and have even been allowed their costs.(h) As to buildings used in trade, and the value of which must depend on external and uncertain circumstances, trustees would not be justified in lending so much as one-half.(i)

Trustees are also precluded from lending on mortgage to one of themselves;(k) and a power to lend on real securities will not justify a loan upon railway mortgages, for how is the value to be ascertained?(l) And where trustees are empowered to lend "on such securities as they should approve," they are still bound to make inquiries, and exercise a sound discretion whether the securities are of sufficient value;(m) and if trus-

(d) See *Waring v. Waring*, 3 Ir. Ch. Rep. 336.

(e) *Stickney v. Sewell*, 1 M. & C. 8; *Norris v. Wright*, 14 Beav. 307; *Macleod v. Annesley*, 16 Beav. 600.

(f) *Stickney v. Sewell*, *Norris v. Wright*, *ubi supra*; *Phillipson v. Catty*, 7 Hare, 516; *Drosier v. Brereton*, 15 Beav. 221.

(g) *Stretton v. Ashmall*, 3 Drew. 12; *Macleod v. Annesley*, 16 Beav. 600.

(h) *Jones v. Lewis*, 3 De Gex & Sm. 471. Reversed on appeal, it is believed, by Lord Truro, on Feb. 26, 1852, but on what grounds not known.

(i) *Stickney v. Sewell*, 1 M. & Cr. 8.

(k) *Stickney v. Sewell*, *ubi supra*; and see — *v. Walker*, 5 Russ. 7; *Francis v. Francis*, 5 De Gex, Mac. & Gor. 108.

(l) *Mant v. Leith*, 15 Beav. 525.

(m) *Stretton v. Ashmall*, 3 Drewry, 10.

tees lend on any irregular securities, the onus lies on the trustees to show the sufficiency of the security.<sup>(n)</sup>

[\*346] \*Of course where trustees and executors are empowered by the will to lay out the money upon real securities, they are authorized in continuing it upon existing mortgages.<sup>(o)</sup> But the trustees should make inquiry as to the sufficiency of the security.

If trustees have a power of lending to three, on a mortgage of their joint interest in a particular property, they cannot lend to two of them, though the two may be able to pass the whole interest. Neither can the trustees lend to the three without taking any security at the time though after an interval of two years they succeed in obtaining the security. It is no excuse to say that the delay in taking the security did not occasion the loss. The answer is, that the terms of the power were not complied with.<sup>(p)</sup>

Though trustees, having an express power, may without risk, if upon a proper motive, sell out bank annuities and invest the proceeds on mortgage; yet, where the court has had the administration of the trust, it has refused so to exercise the power, as a measure not for the benefit, except remotely, of those in remainder, and of questionable advantage to the tenant for life.<sup>(q)</sup>

Road bonds, or mortgages of the tolls and toll-houses, are *real* securities, though they may not be eligible real securities; and if a testator, having road bonds, empower his executor to *leave* any part of his assets on existing "real securities," they are not bound to call in the road bonds, but may exercise a discretion. Trustees, however, might not be justified in lending trust money on road bonds as an original investment.<sup>(r)</sup>

Where trust-money is lent upon *mortgage*, it is desirable to keep the trust out of sight, that when the money is paid off, the trust deed may not become an essential link in the mortgagor's title. It is usual, therefore, to insert in the mortgage deed a declaration, that the money advanced belongs to the trustees (not, however, described in that character, but by \*name,) on a joint account, and that the receipt of the [\*347] survivors or survivor, his executors or administrators, shall be a sufficient discharge; a practice which, assuming the principle deed to confer the power of executing the trust and of giving receipts on the survivors and survivor, his executors and administrators, does not seem open to much objection, and has received the sanction of frequent usage. Any declaration of trust that may be requisite is executed by a separate deed. By this method should the mortgage be called in before any change of trustees occurs, no inconvenience arises. Upon a change of trustees, however, the difficulty of so framing a transfer to them of the mortgage as not to disclose the trust is very great. Some conveyancers, indeed, treat the difficulty as insurmountable, and disclose the trust; others recite in the transfer an actual payment of the mortgage money

(n) *Stretton v. Ashmall*, 3 Drewry, 10.

(o) *Angerstein v. Martin*, T. & R. 239; *Ames v. Parkinson*, 7 Beav. 379.

(p) *Fowler v. Reynal*, 3 Mac. & Gor. 500; 2 De G. & Sm. 749.

(q) *Barry v. Marriott*, 2 De Gex & Sm. 241.

(r) *Robinson v. Robinson*, 1 De Gex, Mac. & Gor. 447.

by the new trustees to the old, a practice open to the objection that it involves a recital absolutely contrary to fact. A third and middle course, frequently adopted, is as follows : A. and B. being appointed new trustees in the room of C. and D., the recitals omit to notice the appointment of A. and B. as new trustees, and merely state that A. and B. "have become entitled to the mortgage, and required C. and D. to convey and assign to them." But this last method is by no means free from difficulty. The degree of inaccuracy of statement is perhaps no greater than that involved in the original joint account clause ; but the absence of consideration creates embarrassment, and there seems room for contention by a future purchaser of the mortgaged estate that he has a right to know *how* A. and B. became entitled. Another mode is to recite that C. and D. are possessed of the mortgage moneys and security in trust for A. and B. to whom the same belong on a joint account, and who are desirous of having the same vested in them ; a method affording greater prospect of success than that last mentioned, but involving at the same time somewhat more divergence from the real facts.

Where trustees are expressly authorized to lend on real securities in England, Wales, or Great Britain, they are now empowered by the act of parliament, 4 & 5 Gul. 4, c. 29, to lend on real securities in Ireland. But the second section \*enacts that all loans in which any *minor*, [\*348] *unborn child*, or *person of unsound mind* is interested, shall be made by the direction of the Court of Chancery or Exchequer, such direction to be obtained *in any cause or(s) upon petition* in a summary way. And the fourth section provides, that every such loan shall be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales, or Great Britain. And by the fifth section it is declared, that the provisions of the act shall not apply to any case in which the trust contains an express restriction *against* investment on securities in Ireland.

Upon an application to the court under this act, for the investment of a fund in court upon an Irish security, the master of the rolls refused even a reference as to the propriety of such a step ; for though it would be beneficial to the tenant for life as increasing the annual produce, it was not so safe a security as regarded the remaindermen, and it was the duty of trustees to act impartially for the benefit of *all* parties alike.<sup>(t)</sup> And Lord Justice Knight Bruce, when vice-chancellor, appears to have entertained similar views.<sup>(u)</sup> But such an order had been made by the vice-chancellor of England ;<sup>(v)</sup> and a similar order was afterwards made by the lord chancellor, though his lordship's attention was called to the case at the rolls. His lordship observed, that since the act of parliament, England and Wales must, for the purpose, be taken to include Ireland ; and that the parties in remainder were interested, as well as the tenant for life, in investing the money upon a security which would yield a higher

(s) *Ex parte French*, 7 Sim. 510.

(t) *Stuart v. Stuart*, 3 Beav. 430.

(v) *Ex parte French*, 7 Sim. 510.

(u) *Kirkpatrick's Trust*, 15 Jurist, 941.



rate of interest, for *if it remained there long enough they would have the benefit of it.*(w)

If the consent of a married woman be required by the trust, and the husband and wife present a petition, with her concurrence, under the act, this does not fulfil the requisition of the wife's consent to the investment; for when the husband and wife join in any legal proceeding, it is not the act of the \*wife; and whenever she is to be bound, it is [\*349] necessary that she should appear distinctly and separately from the husband.(x)

Trustees under a power to lend on mortgage, ought not to invest on security of leaseholds for *lives*, for there can be no security without resorting to a policy of insurance, and then, *quatenus* the policy, they rely upon the funds and credit of a private company.(y) This remark, however, does not apply to leases for lives in Ireland renewable for ever, (where the power authorises an investment on real securities in Ireland;) but the trustees must not advance more than one-half the value of the property.(z) In the case of leaseholds, the lessee generally does not know the lessor's title; and where this is the case, it is an additional reason why trustees cannot accept the security.

Where there is a power to lend on mortgage, there may be no objection to an investment on long *terms of years*, at a pepper-corn rent; but, as to leaseholds of short duration, and incumbered with covenants and clauses of forfeiture, without laying down the rule that a trustee would not be justified under any circumstances in lending on such a security, he would at least be treading on very delicate ground, and the *onus* would lie heavily upon him to make out the perfect property of the investment.(a) If the trustees be authorised and *required*, at the instance of the tenant for life, to invest the trust fund in a *purchase* of leaseholds, they have no option if the tenant for life insist upon his right.(b)

If a power be given to invest trust money in a purchase of lands, or other freehold hereditaments, a trustee may no doubt purchase an estate with a suitable house upon it; but it is conceived, that under such a power trustees ought not to purchase a house merely. This is a property of a wasting nature; and although the tenant for life might be bound to keep it in ordinary repair, he could not be compelled to preserve it [\*350] \*against natural decay. It is clear that a power to invest in government annuities would not justify the purchase of long annuities; and there is a similar difference between land and houses, the former being worth about thirty years' purchase, but the latter much less, so that the tenant for life would be benefited at the expense of the remainderman.

Trustees having a power to invest in a purchase of copyholds would not be justified in buying copyholds for *lives* only.(c)

(w) *Ex parte Pawlett*, 1 Phill. 570.

(x) *Norris v. Norris*, 14 Beav. 291.

(y) *See Lander v. Weston*, 3 Drew. 389.

(z) *Macleod v. Annesley*, 16 Beav. 600.

(a) *See Wyatt v. Sharratt*, 3 Beav. 498; *Fuller v. Knight*, 6 Beav. 209.

(b) *Cadogan v. Earl of Essex*, 2 Drewr. 227; *Beauclerk v. Ashburnham*, 8 Beav. 322.

(c) *Trench v. Harrison*, 17 Sim. 111. N. B. The words, "*of inheritance*," in the marginal note, do not occur in the settlement itself.

Trustees cannot be advised to make advances upon a second mortgage, not only because they have neither the legal estate nor the possession of the title deeds, but also because they may be placed under serious difficulties by the acts of the first mortgagee. If he file a bill of foreclosure, the trustees will forfeit their interest unless they redeem, which they have no means of doing; and if the first mortgage contain a power of sale, the mortgagee may sell the property at a great disadvantage, and the trustees cannot prevent it, unless by redemption, which the state of the trust fund may, very probably, not permit.(d)

Of course, trustees may not join with others in a mortgage, so as to mix up the trust fund with the rights of strangers; and still less could they take a joint mortgage in the name of a common trustee, for this would be also a delegation of their duty.

There does not appear to be any absolute objection to a loan by trustees on the security of a *reversion*; but they should be careful, in such a case, not to advance more than the proper proportion, according to the nature of the property, of the *present value of the reversion*, and in taking a security of this kind a full power of sale would be an essential provision.

Trustees who have a power to lend on real securities, may not lend on personal security with a judgment entered up against the borrower; though by the 1 & 2 Vict. c. 110, judgments are \*made a charge [\*351] on all the lands of the debtor, as if he had, by writing under his hand agreed to charge the same.(e)

When trustees propose to lend on mortgage, they should be careful not to part with the money, except on delivery of the security; for, of course they will be liable for all the consequences if they sell out stock, and allow their solicitor or agent to receive the money on his representation that the mortgage is ready, and it afterwards turns out that the proposed security was a pure invention, and that the money has been misapplied.(f)

In the absence of any express power, the only unobjectionable investment is in one of the government or bank annuities; for here, as the directors have no concern with the principal, but merely superintend the payment of the dividends and interest till such time as the government may pay off the capital, it is not in their power, by mismanagement or speculation, to hazard the property of the shareholder.(g) And of the government or bank annuities, the one which the court has thought proper to adopt is the three per cent. consolidated bank annuities, the fund, from its low rate of interest, the least likely to be determined by redemption.(h) Let a trustee who has money in hand which he ought to render productive, invest it on this security, at the same time execut-

(d) See *Norris v. Wright*, 14 Beav. 308; *Robinson v. Robinson*, 16 Jur. 256; *Drosier v. Brereton*, 15 Beav. 226; *Waring v. Waring*, 3 Ir. Ch. Rep. 337.

(e) *Johnston v. Lloyd*, 7 Ir. Eq. Rep. 252. Decided upon the corresponding enactment in the Irish Act, 3 & 4 Vict. c. 105.

(f) *Rowland v. Witherden*, 3 Mac. & Gor. 568; *Hanbury v. Kirkland*, 3 Sim. 265.

(g) *Trafford v. Boehm*, 3 Atk. 444, per Lord Hardwicke.

(h) See *Howe v. Earl of Dartmouth*, 7 Ves. 151. See too p. 340, supra note (g).

ing a declaration of trust, that in the event of his bankruptcy or insolvency the fund may be identified, and he has done his duty, and will not be answerable for any subsequent depreciation.<sup>(i)</sup>

[\*352] In the report of *Hancom v. Allen*(*k*) it is said, "The trust money had been laid out by the trustees in *funds* which sunk in their value, without any *mala fides*; but the same not being laid out in the *fund* in which the court directs trust money to be laid out, the trustees were ordered to account for the principal and pay it into the bank, and then that it should be laid out in bank three per cent. annuities." It might be inferred from this statement, that, if a trustee invest in any other government security than the three per cent. consols, the court would hold him accountable for any loss by a fall of the stock; but such a doctrine would be extremely severe against trustees,<sup>(l)</sup> and the case as extracted from the registrar's book is no authority for any such proposition. Thomas Phillips, a trustee of 1500*l.*, instead of investing the money in a purchase of land and in the mean time on some sufficient security, as required by the trust, had advanced it to his brother, John Phillips, a banker, without taking any other precaution than accepting a simple acknowledgment of the loan. John Phillips continued to pay interest upon the money for some time, but eventually became insolvent, and the fund was lost. The court under these circumstances called upon the trustee to make good the amount. The decision was reversed in the house of lords, perhaps on the ground of the plaintiff's acquiescence.<sup>(m)</sup> A trustee, however, must confine himself to government securities; for he is not allowed to invest even on public securities, which are not *government* securities.<sup>(n)</sup>

Where *successive estates* are limited, the scale should of course be held evenly as between all parties, and the tenant for life should not be allowed, by an investment on a security less safe or less permanent than the usual one, and therefore yielding to the present holder an increased rate of interest, to advance himself at the expense of the remainderman. Upon this principle, if a testator's estate consist of bank stock, long annuities, or other fund either not a government security or not of the most permanent character, the court, as soon as its \*observation [353] is attracted to the circumstance, invariably directs a conversion of such estate into three per cent. bank annuities.<sup>(o)</sup> Even four per cent. and five per cent. bank annuities, as more liable to the chance of

(i) *Bird v. Lockey*, 2 Vern. 744, 4th point; *Ex parte Champion*, cited *Franklin v. Frith*, 3 B. C. C. 434; *Powell v. Evans*, 5 Ves. 841, and *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Knight v. Earl of Plymouth*, 1 Dick. 126, per Lord Hardwicke; *Peat v. Crane*, cited *Hancom v. Allen*, 2 Dick. 499, note; *Clough v. Bond*, 3 M. & C. R. 496, per Lord Cottenham; *Holland v. Hughes*, 16 Ves. 114, per Sir W. Grant; *Moyle v. Moyle*, 2 R. & M. 716, per Lord Brougham; and see *Jackson v. Jackson*, 1 Atk. 513.

(k) 2 Dick. 498.

(l) See *Angell v. Dawson*, 3 Y. & C. 316; *Ex parte a projected Railway*, 11 Jur. 160; *Matthews v. Brise*, 6 Beav. 239; *Band v. Fardell*, 1 Jur. N. S. 1214.

(m) 7 B. P. C. 375.

(n) *Sampayo v. Gould*, 12 Sim. 435, per Sir L. Shadwell.

(o) *Howe v. Earl of Dartmouth*, 7 Ves. 137, and the cases cited, *ib.*; *Mills v. Mills*, 7 Sim. 501; *Bate v. Hooper*, 5 De G. M. & G. 338. See *Pickering v. Pickering*, 4 M. & Cr. 289.



redemption, are ordered to be similarly converted.(p) It follows that trustees, who must be guided by the conduct of the court, should, where successive interests are limited, invest in the three per cent. bank annuities, and in that fund exclusively.

However, when the trustees were directed by the will to invest "on *government* or other *good* security," and part of the testator's estate consisted of navy five per cents., and the tenant for life continued to receive the dividends for more than thirty years, the court refused to hold the trustees liable, for not having converted the navy five per cents. into three per cent. consols.(q) Of course, where the fund is already invested in consols, it would be a gross breach of trust to sell out and invest the proceeds in an irregular fund, as, for instance, in long annuities.(r)

Where a tenant for life has been wrongly in possession of the dividends of a stock which ought to have been converted, he will be accountable to the remainderman for the excess of his receipts beyond the income he would have received had the fund been properly invested.(s) Should the tenant for life be insolvent, the executors of the testator would *probably* be decreed to make compensation to the suffering party; but Lord Eldon said, he would not state what the court would do in such a case, for it depended on many circumstances.(t) In the subsequent case of *Dimes v. Scott*,(u) where the executors were *expressly directed* to convert the testator's personal \*estate into money, and invest the proceeds in government or real securities in trust for A. for life, [\*354] remainder to B., and the executors for eleven years permitted A. to receive 10 per cent. interest upon an Indian loan, it was held they were chargeable with the difference between the 10 per cent. interest they had wrongfully paid, and the interest that would have resulted from a conversion into three per cent. consols at the expiration of one year from the testator's decease.

If any stock, other than three per cent. consols, be *specifically* bequeathed to A. for life, remainder to B., in that case the court has no power to direct a conversion into three per cent. consols;(v) and a power of varying the securities expressly given to the executors will make no difference in this respect, for the testator is held to have given them the authority, not with the intention of varying the relative rights of the legatees, but merely with the view of adding security to the property.(w)

A testator gave his residuary estate to executors upon trust to pay

(p) *Howe v. Earl of Dartmouth*, 7 Ves. 151, per Lord Eldon; *Powell v. Cleaver*, and other cases, cited id. 142.

(q) *Band v. Fardell*, 1 Jur. N. S. 1214.

(r) *Kellaway v. Johnson*, 5 Beav. 319.

(s) *Howe v. Earl of Dartmouth*, 7 Ves. 137, see 150, 151; *Mills v. Mills*, ubi supra; and see *Pickering v. Pickering*, 4 M. & Cr. 289.

(t) See *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Holland v. Hughes*, 16 Ves. 114.

(u) 4 Russ. 195; and see *Mehrtens v. Andrews*, 3 Beav. 72.

(v) *Lord v. Godfrey*, 4 Mad. 455; *Alcock v. Sloper*, 2 M. & K. 699; *Collins v. Collins*, ib. 703; *Bethune v. Kennedy*, 1 M. & C. 114; *Vincent v. Newcombe*, 1 Younge, 599; and see *Pickering v. Pickering*, 4 M. & Cr. 289.

(w) *Lord v. Godfrey*, 4 Mad. 455.

the annual produce to A. for life in equal portions at Lady-day and Michaelmas-day, and after his decease in trust for other purposes. A motion was made that the executors might invest a sum in their hands in the three per cent. bank annuities, but it was objected that the dividends of this stock were payable in January and July, whereas, if the money were laid out in the three per cent. reduced annuities, the dividends would be payable at the time directed by the testator; and Sir John Leach made the order accordingly.(x)

A mortgage may produce a higher rate of interest than an investment in the three per cent. consols; but in this case the advantage does not arise from the inferior nature of the security as in the instance of bank stock, nor from any perishable or redeemable quality as in the instance of the long annuities or the four per cents.; the court, therefore, will [\*355] \*not permit the mortgage to be called in without a previous inquiry by the master whether it will be for the benefit of all the parties interested.(y)

And where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the court of chancery, it is not the duty of the executor to transmit the assets to England to be invested in the three per cent. consols, but he may invest the property in the securities of the East India Company, and the tenant for life will be entitled to the dividends or interest, though to the amount of 10 or 12 per cent. If the parties return to England, and so come under the jurisdiction of the court, the fund may then be brought over at the instance of the remainderman, and the tenant for life must submit to the consequential reduction of his income.(z)

If trustees are bound by the terms of their trust to invest in the *public funds*, and instead of so doing they retain the money in their hands, the *cestuis que trust* may clearly elect to charge them with the amount of the money or with the amount of the stock which they might have purchased with the money.(a) And as the court expects a trustee, where the trust is of a permanent character, to invest the fund in three per cent. bank annuities, even though the settlement contain no express direction to that effect, the trustee, if he improperly retained the money in his hands, would, it seems, in this case also be held liable at the option of the *cestuis que trust* for the principal sum or the amount of stock which it would have purchased.(b)

But if trustees or executors be directed by the will to convert the testator's property and invest it in government or real securities, it was long a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been [\*356] made, and subsequent \*dividends, at the option of the *cestuis*

(x) Caldecott v. Caldecott, 4 Mad. 189.

(y) See Howe v. Earl of Dartmouth, 7 Ves. 150.

(z) Holland v. Hughes, 16 Ves. 111; S. C. 3 Mer. 685.

(a) Shepherd v. Moul, 4 Hare, 504, per Sir J. Wigram; Robinson v. Robinson, 1 De Gex, Mac. & Gord. 256, per Cur.

(b) Robinson v. Robinson, 1 De Gex, Mac. & Gor. 256, per Cur.

*que trust* ;(c) or whether they should be charged with the amount of principal and interest only, without an option to the *cestuis que trust* of taking the stock and dividends.(d) It has now been decided that the trustee is answerable only for the *principal money* and interest, and that the *cestuis que trust* have no option of taking the stock and dividends. The principle upon which the court proceeded, was that the trustee could be held liable only for not having done what it was his duty to have done, and the measure of his responsibility was that which the *cestuis que trust* must have been entitled to in whatever mode that duty was performed ; that the trustee might have discharged his duty without purchasing three per cent. bank annuities ; that the trustee was not bound retrospectively to have exercised the discretion one way or the other, but was answerable only for the consequences of not having exercised the discretion ; that to compel the trustee to purchase a sum of stock because the price had since risen, was to regulate the liability by an accidental or subsequent occurrence, and not by the superiority of the stock over a mortgage at the time when the investment ought to have been made.(e)

If the trust-fund be *standing on a proper security*, and the trustee call it in for no purpose connected with the trust, and therefore in dereliction of his duty, or for a purpose not authorised by the terms of the trust, he will be compellable, at the option of the *cestuis que trust*, either to replace the specific stock, or the stock into which, if not sold out, it would have been converted by act of parliament,(f) with the intermediate dividends,(g) or to account for the proceeds of the sale(h) with \*interest at 5 per cent.(i) And the breach of trust will not be [357] cured by a subsequent reinvestment upon the trusts of the stock unless the reinvestment be the same in specie.(k) But in a case where the trustee did not seek to make any thing himself, but was honourably unfortunate in having yielded to the importunity of one of the *cestuis que trust*, it was held by Sir A. Hart, that, although the trustee was bound to replace the specific stock, the *cestuis que trust* should not have the option of taking the proceeds with interest.(l) If the trustee become bankrupt, the *cestuis que trust* may at their option prove for the proceeds

(c) Hockley v. Bansock, 1 Russ. 141; Watts v. Girdlestone, 6 Beav. 188; Ames v. Parkinson, 7 Beav. 379; Ouseley v. Anstruther, 10 Beav. 456.

(d) Marsh v. Hunter, 6 Mad. 295; Gale v. Pitt, M. R. 10 May, 1830; Shepherd v. Moulds, 4 Hare, 500; Rees v. Williams, 1 De G. & Sm. 319.

(e) Robinson v. Robinson, 1 De Gex, Mac. & Gor. 247.

(f) Phillipson v. Gatty, 7 Hare, 516; Norris v. Wright, 14 Beav. 304, 305; Phillipson v. Munnings, 2 M. & Cr. 309.

(g) Davenport v. Stafford, 14 Beav. 335.

(h) Bostock v. Blakeney, 2 B. C. C. 653; Ex parte Shakeshaft, 3 B. C. C. 197; O'Brien v. O'Brien, 1 Moll. 533, per Sir A. Hart; Raphael v. Boehm, 11 Ves. 108, per Lord Eldon; Harrison v. Harrison, 2 Atk. 121; Bate v. Scales, 12 Ves. 402; Phillipson v. Gatty, 7 Hare, 516; Norris v. Wright, 14 Beav. 305; Rowland v. Witherden, 3 Mac. & Gor. 568; Wiglesworth v. Wiglesworth, 16 Beav. 269.

(i) Crackelt v. Bethune, 1 J. & W. 586; Mosley v. Ward, 11 Ves. 581; Pocock v. Reddington, 5 Ves. 794; Piety v. Stace, 4 Ves. 620; Jones v. Foxall, 15 Beav. 392.

(k) Lander v. Weston, 3 Drew. 389.

(l) O'Brien v. O'Brien, 1 Moll. 533.



with interest, or for the price of the specific stock at the date of the commission.<sup>(m)</sup>

If trustees are under an obligation to invest in the funds, and they pay the money into a bank with a direction to lay it out in bank annuities, and the bankers neglect to do it, and the trustees make no inquiry for five months, and the bankers fail, the trustees are answerable for the money or the stock at the option of the *cestuis que trust*.<sup>(n)</sup>

Trustees would not be justified in making any investment that would subject the trust-money to the power or control of any *one* of the trustees singly; they could not, for instance, lay out the fund upon India bills (supposing such a security were warranted by the settlement,) if made payable, not to all the trustees in their joint capacity, but to one of the trustees individually.<sup>(o)</sup>

Attorneys and solicitors employed in negotiating a loan of trust-moneys, may not be liable for a breach of trust if they have no other privity with the transaction than what arises from their professional duties, but they [\*358] will be deemed trustees \*and be responsible as such if they act professionally in carrying out a transaction which they know to be a breach of trust, and which is calculated to promote their own private ends.<sup>(p)</sup> In laying out trust-moneys, trustees would do well not to employ the same solicitor who acts for the borrower. Besides the inconveniences that arise from the doctrine of implied notice, there is in this case such a conflict of duties on the part of the solicitor, that he cannot adequately represent the interests of both lender and borrower.<sup>(q)</sup>

## SECTION IV.

### LIABILITY OF TRUSTEES TO PAYMENT OF INTEREST.

If the trustee be guilty of any unreasonable delay in investing the fund or transferring it to the hand destined to receive it, he will be answerable to the *cestui que trust* for interest during the period of his *laches*, and a trustee may be decreed to pay interest even though it be not prayed by the bill,<sup>(r)</sup> and will be liable to pay personally the costs of the suit.<sup>(s)</sup>

An *executor* should discharge the testator's liabilities as soon as he has collected assets sufficient for the purpose, and therefore if he keep money in his hands idle, when there is an outstanding debt upon which

(m) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Ex parte Gurner*, 1 Mont. Deac. & De Gex, 497.

(n) *Challen v. Shippam*, 4 Hare, 555.

(o) *Walker v. Symonds*, 3 Sw. 1, see 66; and see *Salway v. Salway*, 2 R. & M. 218; *Ex parte Griffin*, 2 Gl. & J. 114; *Clough v. Dixon*, 8 Sim. 594; 3 M. & C. 490.

(p) *Alleyne v. Darcey*, 4 Ir. Ch. Re. 199, see 204, 208; *Fyler v. Fyler*, 3 Beav. 550.

(q) See *Waring v. Waring*, 3 Ir. Ch. Re. 331.

(r) *Woodhead v. Marriott*, C. P. Coop. Cases, 1837-38, 62; *Turner v. Turner*, 1 J. & W. 39.

(s) *Tickner v. Smith*, 3 Sm. & Gif. 42.

interest is running, he will himself be charged with interest on a sum equal in amount to the debt, and if the outstanding debt carry interest at 5 per cent., the executor will be charged with interest at the same rate.<sup>(t)</sup>

After payment of debts and legacies, if the executor or administrator be guilty of *laches* in accounting for the surplus \*estate to the residuary legatee,<sup>(u)</sup> or next of kin,<sup>(v)</sup> he will be charged by [\*359] the court with interest for the balance improperly retained, whether the prayer of the bill extend to it or not.<sup>(w)</sup>

And, on the same principle, if the assignees of a bankrupt neglect to pay a dividend to the creditors,<sup>(x)</sup> or the receiver of an estate do not move the court in proper time to have the rents invested,<sup>(y)</sup> they will be ordered to account for the money with interest from the time the breach of duty commenced.

And an executor or other person cannot excuse himself by saying that he made no actual use of the money, but lodged it at his banker's,<sup>(z)</sup> and to a separate account,<sup>(a)</sup> for it was a breach of trust to *retain* the money: he was bound to make it *productive* to the *cestui que trust*.

But, where an executor conceived he was himself entitled to the residue, and the court considered his claim to be just in itself, but was obliged from a particular circumstance in the case to give judgment against him, it was thought too severe to put him in the situation of one who had neglected his duty, and the demand against him for interest was consequently disallowed.<sup>(b)</sup>

\*Formerly, indeed, it was held by the court, that an executor might employ the assets in his trade, or lend them upon security, [\*360] and he should not be called upon to account for the profits or interest.<sup>(c)</sup> And such was the case even where money which had been lent by the

(t) Dornford v. Dornford, as cited in Tebbs v. Carpenter, 1 Mad. 301; Hall v. Hallet, 1 Cox, 134; Turner v. Turner, 1 J. & W. 39.

(u) Forbes v. Ross, 2 Cox, 113; Seers v. Hind, 1 Ves. jun. 294; Younge v. Combe, 4 Ves. 101; Longmore v. Broom, 7 Ves. 124; Rocke v. Hart, 11 Ves. 58; Piety v. Stace, 4 Ves. 620; Ashburnham v. Thompson, 13 Ves. 402; Raphael v. Boehm, 11 Ves. 92; S. C. reheard, 13 Ves. 407; S. C. spoken to, 13 Ves. 590; Dornford v. Dornford, 12 Ves. 127; Franklin v. Frith, 3 B. C. C. 433; Littlehalves v. Gascoyne, 3 B. C. C. 73; Newton v. Bennet, 1 B. C. C. 359; Lincoln v. Allen, 4 B. P. C. 553; Crackelt v. Bethune, 1 J. & W. 586; Tebbs v. Carpenter, 1 Mad. 290.

(v) Hall v. Hallett, 1 Cox, 134; Perkins v. Baynton, 1 B. C. C. 375; Stackpoole v. Stackpoole, 4 Dow, 209, see 224; Heathcote v. Hulme, 1 J. & W. 122; Holgate v. Haworth, 17 Beav. 259.

(w) Hollingsworth v. Shakeshaft, 14 Beav. 492.

(x) Treves v. Townshend, 1 B. C. C. 384; In re Hilliard, 1 Ves. jun. 89.

(y) Foster v. Foster, 2 B. C. C. 616; Hicks v. Hicks, 3 Atk. 274; Hankey v. Garret, 1 Ves. jun. 236.

(z) Younge v. Combe, 4 Ves. 101; Franklin v. Frith, 3 B. C. C. 433; Treves v. Townshend, 1 B. C. C. 384; In re Hilliard, 1 Ves. jun. 89; Dawson v. Massey, 1 B. & B. 230; Browne v. Southouse, 3 B. C. C. 107; and see Rocke v. Hart, 11 Ves. 60.

(a) Ashburnham v. Thompson, 13 Ves. 402.

(b) Bruere v. Pemberton, 12 Ves. 386. But see Sutton v. Sharp, 1 Russ. 146; and Turner v. Maule, 3 De G. & Sm. 497.

(c) Grosvenor v. Cartwright, 2 Ch. Ca. 21; Linch v. Cappy, 2 Ch. Ca. 35; and see Brown v. Litton, 1 P. W. 140.

testator on good security was called in by the executor for the express purpose of being re-lent by himself. The executor, it was argued, was not bound to lend the assets, and if he did so, it was at his peril, and he was answerable for losses, and, if accountable for any loss, he was surely entitled to any gains.(d) But Lord North overruled the doctrine in spite of the alleged practice of the court for the last twenty years, and the authority of above forty precedents. As to the argument, that, if the money should be lost, the executor would be personally responsible, his lordship said, it was very well known that a man might insure his money at the rate of 1 per cent.(e)

A distinction was afterwards taken between a solvent and an insolvent executor; that the former, as he might suffer a loss, should take the gain, but as an executor who was insolvent at the time of the loan could incur no risk of a loss personally, he should not be allowed to take to himself any benefit.(f)

And Lord Hardwicke drew another distinction; that if an executor had *placed out* assets that were *specifically bequeathed*, he should be made to account for the interest, but the master was never directed to charge interest upon an executor who made use of *general* assets, come to his hands, *in the way of his trade*.(g)

But all these refinements have long since been swept away;(h) and the rule is now *universal*, that, whether the executor was solvent or insolvent, whether the money was part of \*the general assets or [361] specifically bequeathed, whether lent upon security or employed in the way of trade, the executor shall account for the utmost actual profits to the testator's estate.(i)

And where the money has been employed in trade, the *cestui que trust* has the option of taking the actual profits or of charging the executor with interest.(j) And an executor who is a trader is considered to employ the money in trade, if he lodge it at his banker's, and place it in his own name, for a merchant must generally keep a balance at his banker's, and this answers the purpose of his credit as much as if the money were his own.(k)

The rate of interest with which an executor is usually charged is 4 per cent.;(l) but the rule holds only where it does not appear that the exe-

(d) See *Ratliffe v. Graves*, 2 Ch. Ca. 152.

(e) *Ratliffe v. Graves*, 1 Vern. 196; S. C. 2 Ch. Ca. 152.

(f) *Bromfield v. Wytherley*, Pr. Ch. 505; *Adams v. Gale*, 2 Atk. 106.

(g) *Child v. Gibson*, 2 Atk. 603.

(h) As to the former distinction, see *Newton v. Bennet*, 1 B. C. C. 361; *Adye v. Feuillateau*, 1 Cox, 25; and as to the latter, see *Newton v. Bennet*, 1 B. C. C. 361.

(i) *Tebbs v. Carpenter*, 1 Mad. 304, per Sir T. Plumer; *Lee v. Lee*, 2 Vern. 548; *Adye v. Feuillateau*, 1 Cox, 24; *Piety v. Stace*, 4 Ves. 622, per Lord Alvanley.

(j) *Heathcote v. Hulme*, 1 J. & W. 122; *Anon. case*, 2 Ves. 630, per Sir T. Clarke; *Docker v. Somes*, 2 M. & K. 655; *Ex parte Watson*, 2 V. & B. 414; *Brown v. Sansome*, 1 M'Clel. & Y. 427; *Robinson v. Robinson*, 1 De Gex, Mac. & Gor. 257.

(k) *Treves v. Townshend*, ubi supra; *Moons v. De Bernales*, 1 Russ. 301; *In re Hilliard*, 1 Ves. jun. 90; *Sutton v. Sharp*, 1 Russ. 146; *Rocke v. Hart*, 11 Ves. 61; but see *Browne v. Southouse*, 3 B. C. C. 107.

(l) See *Forbes v. Ross*, 2 Cox, 116; *Hall v. Hallet*, 1 Cox, 138; *Tebbs v. Carpenter*, 1 Mad. 306; *In re Hilliard*, 1 Ves. jun. 90; *Browne v. Southouse*, 3 B. C.



executor has made greater interest, for the court invariably compels the executor to account for every farthing he has actually received.<sup>(m)</sup>

It is not easy to define the circumstances under which the court will charge executors and trustees with more than 4 per cent. interest, or with *compound* interest, and the principles by which the court is regulated in so doing are involved in much uncertainty. In a late case, the rule was thus laid down by the present master of the rolls: "If an executor has retained \*balances in his hands, which he ought to have invested, [\*362] the court will charge him with simple interest, at 4 per cent. If, in addition to such retention, he has committed a direct breach of trust, or if the fund had been taken by him from a proper state of investment, in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum. If, in addition to this, he has employed the money so obtained by him in trade or speculation, for his own benefit or advantage, he will be charged either with the profits actually obtained from the uses of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest."<sup>(n)</sup>

The previous dicta and decisions undoubtedly seem to establish, in accordance with the views just quoted, that an executor will be charged with interest at 5 per cent. where he is guilty, not merely of negligence, but of actual corruption or misfeasance, amounting to a wilful breach of trust.<sup>(o)</sup> But in a recent case before the present lord chancellor, his lordship expressed his disapprobation of charging the executor with a higher rate of interest by way of *penalty*, and stated his own opinion as follows: "What the court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it. I do not think there is any other intelligible ground for charging an executor with more interest than he has made, than one of those I have mentioned. *Misconduct* does not seem to me to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that [\*363] particular result."<sup>(p)</sup> The particular case \*before his lordship

C. 107; *Mosley v. Ward*, 11 Ves. 582; *Perkins v. Baynton*, 1 B. C. C. 375; *Treves v. Townshend*, 1 B. C. C. 386; *Hicks v. Hicks*, 3 Atk. 274; *Younge v. Combe*, 4 Ves. 101; *Rocke v. Hart*, 11 Ves. 58; *Hankey v. Garret*, 1 Ves. jun. 236; but see *Bird v. Lockey*, 2 Vern. 744, 4th point; *Carmichael v. Wilson*, 3 Moll. 79; *Attorney-General v. Alford*, 4 De Gex, Mac. & Gor. 843.

(m) *Forbes v. Ross*, 2 Cox, 116, per Lord Thurlow; *In re Hilliard*, 1 Ves. jun. 90, *per eundem*; *Hankey v. Garret*, 1 Ves. jun. 239, *per eundem*; *Brown v. Litton*, 10 Mod. 21, per Lord Harcourt; *Hall v. Hallet*, 1 Cox, 138, per Lord Thurlow.

(n) *Jones v. Foxall*, 15 Beav. 392.

(o) *Tebbs v. Carpenter*, 1 Mad. 306, per Sir T. Plumer; *Bick v. Motly*, 2 M. & K. 312; *Mousley v. Carr*, 4 Beav. 53, per Lord Langdale; and see *Crackelt v. Bethune*, 1 J. & W. 588; *Docker v. Somes*, 2 M. & K. 670; *Munch v. Cockerell*, 5 M. & Cr. 220; but see *Meador v. McCreedy*, 1 Moll. 119.

(p) *Attorney-General v. Alford*, 4 De Gex, Mac. & Gor. 851, 852. In *Mayor of Berwick v. Murray*, March 7, 1857, the lord chancellor explained that, what he thought in *Attorney-General v. Alford* was, "that, although there had been great

was merely one of *omission to invest*, under circumstances of gross negligence; and it is conceived that, although his observations cast a certain degree of doubt over the class of authorities last referred to, they cannot be considered as overruled.

Whether, where the money has been employed in trade, *simple* or *compound* interest shall, as a general rule, be charged, is a point upon which the decisions are at conflict, the older pointing invariably to *simple* interest as the proper measure of liability, but some of the more recent to *compound* interest. Respecting the *rate* of interest there has been no conflict. It has been almost invariably held to be 5 per cent.,<sup>(g)</sup> the court presuming every business to yield a profit to that amount; though Lord Thurlow, in one case, offered an inquiry whether, under the circumstances, such a rate of interest might not be too high;<sup>(r)</sup> and in another, where an executor proved extenuating circumstances, 4 per cent. only was charged.<sup>(s)</sup> The first case in which a trustee appears to have been charged with compound interest, by reason only of his having used trust money in trade, appears to have been that of *Walker v. Woodward*.<sup>(t)</sup> There Lord Gifford—the trustee acknowledging that he had made great profits, though he could not furnish the particulars, and the *cestui que trust* waiving the investigation of the actual gains—directed 5 per cent. interest to be charged *with annual rests*. Subsequently the late vice-chancellor of England refused to charge a trustee of a charity estate, who had used the trust moneys in carrying on his trade, with compound interest;<sup>(u)</sup> but in a later case, Sir John Leach charged an executor with compound interest under similar circumstances,<sup>(v)</sup> and in the two latest reported decisions on the subject, the present master of [364] the rolls, in accordance \*with the rule laid down by him (as before stated,) directed an account with rests.<sup>(w)</sup>

Where a testator *expressly directs an accumulation* to be made, and the executor disregards the injunction, it seems *compound* interest will be decreed.<sup>(x)</sup> “Where there is an express trust,” said Lord Eldon, “to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as to the prin-

misconduct on the part of Mr. A., in not communicating to the proper authorities the fact that trust moneys had come to his hands, yet that was not a sort of misconduct which enabled him (the Lord Chancellor) to charge Mr. A. with more than the ordinary rate of interest.” Taken from short-hand writer’s note of judgment.

(g) *Treves v. Townshend*, 1 B. C. C. 384; *Rocke v. Hart*, 11 Ves. 61, per Sir W. Grant; *Heathcote v. Hulme*, 1 J. & W. 122, see 134; *Attorney-General v. Solly*, 2 Sim. 518; *Mousley v. Carr*, 4 Beav. 53, per Lord Langdale; *Westover v. Chapman*, 1 Coll. 177; *Williams v. Powell*, 15 Beav. 461; *Robinson v. Robinson*, 1 De Gex, Mac. & Gor. 257.

(r) *Treves v. Townshend*, 1 B. C. C. 384. Sed quære.

(s) *Melland v. Gray*, 2 Coll. 295.

(t) 1 Russ. 107.

(u) *Attorney-General v. Solly*, 2 Simons, 518.

(v) *Heighington v. Grant*, 5 M. & Cr. 258; 2 Phil. 600.

(w) *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, id. 461; *Penny v. Avison*, 3 Jur. N. S. 62.

(x) *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford v. Dornford*, 12 Ves. 127; *Brown v. Sansome*, 1 McClel. & Younge, 427; *Knott v. Cottee*, 16 Beav. 77; but see *Tebbs v. Carpenter*, 1 Mad. 290; *Attorney-General v. Solly*, 2 Sm. 518; *Pride v. Fooks*, 2 Beav. 430; *Wilson v. Peake*, 3 Jur. N. S. 155.

cipal, to have lent the money to himself, upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest.”(y) And Lord Erskine said he concurred in the same principle, viz. “that a trustee directed to do an act from which the *cestui que trust* would derive a particular advantage, and not performing that trust, shall be charged precisely in the same manner as if he had performed it.”(z)

An executor will not in general be charged with interest but from the end of a year from the time of the testator’s decease. “The question,” said Lord Thurlow, “whether an executor shall be charged with interest on the assets retained in his hands, turns upon this, viz. whether the fund has been so kept for any other purpose than that of discharging the growing claims upon it. It frequently may be necessary for an executor to keep large sums in his hands, especially in the course of the first year after the decease of the testator, in which case such necessity is so fully acknowledged, that, according to the constant course of the court, the fund, until that time, is not considered distributable. *After that*, if the court observes that an executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust, the consequence of which is, that the court will charge the \*executor with interest.”(a) [\*365] “With respect to the general question of charging executors with interest,” observed Sir A. Hart, “there are two things to be kept in view, first, we are not to look so closely into the dates of a running account to calculate interest upon it, as to deter respectable men from undertaking the office of executor; and on the other hand we are not loosely to permit any man, however respectable, to retain the money of others in his hands without making it productive. An executor’s duty in this respect is to deal with the trust estate as a provident man would deal with his own, and every provident person makes interest of his money when he has got together a sum which he thinks to be worth while to lay out at interest.”(b)

It will be observed that, in the preceding cases, trustees and executors have been decreed to pay interest in respect only of moneys actually come to hand, and improperly retained; for when a fund has never been received, but has been inexcusably left outstanding and lost, it seems the court contents itself with holding the trustees liable for the *principal*, without enforcing against them the equity, that as the fund, if got in, would have become productive, the trustees ought further to be charged with interest.(c)

## SECTION V.

### OF THE DISTRIBUTION OF THE TRUST FUND.

It is incumbent upon the trustee to satisfy himself beyond doubt,

(y) *Raphael v. Boehm*, 11 Ves. 107.

(z) *S. C.* 13 Ves. 411.

(a) *Forbes v. Ross*, 2 Cox, 115.

(b) *Flanagan v. Nolan*, 1 Moll. 85.

(c) *Tebbs v. Carpenter*, 1 Mad. 290; and see *Lowson v. Copeland*, 2 B. C. C. 156.



before he parts with the possession of the property, who are the parties legally entitled to it. And the necessity of seeing that the trust-money comes to the proper hand is obligatory, not only on trustees regularly invested with the character, but to all persons having notice of the equities: as if A. lend a sum to B. and B. afterwards discovers that it is trust-money, he cannot pay it back to A. unless A. had a power of signing \*a receipt for it.(d) If through any misapprehension on [\*366] the part of the trustee the trust money finds its way into a channel not authorized by the terms of the trust, he will be held personally responsible for the misapplication to the parties who can establish a better claim. "I have no doubt," said Lord Redesdale upon one occasion, "the executors *meant* to act fairly and honestly, but they were misadvised; and the court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If under the best advice he could procure he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer."(e)

This must be considered as the *general* rule; but under *particular* circumstances the court might possibly hold an executor justified by having acted upon the advice of counsel. Thus, a testator had executed a promissory note in Switzerland for 600*l.*, but by a counter-note executed shortly after, it was declared that 400*l.* only was due upon valuable consideration. A Swiss court, upon proceedings taken there, had awarded the payment of the whole 600*l.* The executor in England, though by our law under the circumstances of the case but 400*l.* was demandable, had discharged the whole amount. Lord Alvanley said, "I very much wish, upon the rules of the court, I could hold the executor fully justified; but when I consider his neglect in making this payment of his own conjecture and to the wrong of the *cestuis que trust*, I must hold that the master was right in charging him. He certainly acted with a good intention, and imagined himself justified; but he thought fit to depend upon that which a prudent executor would not have relied on—this strange transaction in Switzerland. *If he had taken advice, and been advised by any gentleman of the law in this country that he was bound to make this payment, I would not have held him* [\*367] *liable, for I will \*not permit a testator to lay a trap for his executor, by doing a foolish act which may mislead him.*"(f)

Every executor is taken to know the law of this country, but otherwise as to foreign laws. Thus, where a legacy was given to a married woman domiciled in Scotland, and before payment of the legacy the husband died, and the executors of the testator paid the legacy to the wife, and

(d) *Sheridan v. Joyce*, 7 Ir. Eq. Rep. 115.

(e) *Doyle v. Blake*, 2 Sch. & Lef. 243; and see *Urch v. Walker*, 3 M. & C. 705, 706; *Turner v. Maule*, 3 De Gex & Sm. 497; *Peers v. Cecley*, 15 Beav. 209. In *Boulton v. Beard*, 3 De Gex, Mac. & Gor. 608, the fact that the trustees had acted upon the advice of counsel was not in evidence, which accounts for the silence of the L. J. upon this point in their judgments.

(f) *Vez v. Emery*, 5 Ves. 141. As to the effect of acting under advice of counsel in reference to costs, see *Angier v. Stannard*, 3 M. & K. 566; *Devey v. Thornton*, 9 Hare, 232; *Field v. Donoughmore*, 1 Dru. & War. 234; *Harper v. Munday*, 2 Jur. N. S. 1197.

the executors of the husband sued the executors of the testator for the same legacy on the ground that, by the law of Scotland where the wife was domiciled, the chose in action did not survive, as by the law of England, to the wife, but passed to the representatives of the husband, it was held, that the executors were not bound to know the law of Scotland, and as express notice of it was not proved against the executors, the prior payment was declared to be valid.(g)

In cases where there exists a mere shadow of doubt as to the rights of the parties interested, and it is highly improbable that any adverse claim will in fact, be ever advanced, the protection of the trustee may be provided for by a substantial bond of indemnity. In general, however, a bond of indemnity is a very unsatisfactory safeguard, for when the danger arises, the obligors are often found insolvent, or their assets have been distributed. And if the bond be to indemnify against a breach of trust, the court shows no mercy towards a trustee who admits himself to have wilfully erred by having endeavoured to arm himself against the consequences.

A trustee cannot be expected to incur the least risk, and therefore if all the equities be not perfectly clear, he should decline to act without the sanction of the court, and he will be allowed all costs and expenses incurred by him in an application for that purpose.(h) And as the trustee is indemnified \*by the decree of the court, he will appeal [\*368] from any decision to the court above at *his own risk*.(i)

The proceeding may be instituted either by the trustee or the *cestui que trust*; but in most cases a suit is sustained rather than originated by the trustee, but whether the trustee be plaintiff or defendant, he should take care before an order is made, that all parties who have any color of title are before the court, for if the trustee fail in his duty to point out the proper parties, it might be held that the order of the court under such circumstances did not indemnify him.

Where the bill is filed by a *cestui que trust* and it is found at the hearing that upon the true construction of the instrument he has no interest in the fund, yet if the point was so doubtful that the trustees could not safely act without the opinion of the court, the plaintiff will have his costs, as the declaration of the rights of the parties was necessary to the administration of the trust.(k) But the case of a plaintiff filing a bill on the ground of a contingent interest which fails stands on a different footing.(l)

The court, according to the old practice, could not have made a mere declaratory order without consequential directions,(m) and could not

(g) *Leslie v. Baillie*, 2 Y. & C. Ch. Ca. 91.

(h) *Talbot v. Earl of Radnor*, 3 M. & K. 252; *Goodson v. Ellisson*, 3 Russ. 583; *Curtis v. Candler*, 6 Mad. 123; *Knight v. Martin*, 1 R. & M. 70; S. C. *Taml.* 237; *Taylor v. Glanville*, 3 Mad. 176; *Angier v. Stannard*, 3 M. & K. 566. And see *Campbell v. Home*, 1 Y. & C. Ch. Ca. 664.

(i) *Rowland v. Morgan*, 13 Jur. 23.

(k) *Westcott v. Culliford*, 3 Hare, 274, and cases there cited; *Turner v. Framp-ton*, 2 Collyer, 336; *Boreham v. Bignall*, 8 Hare, 134; *Lee v. Delane*, 1 De Gex & Sm. 1.

(l) *Hay v. Bowen*, 5 Beav. 610.

(m) See *Daniell v. Warren*, 2 Y. & C. Ch. Ca. 292; *Shewell v. Shewell*, 2 Hare, 154; *Gaskell v. Holmes*, 3 Hare, 438; *Say v. Creed*, 3 Hare, 455.

have administered the trust in the presence of some only of the parties interested, or as to a part only of the trust estate, or as to the rights of persons entitled under a will without taking preliminary accounts; but now by 15 & 16 Vic. c. 86, sects. 50 & 51, the court is authorized to make declaratory orders merely, as also to adjudicate on questions in the presence of some only of the persons interested, and as to part only of the trust estate, and without ascertaining the particulars or accounts of the property touching which the questions have arisen. The opinion of the court may also be now obtained upon a special case under the provisions of Sir Geo. Turner's Act, 13 & 14 Vic. c. 35.

[\*369] \*A not unfrequent difficulty with a trustee in the distribution of a trust-fund is, that the *cestui que trust* is a *feme covert* whose husband has become *bankrupt* or *insolvent*, or has assigned the wife's share of the trust fund, or has deserted the wife. In the case of bankruptcy or insolvency, it is competent to the trustee to agree with the assignees, as he might have done with the husband, to divide the fund,<sup>(n)</sup> and the payment of one half to the assignees, and the settlement of the other half on the wife and children, is, in the absence of special circumstances, considered a reasonable apportionment.<sup>(o)</sup> As the moiety paid to the assignees represents the whole of the husband's interest, the entirety of the other moiety must be settled on the wife and children, to the utter exclusion of the husband,<sup>(p)</sup> except on failure of issue.<sup>(q)</sup> It would appear that in Lord Eldon's time a rule existed against giving the wife the *whole* fund.<sup>(r)</sup> More recently in a case<sup>(s)</sup> in the Exchequer, where the husband was an *insolvent*, Baron Alderson directed a settlement of the *whole* fund. "The situation," he said, "of an *insolvent* is very different from that of a *bankrupt*. The wife of an *insolvent* may be in the workhouse with her children, and yet if the *insolvent* afterwards acquires property, neither the wife nor the children will be benefitted by it, but the whole goes to the creditors. A *bankrupt*, on the other hand, after he has obtained his certificate, is a free man. It appears to me, therefore, that the *insolvent's* wife and children are entitled to the whole fund, and if I am bound by the practice of the court to take away any portion of it, I will take away a shilling." At the present day, it is clear that no distinction exists between insolvency and bankruptcy, and that the court will, wherever the special circumstances warrant the step, settle \*the whole on the wife and children.<sup>(t)</sup> Indeed, in every case arising in reference to the wife's

(n) Ryland v. Smith, 1 M. & C. 56.

(o) Napier v. Napier, 1 Dru. & War. 407; Vaughan v. Buck, 1 Sim. N. S. 287; Bagshaw v. Winter, 5 De Gex & Sm. 468.

(p) Lloyd v. Williams, 1 Mad. 450; Barker v. Lea, 6 Mad. 330; Whittem v. Sawyer, 1 Beav. 593.

(q) Carter v. Taggart, 5 De Gex & Smale, 49; Gent v. Harris, 10 Hare, 383; Bagshaw v. Winter, 5 De Gex & Sm. 468.

(r) Dunkley v. Dunkley, 2 De Gex, Mac. & Gor. 396.

(s) Brett v. Greenwell, 3 Y. & C. 230.

(t) Gardner v. Marshall, 14 Sim. 575; and see Re Kincaid, 1 Drew. 326; Watson v. Marshall, 17 Beav. 363; Dunkley v. Dunkley, 2 De Gex, Mac. & Gor. 390; Carter v. Taggart, 5 De Gex & Smale, 49; Gent v. Harris, 10 Hare, 383; and see Bonner v. Bonner, 17 Beav. 86; Koeber v. Sturgis, 22 Beav. 588.



equity to a settlement, the court exercises a discretion with reference to the particular circumstances, namely, the conduct of the parties,<sup>(u)</sup> the wife's means of livelihood,<sup>(v)</sup> the settlement, if any, previously made upon her,<sup>(w)</sup> and the sums before received by the husband in respect of the wife's fortune.<sup>(x)</sup> The trustee should of course endeavour to act as the court itself would direct.

The wife's claim in equity to a settlement prevails even against the assignees of the husband for valuable consideration, except where the wife is tenant for life only, when the wife has no equity against the purchaser.<sup>(y)</sup>

A case of perplexity to trustees which, until recent decisions had settled the law, arose not unfrequently, was as follows:—A fund was settled on A. for life, and after his decease on B., a married woman, absolutely; and, in order to reduce the wife's *chose in action* into possession, the husband proposed to purchase the prior life-interest, and have it assigned to himself or his wife. In such case, it was asked, were the trustees justified in considering the fund as reduced into possession, and payable to the husband, or could the wife claim by survivorship, on the ground that her interest, notwithstanding the assignment of the life-estate, must still be regarded in equity as of a reversionary nature, and so incapable of reduction into possession? If the assignment was made to the *husband*, it might be said, that, as the life-interest was possessed by him in his *own right*, and the reversionary interest in *right of his wife*, the two could not coalesce; and if the assignment was made to the wife so that the husband \*would have both interests in the same right, it might be said that the *feme* on the coverture ceasing might [\*371] disclaim the accession of interest that caused the merger, and that, as the transaction on the face of it was a mere contrivance of the parties to defeat the right of the wife, she might hold the trustees answerable for the consequences.

In a case where 10,000*l.* stock was settled in this manner, and it was proposed that the husband should purchase the life-interest for 3000*l.*, and take an assignment of it to the wife, the opinion of the late Mr. Jacob was as follows:—"I understand that Mrs. B. has a vested interest in the 10,000*l.*, subject only to the life-interest of A. her father; and if so, A. can assign his life-interest to Mrs. B., and the effect will be to convert her interest into an immediate right to the fund in possession. And when a married woman has such an immediate right, the trustees *in general* may safely transfer to the husband. But I do not think it safe for the trustees to do this of their own authority when the interest was originally reversionary, and has by an assignment of this description been converted into a present interest. If the wife survived her husband, she might contend (and possibly with success) that the assignment was a contrivance to defeat her right by survivorship, and I

(u) *Gilchrist v. Cator*, 1 De Gex & Sm. 188.

(v) *Bagshaw v. Winter*, 5 De Gex & Sm. 467; *Ex parte Pugh*, 1 Drew. 202.

(w) *Scott v. Spashett*, 3 Mac. & Gor. 599.

(x) *Gardner v. Marshall*, 14 Sim. 575; *Vaughan v. Buck*, 1 Sim. N. S. 287.

(y) *Tidd v. Lister*, 10 Hare, 140.

do not think it quite clear that the court would hold her bound by it. But after the assignment has been made, Mr. and Mrs. B. may file an amicable bill against A. and the trustees praying a transfer to Mr. B., and I think there would be very little doubt of the court making the decree for a transfer as prayed, upon Mrs. B. being examined in court, and consenting, and upon an affidavit of their being no settlement affecting this fund. And I think that the decree of the court would fully indemnify the trustees in making the transfer." A bill was accordingly filed by the husband and wife against A. and the trustees: and on the wife being examined in court, and waiving a settlement, the trustees were ordered to sell out the stock, pay the costs, and hand over the balance to the husband.(z)

[\*372] A similar order was made by the vice-chancellor of \*England in several subsequent cases,(a) and Lord Cottenham, on being applied to under one of the orders, seems to have assented to the doctrine.(b) But in a case before the master of the rolls, the question was considered to involve too much difficulty to be disposed of on petition,(c) and the case of *Weittle v. Henning*,(d) before Lord Cottenham, has now decided that a reversionary chose in action of the wife cannot by means of this machinery be reduced into possession so as to be made disposable.

When the trustee is satisfied as to the parties rightfully entitled, he may pay the money either to the parties themselves, or to any agent empowered by them to receive it; and the authority need not be by *power of attorney*, or by *deed*, or even in *writing*. The trustee is safe if he can prove the authority, however communicated. But a trustee would not be acting *prudently* if he parted with the fund to an agent without some document producible at any moment by which he could establish the fact of the agency.

The trustee must look well to the *genuineness* of the authority, for if he pay a wrong party it will be at his own peril. Thus where A., possessed of 1000*l.* million bank stock, employed B., a broker, to receive the dividends for her, and B. *forged* a letter of attorney authorizing him to sell the stock, and a sale was effected accordingly, it was decreed by Lord Northington that the company was bound to make good the loss; for "a trustee," he said, "whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust-money; and if the transfer be made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before"(e)

[\*373] Where an infant *cestui que trust* represented himself to be \*of age, and induced the trustee to pay him, it was held that as the

(z) *Wilson v. Oldham*, V. C. March 5, 1841, MS.

(a) *Creed v. Perry*, 14 Sim. 592; *Bean v. Sykes*, ib. 593; *Lachton v. Adams*, ib. 594; *Hall v. Hugonin*, ib. 595; *Bishop v. Colebrook*, 16 Sim. 39.

(b) *Lachton v. Adams*, 14 Sim. 594.

(c) *Story v. Tonge*, 7 Beav. 91; and see *Box v. Box*, 2 Conn. & Laws, 605.

(d) 2 Phill. 731.

(e) *Ashby v. Blackwell*, 2 Ed. 299; *Sloman v. Bank of England*, 14 Sim. 475; and see *Harrison v. Pryse*, Barn. 324; *Ex parte Joliffe*, 8 Beav. 168.

infant was old enough to commit a fraud, the trustee could not be liable to him over again when he came of age.<sup>(f)</sup>

It is the practice of the court in administration suits, where a debt is owing to a firm jointly, to pay the amount to the surviving partners without the concurrence of the representatives of the deceased partners, and "*prima facie*" a trustee would be justified in doing the same.<sup>(g)</sup>

If a trustee or executor has made an overpayment to a *cestui que trust* or legatee, he has a right to recoup himself out of any other interest of that *cestui que trust* or legatee, and the court will even make an order on such *cestui que trust* or legatee, personally to repay the trustee or executor,<sup>(h)</sup> but not after a lapse of thirty years.<sup>(i)</sup>

On the final adjustment of the trust accounts it is usual for the trustee, on handing over the balance to the parties entitled, to require from them an acknowledgment that all claims and demands have been settled.<sup>(k)</sup> It is reasonable, that when the trustee parts with the whole fund, and so denudes himself of the means of defence, he should be placed by the party receiving the benefit in the utmost security against future litigation. In practice it is usual to require a release under seal, for an acquittance of this kind *may* be opened by the *cestui que trust* on showing fraud, concealment or mistake; but *prima facie* it is a simple and valid defence, and throws on the releasor the *onus* of displacing it. In strict right, however, a trustee in the absence of special circumstances cannot insist upon a release under seal. Thus, in *Chadwick v. Heatley*,<sup>(l)</sup> a residuary legatee who had become entitled in possession called for the transfer of a sum of stock representing the residue. The trustee insisted on a general release in respect of the testator's estate, and the residuary legatee offered only a receipt for the particular sum. A bill was filed by the \*claimant against the trustee, and the Vice-Chancellor K. Bruce held that in strictness a release by deed could [\*374] not be demanded, though he thought it was not out of the ordinary course of business or unreasonable; that the plaintiff's refusal to execute a deed was justifiable, but that he was bound to have given an acquittance in writing in full of all demands. It seems also to have been decided in a case at the rolls,<sup>(m)</sup> that a trustee cannot as a matter of right insist on a release under seal.

In *King v. Mullins*,<sup>(n)</sup> a sum of 174*l.* had been placed in the hands of a trustee upon trust by a parol declaration for Sarah for life, and on her death to pay her funeral expenses, and subject thereto to divide the fund between John and William. The costs of the suit depended on the question whether the trustee ought, as required, to have transferred

(f) *Overton v. Banister*, 3 Hare, 503.

(g) *Philips v. Philips*, 3 Hare, 289.

(h) *Livesey v. Livesey*, 3 Russ. 287; *Fordham v. Wallis*, 10 Hare, 217; *Dibbs v. Goren*, 11 Beav. 483.

(i) *Bate v. Hooper*, 5 De G. M. & G. 338.

(k) See — *v. Osborne*, 6 Ves. 455; but the release here spoken of was apparently a conveyance.

(l) 2 Coll. 137; *Warter v. Anderson*, 11 Hare, 301.

(m) *Fulton v. Gilmour*, 15 February, 1845, Hill on Trustees, 604.

(n) Vice-Chancellor Kindersley, 21st December, 1852, MS.; 1 Drew. 308.



the sums on the joint receipt of Sarah, John, and William, or whether he was right in refusing, unless they executed a release under seal. The vice-chancellor decided that the trustee was entitled to a release on the ground, first, that the trust was by parol, and secondly, that the time of payment, according to the tenor of the deed, was anticipated, as the tenant for life was still living. These reasons cannot be regarded as satisfactory. The circumstance that the trust was by parol, and therefore obscure, might have been ground for demanding an indemnity; but seems to afford no reason for requiring a release under seal as distinguished from a simple receipt or acquittance in writing. Neither does the anticipation of the time appear to be material, for Sarah, John, and William were admitted to be the only *cestuïs que trust*, and their concurrence in the receipt was equivalent to a reduction into possession.

The trust fund is not unfrequently transferred from the trustees of an old settlement to the trustees of some new settlement, and the trustees of the old settlement insist on a general release before they will part with the fund, while, on the other hand, the trustees of the new feel a reluctance to \*give more than a simple receipt. It is believed that [\*375] the requisition of the trustees of the old settlement has been generally complied with; but of course the trustees of the new cannot be called upon to enter into any covenant of indemnity.

As the party to benefit by a deed is, in general, the one to prepare it, the release will be drawn by the solicitor of the trustee. Another reason would be that the trustee has the necessary documents in his possession. The expense must, of course, be paid out of the trust fund.

When a trustee pays money under the direction of the court, he is indemnified by the order itself, and is not entitled to any release from the parties.(o) It would be impossible to hold a trustee answerable for an act not of himself but of the court. It is the duty, however, of the trustee to fully inform the court of all the material facts within his knowledge, and if he improperly withheld them he might be made responsible for the deception practised on the court.

Now by the 10th & 11th Vict. c. 96, entitled "An act for better securing trust funds and for the relief of trustees,"(p) after reciting that it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved; it is enacted:

I. That all *trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust whatever*,(q) or the

(o) See *Gillespie v. Alexander*, 3 Russ. 137; *Underwood v. Hatton*, 5 Beav. 39; *Farrell v. Smith*, 2 B. & B. 337; *Fletcher v. Stevenson*, 3 Hare, 370; *Knatchbull v. Fearnhead*, 3 M. & Cr. 126; *David v. Frowd*, 1 M. & K. 209; *Sawyer v. Birchmore*, 1 Keen, 401, &c.

(p) See an Essay on this act by F. H. Appach, where all the cases up to the date of that of publication will be found carefully collected.

(q) The owner of an estate charged with a sum in favour of another is not a trustee of that sum within the act, for he has not the moneys in his hands; and if it were held otherwise, the money might be paid into court, and the incumbrancer would have to bear the costs of getting it out; whereas the nature of the charge is, that the beneficiary is entitled to have it raised out of the estate, together with the costs of raising it; *Re Buckley's Trust*, 17 Beav. 110.

major part of them shall be at *\*liberty, (r)* on filing an affidavit *[\*376]* shortly describing the instrument creating the trust, according to the best of their knowledge and belief, *(s)* to pay the same with the privity of the accountant-general of the High Court of Chancery into the bank of England, *(t)* to the account of such accountant-general in the matter of the particular trust, *(u)* (describing the same by the *[\*377]* \*names of the parties as accurately as may be for the purpose of distinguishing it,) in trust to attend the orders of the court, and that all trustees or other persons having any annuities or stocks standing in their

But it has been thought that where there is a power of sale without a power of signing receipts the purchaser may take the estate under the power of sale, and pay the money into court under the Trustee Relief Act; *Cox v. Cox*, 1 Kay & Johns. 251.

A sum of money was payable by instalments, and the trustee, after receiving one instalment, paid it into court, and on a petition by the *cestui que trust*, the court not only administered the instalment paid in, but also gave directions to the trustee as to the future instalments; and said the order would give ample indemnity to the trustee; *Re Wright's Settlement*, 1 Sm. & Gif. App. V. The court had, in fact, no jurisdiction as to the instalments payable *in futuro*, and the order would be an indemnity in this sense only, that the trustee would be acting in a way which had received the sanction of the court, though extra-judicially.

Where money in which a lunatic is interested has been paid into court, the lord chancellor has jurisdiction under the act to order re-payment to the guardians of the part of the expenses incurred by them for the support of the lunatic; *Re Upfoll's Trust*, 3 Mac. & Gor. 281.

*(r)* *Liberty* only is given to trustees to transfer the fund into court, and bills or claims for the administration of the trust may be filed by or against trustees, or *cestuis que trust* as before, at any time previous to the transfer into court; *Thorp v. Thorp*, 1 Kay & Johns. 438.

When the fund has been actually transferred into court under the Trustee Relief Act, the court's jurisdiction attaches, and any proceeding must be taken under the act, and no bill or claim can be filed with reference to the fund transferred, though, as to any portion deducted for costs, or other part retained by the trustees, or for which they are accountable, the ordinary remedies are preserved to the *cestuis que trust*; *Goode v. West*, 9 Hare, 378; *Attorney-General v. Alford*, 2 Sm. & Gif. 488.

*(s)* The affidavit must not go into the whole history of the trust, so as to show upon the accounts how the particular sum arose, or the trustee will be deprived of his costs; *In re Waring*, 16 Jur. 652. All the trustees should properly join in the affidavit, as all may have some information to contribute, but under particular circumstances the court will order the accountant-general to receive the money on the affidavit of one of several co-trustees; — *v. —*, *V. C. Wood*, 1 Jur. N. S. 974.

*(t)* The payment may of course be made without an order of the court: *In re Biggs*, 11 Beav. 27. And when an executor, after paying money into court, discovered debts of the testator, he was allowed to have the money paid back to him out of court, on his undertaking to apply it properly. *Re Tournay*, 3 De Gex & Sm. 677.

*(u)* The money must not be paid in by an executor to an account, "the trusts of the testator's will," for this implies not a particular trust, but a general administration of the testator's estate. The executor must take on himself the responsibility of severing the fund from the testator's assets, and appropriating it to the particular purpose, and then pay it in to the limited account. If it has already been paid in to an account too general for the court to deal with, it may, on a separate application, be carried over to the right account, and the court will then proceed to adjudicate upon the rights of the parties; *Re Joseph's Will*, 11 Beav. 625; *Re Everett*, 12 Beav. 485; *Re Wright's Will*, 15 Beav. 367. As to the proper heading of the account, see further *In re Jervoise*, 12 Beav. 209; *Re Tillstone's Trust*, 9 Hare, Append. LIX.; and see Appach on the Acts, p. 44.

names(*v*) in the books of the governor and company of the bank of England, of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trust whatever, or the major part of them shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said accountant-general, with his privity in the matter of the particular trust (describing the same as aforesaid,) in trust *to attend the orders of the said court*,(*w*) and in every such case the receipt of one of the cashiers of the said bank for the money so paid, or in the case of stocks or securities the certificate of the proper officer of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited. (*x*)

II. That *such orders as shall seem fit* shall from time to time be made by the High Court of Chancery in respect of the trust moneys, stocks, or securities, so paid in, transferred, and deposited as aforesaid; and for the investment and payment of any \*such moneys, or of any dividends [\*378] or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, *upon a petition* (*y*) to be presented in a summary way to the lord chancellor or the master of the rolls without bill by such party or parties as to the court shall appear to be competent and necessary in that behalf, and service of such petition shall be made

(*v*) Where stock is standing in the names of deceased and surviving trustees, the survivor may transfer into court under the act; In re Parry, 6 Hare, 306.

(*w*) Where the court is not satisfied as to the facts by affidavit, it will, before making an order, direct an inquiry; Re Wood's Trust, 15 Sim. 469; and see Re Sharpe's Trust, 15 Sim. 470.

(*x*) The payment into court is a discharge only as to the money paid in, and leaves the trustee liable to a suit in respect of the costs deducted by him, or any other moneys that might be recovered upon the footing of the trust; see Goode v. West, 9 Hare, 378; Attorney-General v. Alford, 2 Sm. & Gif. 488; Thorp v. Thorp, 1 Kay & Johns. 438.

(*y*) The application must be made by petition, and cannot be made upon motion; In re Masselin's Will, 15 Jur. 1073; or upon a summons at chambers. But when an order has been once made upon a petition in compliance with the act, so as to found the jurisdiction, any further proceeding may be at chambers; Re Hodges, 4 De Gex, Mac. & Gor. 491.

The trustees themselves are *competent* to present the petition, but they are not the *proper* persons, and the court will not allow them more than respondents' costs; Re Cazneau's Legacy, 2 Kay & J. 249.

It was once held that where the fund had been transferred into court, there was still no such suit or matter actually pending as to dispense with the consent of the charity commissioners to an application on behalf of a charity; Re Markwell's Legacy, 17 Beav. 618. But afterwards it was ruled by the Court of Appeal that in such a case there was a matter pending within the meaning of the Charitable Trusts Act, 1853; Re Lister's Hospital, 6 De G. M. & G. 184.

The petition should set out the material statements of the affidavit under which the money is paid in, as the affidavit is regarded as a declaration of the trust to which the attention of the court is to be called; Re Levett's Trust, 5 De Gex & Sm. 619; Re Flack's Settlement, 10 Hare, Append. XXX. But the petition must not set out the affidavit *in extenso*, or at a needless length; Re Courtois, 17 Jur. 852. 10 Hare, Append. LXIV.

A claimant may proceed *in formâ pauperis* under the act; Re Money, 13 Beav.



upon such person or persons as the court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced, and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the court; and if it shall appear that any such trust funds cannot be safely distributed without *the institution of one or more suit or suits* the lord chancellor or master of the rolls may direct any such suit or suits to be instituted.<sup>(z)</sup>

\*The following general orders relative to this act have since, [\*379] in pursuance of the power given by the act, been issued by the court.

1. Any trustee desiring to pay money or transfer stock or securities into the name of the accountant-general of the Court of Chancery under the said act, is to file an affidavit entitled in the matter of the act and of the trust, and setting forth—

1. His own name and address.
2. The place where he is to be served with any petition or any notice of any proceeding or order of the court relating to the trust fund.
3. The amount of stock, securities, or money which he proposes to deposit, or to transfer, or to pay into court to the credit of the trust.
4. A short description of the trust, and of the instrument creating it.
5. The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
6. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities, or money transferred, deposited, or paid in, under the act, as the court may think proper to make or direct.

2. The accountant-general, on production of an office \*copy of the affidavit, is to give the necessary directions for transfer, de- [\*380] posit, or payment, and to place the stock, securities, or money, to the account of the particular trust, and such transfer, deposit, or payment is to be certified in the usual manner.

(z) The court under this act has ample jurisdiction as upon a bill filed, and may therefore declare the validity or invalidity of a deed, without directing a suit, if the court in the exercise of its discretion do not think a suit necessary; *Lewis v. Hillman*, 3 H. L. C. 607. Where trustees of a marriage settlement had transferred the fund into court, and a petition was presented by a person claiming adversely to the settlement, Vice-Chancellor Wood disposed of the case upon the petition, no party having objected; but before the lords justices, the respondent not consenting, the petition was ordered to stand over that a bill might be filed; *Re Fozard's Trust*, 1 Kay & Johns. 233, 24 Law Jour. 441, Ch. In another previous case, Vice-Chancellor Wood had also disposed of the matter on petition, and said that if there were creditors or other unascertained claims, a suit might be necessary; but that otherwise the court had jurisdiction as in a suit, and might direct an issue to try a question of sanity or the like; *Re Allen's Will*, Kay's Rep. App. Ll.; and see *In re Bloye's Trust*, 2 Hall & Tw. 140; 1 Mac. & Gor. 488; *Ex parte Stuteley*, 1 De Gex & Sm. 703.

The court directs a suit for its own satisfaction only, and will not authorize the petitioner to file a bill because it may be the more convenient course for making out his title; *Re Harris's Trust*, 18 Jur. 721.

3. The trustee having made the payment, transfer, or deposit, is forthwith to give notice thereof to the several persons named in his affidavit as interested in or entitled to the fund.

4. Such persons or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

5. The trustee is to be served with notice of any application made to the court respecting the fund, or the dividends or interest thereof, by any party interested therein or entitled thereto.<sup>(a)</sup>

[\*381] \*6. The parties interested in or entitled to the fund, are to be served with notice of any application made to the court by the trustees respecting the fund in court, or the interest or dividends thereof.<sup>(b)</sup>

7. No petition is to be set down to be heard, until the petitioner has

(a) If the trustee try to avoid service, the court, on being satisfied of the fact, will make the order without service; *Ex parte Bougham*, 16 Jur. 325.

The trustee who is served with the petition is *prima facie* entitled to his costs; *Re Erskine's Trust*, 1 Kay & Johns. 302; *Croyden's Trust*, 14 Jur. 54. But where the trustee has paid in the fund *abusively*, as in order to evade a bill about to be filed against him, he will have no costs; *Re Waring*, 16 Jur. 652; and see *Re Fagg's Trust*, 19 L. J. 175. And where he has transferred the fund into court without sufficient reason, though he may be allowed the costs of the transfer, he will not be allowed the costs of appearing on the petition; *In re Covington*, 1 Jur. N. S. 1157; *Ex parte Hemming*, 2 Jur. N. S. 1186; and see *Croyden's Trust*, 14 Jur. 54.

If the person who pays in is the personal representative of a testator whose will creates the difficulty, the executor must take his costs of paying in the fund out of the testator's estate, but the subsequent costs come out of the fund; *Re Cawthorne*, 12 Beav. 56. *Secus*, however, if the trust fund has been severed from the testator's estate, and is paid in by a trustee and not by the executor; *Re Lorimer*, 12 Beav. 521; *Ex parte Lucas*, V. C. Bruce, 6 July, 1849. And the court cannot direct the costs to be paid out of another fund also paid in by the trustee, but standing to a different account, though it may form part of the testator's residuary estate, and therefore be, *per se*, liable to costs; *Re Hodgson*, 18 Jur. 786; and of course not out of the testator's residuary estate, where it has not been paid in; *Re Bartholomew's Trust*, 13 Jur. 380 and see *Re Sharpe's Trusts*, 15 Sim. 470; *Re Feltham's Trusts*, 1 Kay & Johns. 534; though where five-sixteenths of a fund paid into court had elapsed, the court threw the whole costs on the *lapsed shares* as constituting part of the *residue*; *Ham's Trust*, 2 Sim. N. S. 106. And if a trustee deduct his costs before paying in the fund, the court has no jurisdiction as to the sum deducted; *In re Bloye's Trust*, 1 Mac. & Gor. 504; 2 Hall & Tw. 153. Whether on a petition by tenant for life for payment of the dividends, the costs come out of the *corpus* or out of the income, is a point on which the practice in the courts of different judges has much varied. In favour of payment out of *corpus*, the following cases may be cited: *Re Ross*, 1 Sim. N. S. 196, V. C. Cranworth; *Re Field's Trusts*, 16 Beav. 146, M. R. Sir J. Romilly; *Re Staple's Trust*, 13 Jur. 273, V. C. E.; *Re Butler's Trust*, 16 Jur. 32, M. R. Sir J. Romilly; and in support of the contrary view, *Ex parte Fletcher*, 12 Jur. 619; 17 L. J. 169; and *Ex parte Peart*, 12 Jur. 620; 17 L. J. 168, V. C. Knight Bruce; *Re Lorimer*, 12 Beav. 521, Lord Langdale; *Bangley's Trust*, 16 Jur. 682, and *Re Ingram*, 18 Jur. 811, V. C. Kindersley; *Re Woodburn*, 5 Weekly Rep. 649, M. R. 423; in which case it was decided by the full Court of Appeal (notwithstanding the contrary opinion previously entertained, see 3 K. & J. 41), that the court has jurisdiction under the Trustee Relief Act to make the trustee *pay* costs. And see *Re Jones*, 3 Drew. 679.

(b) If a person not appearing by the affidavit to have an interest, but who made a claim, be served with the petition, and disclaim at the bar, he will not be allowed his costs; *Re Parry's Trust*, 12 Jur. 615.

first named a place where he may be served with any petition or notice of any proceeding or order of the court relating to the trust fund.

8. Petitions presented and affidavits filed under the said act, are to be entitled in the matter of the said act (10 & 11 Vict. c. 96,) and in the matter of the particular trust.

The 10 and 11 Vict. c. 96, did not enable the major part of trustees to pay in or transfer a fund where the other trustees had a legal control over the fund and would not concur. Accordingly, by 12 and 13 Vict. c. 74, it was enacted, that where moneys, annuities, stocks, or securities were vested in persons as trustees, executors, administrators, or otherwise, and *the major part of them* were desirous of transferring the funds into court, under the Trustee's Relief Act, the court on a petition presented under the said act for that purpose, might direct the transfer by the major part, without the concurrence of the rest, and might make an order on the necessary parties to permit such a transfer.

By an order of 7th May, 1852, it was directed, that where the affidavit on which the money is paid in did not state it to be unnecessary to invest the money, the accountant-general should invest it in three per cent. bank annuities.

\*By 18 and 19 Vict. c. 124, s. 22, any trustee or other person having stock or money in his hands for a *charity* may, by an [\*382] order of the board of charity commissioners, transfer the stock or pay the money to the official trustees of charitable funds, and such payment or transfer will be an indemnity to the person paying or transferring.

## \*CHAPTER XIV.

[\*383]

### THE DUTIES OF TRUSTEES OF RENEWABLE LEASEHOLDS.

UPON this head we shall first examine the preliminary question, in what cases the obligation to renew is imposed by the settlement. We shall then proceed to inquire in what manner the trustees are to levy the fines payable upon the renewals.

I. In what cases the obligation to renew is imposed by the settlement.

It might naturally be considered, that, from the very circumstance of the leaseholds being of a renewable character, a settlement of them to several persons in succession would *per se* imply a right in the remainderman to call upon the tenant for life to contribute to the fine; (a) and indeed Lord Thurlow, in the instance of a lease which had not previously been treated as renewable, observed, "The cases in which the *nature of the estate* or the will of the testator compels a renewal, appear not to apply to the present: where there is *no such custom*, or direction, it is in the discretion of the tenant for life to renew or not." (b) However, it seems to

(a) See *White v. White*, 4 Ves. 32.

(b) *Nightingale v. Lawson*, 1 B. C. C. 443.



be now established generally, that, in a devise of renewable leaseholds without the interposition of a trustee, the remainderman cannot oblige the tenant for life to contribute to the fine.<sup>(c)</sup> And so it was determined even where the devise was expressly made, "subject to the payment of [\*384] all fines, and as they became due yearly \*and for every year."<sup>(d)</sup> But as the interest given is in its nature capable of renewal, the court says, "If the tenant for life do renew, he shall not by converting the new acquisition to his own use derive an unconscientious benefit out of the estate,"<sup>(e)</sup> but, on the remainderman's contributing to the fine, shall be regarded as a trustee, and shall hold the renewed interest upon the trusts of the settlement.<sup>(f)</sup>

Next, will the *interposition of a trustee* sufficiently indicate an intention of obliging the tenant for life to renew? "In a devise to trustees," said Lord Hardwicke, "if *cestui que trust* for life be one of the lives, I should doubt whether such *cestui que trust* could be compellable to contribute; but here all these lives were strangers; the intent of the testator certainly was, that the lease should continue, and be kept on foot, and something must be done for a renewal, though nothing is mentioned."<sup>(g)</sup> Lord Alvanley on one occasion alluded to the point, but said he was not called upon to decide it.<sup>(h)</sup> In a late case where the devise was to trustees upon trust to permit one to receive the rents for life, with remainders over, "subject to the payment of the rents and performance of the covenants reserved and contained, or to be reserved and contained, in the present or future leases, whereby such premises were or should be held, and also all taxes, fines, and expenses attending the premises," it was held that the obligation of renewing the lease was imposed by the will.<sup>(i)</sup> In *Lock v. Lock*<sup>(k)</sup> a testator had devised a college lease of twenty-one years to his wife for life, remainder to her son, she paying 10*l.* per annum to the son *during her life*; and it was held, that, as the testator contemplated the continuance of the lease during the life of the wife, she was bound to renew. It has now been decided by Lord Plunkett, in Ireland, that a settlement with the *mere interposition of a trustee* does *not* impose an obligation to renew.<sup>(l)</sup>

\*Where leaseholds of this kind are made the *subject of a marriage settlement*, it may be argued, that, as all the parties who have any interest given them are purchasers, the enjoyment of the

(c) *White v. White*, 4 Ves. 32, per Lord Alvanley; S. C. 9 Ves. 561, per Lord Eldon; *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow.

(d) *Capel v. Wood*, 4 Russ. 500.

(e) *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow.

(f) *Nightingale v. Lawson*, 1 B. C. C. 440; *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Fitzroy v. Howard*, 3 Russ. 225.

(g) *Verney v. Verney*, 1 Ves. 429.

(h) *White v. White*, 4 Ves. 33.

(i) *Hulkes v. Barrow*, Tam. 264.

(k) 2 Vern. 666.

(l) *O'Ferrall v. O'Ferrall*, Lloyd & Goold, Rep. temp. Plunket, 79. In *Trench v. St. George*, 1 Dru. & Walsh, 417, before the same judge, it is not clear whether his lordship did or not consider the will as creating an obligation to renew, but it would rather appear that he did. The remainderman was held not liable to contribute towards the renewal fines in favour of the tenant for life, except as respected certain fines paid subsequently to 1819, as to which the remainderman submitted to contribute. See pp. 454-456.

tenant for life should be consistent with that of the other subsequent takers.

In *Lawrence v. Maggs*,<sup>(m)</sup> the case of a marriage settlement with trustees interposed, but without any mention of renewals, Lord Northington said, "The husband renewed twice; first, when he put in his own life, which was of no benefit to those in the settlement who were to take in remainder after his death. He renewed a second time, and put in his wife's life, and this he does *voluntarily and without there being any direction for it in the settlement*. The renewing the lease with any other life than that of the tenant for life is for the benefit of the remainderman, and he is to be deemed a creditor, keeping down the interest during his enjoyment." The plain implication from which remark is, that in his lordship's opinion the tenant for life was considered *not* bound to renew.

There appears to be no other authority upon the subject but what may be collected from Sir W. Grant's observations in *Lord Montfort v. Lord Cadogan*. "The proposition," he said, "that under the marriage settlement it was the duty of the trustees to renew does not admit a question. *The lease being made the subject of a settlement, it was clearly meant that it should be kept on foot by renewals*. The trustees were to apply so much of the rents and profits as would be necessary for that purpose. They are not in so many words directed to renew, but the means being given, and the purpose expressed, there is no doubt that they were to apply those means to that purpose."<sup>(n)</sup>

But, if renewable leaseholds be *articled to be settled* on the husband for life, remainder to the wife for life, remainder to [\*386] the children, the court will, in executing the settlement, insert the proper directions for renewals. This, it seems, was directly determined in *Graham v. Lord Londonderry*;<sup>(o)</sup> and the case of *Lawrence v. Maggs*, before Lord Northington, was cited in *Pickering v. Vowles*, before Lord Thurlow,<sup>(p)</sup> as establishing the same doctrine; but it appears by the report taken from Lord Northington's own MS. that the bar were mistaken in this.<sup>(q)</sup> However, Lord Thurlow himself seems to have entertained that opinion, for, in *Pickering v. Vowles*, where the property was articulated to be settled, but there were no directions for renewals, his lordship said, "It was *intended* the lease should be fully estated, and that the husband and wife should have life estates, and that so fully estated it should go to the children."

A direction for renewals is sometimes in the form of a *discretionary* power. The instrument *may*, indeed, be so specially worded, that the power should be perfectly arbitrary; but, if the proviso be simply that "it shall be lawful for the trustees to renew, from time to time, as occasion may require, and as they may think proper," the clause will be construed, not as conferring an option upon the trustees of renewing or not,

(m) 1 Ed. 453. Search has been made for this case in the R. L. through several years, but the decree has not been found.

(n) 17 Ves. 488; and see *S. C.* 19 Ves. 638; and see *Trench v. St. George*, 1 Dru. & Walsh, 417.

(o) Cited *Stone v. Theed*, 2 B. C. C. 246.

(p) 1 B. C. C. 197. The cause does not appear in R. L.

(q) 1 Ed. 453.

but as a safeguard against any unreasonable demands on the part of the lessor.<sup>(r)</sup>

II. We next proceed to inquire in what manner the fines for renewals are to be levied by the trustees.

Upon this subject we shall *first* advert to the cases where the settlor himself has specifically marked out the fund from which the fines are to be raised, and, *secondly*, we shall examine the rules adopted by the court, where the settlor himself has omitted to declare any intention.

First, If there be an express trust to provide the fines for renewals out of the "*rents, issues, and profits*," and the leaseholds \*are [\*387] *terms of years not determinable on lives*, so that the times of renewal can be certainly ascertained, it will be the duty of the trustees to lay by every year such a proportion of the annual income as against the period of renewal will constitute a fund sufficient for the purpose.<sup>(s)</sup>

If the trust be to levy the fines for renewal out of the "*rents, issues, and profits*, or *by mortgage*," it was held in a case before Sir J. Leach<sup>(t)</sup> that the annual rents only would in the first instance be applicable, for he considered the authority to mortgage not as making it optional with the trustees whether they should or not affect the interests of the remainderman, by throwing the charge of the renewal upon the *corpus* of the property, but as given for the protection of the *cestuis que trust* in case the amount of the fine should not be otherwise forthcoming,<sup>(t)</sup> and intimated that should the trustees be under the necessity of mortgaging, the court would call back from the party in possession the amount of the incumbrance thus temporarily incurred.<sup>(u)</sup> However, in the later case of *Jones v. Jones*,<sup>(v)</sup> where the trustees were empowered to levy the fines "*by and out of the rents, issues, and profits*, or *by mortgage*, or by such other ways and means as should be advisable," the court, after observing that to levy the fines from the rents would throw them on the tenant for life, while a mortgage would be oppressive to the remainderman, declined to give any opinion whether the trustees might not, in the exercise of their discretion, have determined on whom the burden should fall; but as the trustees had not exercised their discretion, it was open to the court to adjust the *onus* amongst the parties according to the equitable rule, viz. in proportion to their actual enjoyment, as soon as it could be ascertained.<sup>(w)</sup> And in *Greenwood v. Evans*,<sup>(x)</sup> and *Reeves v. Creswick*,<sup>(y)</sup> the fines were to be raised out of \*the *rents, issues, and profits*, or *by mortgage*, and the court adopted the principle of throwing the *onus* on the successive tenants of the estate, in proportion to their actual or prospective enjoyment. The leaseholds were for *lives*,

(r) *Milsington v. Mulgrave*, 3 Mad. 491, 5 Mad. 472; *Mortimer v. Watts*, 14 Beav. 616; and see *Verney v. Verney*, 1 Ves. 430; *Harvey v. Harvey*, 5 Beav. 134.

(s) *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; S. C. 19 Ves. 635; see *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121.

(t) *Milsintown v. Earl of Portmore*, 5 Mad. 471; *Milles v. Milles*, 6 Ves. 761.

(u) 5 Mad. 472, per Sir J. Leach; and see *Shaftesbury v. Marlborough*, 2 M. & K. 121, 123.

(v) 5 Hare, 440.

(w) *Jones v. Jones*, 5 Hare, 440.

(x) 4 Beav. 44.

(y) 3 Y. & C. 715, as corrected from Reg. Lib.; see post, p. 393.



but no distinction was taken on that account. The present leaning of the courts would appear, therefore, to be, to consider the language of the instrument, as directing only the temporary mode of raising the fines, without prejudice to the ultimate equitable adjustment, according to the principles now acted upon in equity in ordinary cases.

If the trust be to raise the fines for renewal out of the "*rents, issues, and profits*," and the leaseholds are either for *lives* or for *years determinable on lives*, the expenses of renewal must still be cast upon the *annual rents*, if it clearly appear that such were meant, though, from the uncertainty of the time, the trustees cannot be sure they shall have accumulated an adequate fund.

But the expression "*rents, issues, and profits*" often stands by itself, without any sufficient indication *aliunde* that annual rents were intended, and then the question arises, and is attended with great difficulty, whether the fines shall be raised out of the annual rents or the *corpus*.

In *Stone v. Theed*,<sup>(z)</sup> where was a gift to trustees of freeholds and leaseholds and personal estate upon trust (subject to annuities) for a person for life, with remainders over, and the testator "directed that his trustees should from time to time renew the lease and add new lives, if they could obtain such lease, and empowered his said trustees to *place out at interest the overplus of the rents* of his real and leasehold estates in government or real securities," Lord Thurlow held that the annual rents only were to be so applied, observing, "He must consider the thing bequeathed to be the subsisting lease, subject to renewal. Suppose it were the case of an estate to which an embankment was necessary: there could be not doubt it was a clear indication of intention that the first trust was to keep the estate productive by embankment or other buildings, \*or, in the present case, by a very strict analogy, by keeping the leases renewed. It was objected, 'Could the testator be understood to make a provision which might exhaust the estate of the first taker?' But the expressions were as strong as if he had said expressly he meant the lease to be kept up, and he must be understood to sacrifice the intent of a provision for the first taker to the original intent of keeping up the estate." In this case it will be observed that from the direction to accumulate the overplus of the rents, it appeared the testator meant the annual rents only to be applicable to the renewals.

In *Allan v. Backhouse*<sup>(a)</sup> a testator devised leaseholds and freeholds to trustees, and directed the fines to be levied "out of the *rents and profits* of the leaseholds, or out of the *rents and profits* of the freeholds." There was nothing in the will from which it could be collected that annual rents and profits only were meant, and Sir T. Plumer considered that, as a gross sum might at any moment be demanded by the lessor, who was not bound to wait, the trustees, by the expression "*rents and profits*," were not confined to the annual rents, but were authorised to sell and mortgage; and that the tenant for life and the remainderman should

(z) 2 B. C. C. 243; see the case stated from Reg. Lib., with some remarks in *Jones v. Jones*, 5 Hare, 451, note (a).

(a) 2 V. & B. 65.

afterwards contribute to the fine in the usual proportions. An appeal was presented to Lord Eldon, by whom the decree was affirmed.<sup>(b)</sup>

In *Shaftesbury v. Marlborough*,<sup>(c)</sup> where there was a devise of renewable leaseholds to trustees upon trust to raise the fines out of the *rents, issues, and profits*, and subject thereto upon the same trusts as the testator's freeholds, Sir J. Leach observed upon the discrepancy between *Stone v. Theed*, and *Allan v. Backhouse*,<sup>(d)</sup> and, so far as the two cases were applicable to the question before him, followed the authority of the former. "The first trust," he said, "is, that the trustees by and out of the rents and profits shall from time to time renew the several leases as occasion may require: the trust as to the renewals overrides all beneficial interest in the lease, and such interest cannot take effect until this trust be performed."

[\*390] \**Playters v. Abbott*<sup>(e)</sup> was a special case. A testator devised copyholds upon trust "out of the *rents and profits*, or by mortgage, sale or other disposition" of the trust estate, to raise the *fines of admission* to the copyholds, make *repairs*, pay the *land-tax* and *quit-rents*, &c., and Sir J. Leach (considering the fine on admission to copyholds to stand on the same footing with fines on renewal of leases,) determined, that as no rents could have accrued before the fines were demandable, viz., immediately on the testator's death, the meaning was *referendo singula singulis*, that the trustees should raise the *fines* by mortgage or sale, and should keep down the *annual* expenses as repairs, land-tax, and quit-rents out of the *annual* rents: that the tenant for life was only called upon to keep down the interest on the mortgage for raising the fines and not to contribute to the principal, for the trustees might clearly have sold, and it was not to be supposed that they were afterwards to impound the accruing rents from the tenant for life in order to purchase other lands of equal value.

In *Townley v. Bond*<sup>(f)</sup> there was a lease for lives at 4s. an acre rent, with a covenant by the lessor for renewal, on payment of an additional rent, by way of fine, and on the marriage of the lessee, the lease was vested in trustees "upon trust to pay and discharge the yearly rents reserved and payable upon any renewal," and subject thereto, upon trust for the husband for life, with remainders over, and the court apparently assumed that the fines were raisable out of the annual rents.<sup>(f)</sup>

In *Creswick v. Reeves*,<sup>(g)</sup> the trustees were empowered to levy the fines from the *rents, issues, and profits*, or by mortgage, and the court apportioned the burthen amongst the successive tenants, according to their prospective enjoyment.

In *Greenwood v. Evans*,<sup>(h)</sup> the trustees were directed to raise the fines out of the *rents, issues, and profits*, or by mortgage, and the court decided that the successive tenants ought to bear a proportionate part of

(b) Jac. 631.

(c) 2 M. & K. 111.

(d) 2 M. & K. 121.

(e) Id. 97; and see *Greenwood v. Evans*, 4 Beav. 44.

(f) 2 Conn. & Laws, 393.

(g) 3 Y. & C. 715, corrected from Reg. Book, post 393.

(h) 4 Beav. 44.

the fine according to the benefit derived by them respectively from the renewal of the lease.

\*In *Jones v. Jones*,<sup>(i)</sup> the trustees were directed to raise the fines by and out of the *rents, issues, and profits*, or *by mortgage*, [\*391] or by such other ways and means as should be advisable, and the court apportioned the burthen amongst the parties according to the actual benefit derived by them.

It thus appears that where the direction is to raise the fines out of the rents, issues, and profits, the court may be compelled, by the express language of the instrument, to throw the fines upon the annual rents, but that where the trustees are empowered to raise the fines out of the rents, issues, and profits, or by mortgage, or otherwise, the discretion to be exercised is held to apply only to the temporary means of raising the fund, and the court apportions the burthen according to the general rule.

On a reference to the master by Sir J. Leach, how a fund for payment of fines on the renewals of leaseholds for lives, where the fines were to be paid from the rents, could best be secured, the master proposed in his report, that each of the lives, upon which the leases were held, should be insured *against the life of the tenant for life* in a sum sufficient to cover the amount of the fine, the premiums upon the policies to be paid out of the annual rents and profits.<sup>(k)</sup> Upon this arrangement we must remark, that the lives of the *cestuis que vie* ought to have been insured *unconditionally* and not against the life of the tenant for life, for the estate was continually deteriorating as the lives wore out, and the remainderman was entitled to have good lives or equivalent insurances. In leaseholds for years, the remainderman has right to a proportional accumulation towards the payment of the next fine, and why is not the same principle to prevail in the case of leasehold for lives? Subject to this observation, a more convenient mode of raising the fines could not perhaps be suggested, and a trustee under similar circumstances would scarcely incur a risk in following the precedent of the court.

Where freeholds and leaseholds for lives are limited to the same uses, it is usual, from the difficulty of mortgaging leaseholds \*vested in trustees (who will not covenant beyond their own acts,) to [\*392] insert a power to charge the *freeholds* for raising the fines; and it would be well to provide that the freeholds and leaseholds might be joined together in the security, and that the loan should precede other charges, and that the *corpus* of the property should be subject to the mortgage, so as to shut out the question of apportionment between the tenant for life and the remainderman.

If a portion of the *annual* rents and profits be destined by the settlor to defray the expenses of renewals, then, should it happen from the unwillingness or incapacity of the lessor that no renewal can be obtained, the sums which would have been raised, will not, it seems, merge for the

(i) 5 Hare, 440.

(k) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 124; and see *Greenwood v. Evans*, 4 Beav. 44.



benefit of the tenant for life, but will belong to the person who would have been the gainer by the renewal.<sup>(l)</sup>

If a trustee,<sup>(m)</sup> or tenant for life, in the situation of a trustee,<sup>(n)</sup> fail in his duty to apply the given fund, the remainderman may call for a compensation from such trustee, or tenant for life, or their assets. But when, by the permission of the trustee, the tenant for life has been in the full enjoyment of the rents and profits without deduction for renewals, though the trustee is primarily answerable to the remainderman, yet the tenant for life, who has had the actual pernaney, must make it good to the trustee.<sup>(o)</sup>

And where the leaseholds were annually renewable for twenty-one years, and the custom had been for the lessee annually to grant underleases for twenty years, the tenant for life, as bound to pay the fines to the lessor out of the annual rents and profits, was declared entitled to the fines paid annually by the under-lessees.<sup>(p)</sup>

[\*393] \*Secondly. It often happens that renewable leaseholds are devised to trustees with a direction, either expressed or implied, to keep the leases continually renewed, but without any declaration of intention from what fund the settlor meant the expenses should be levied.

Where this is the case, the tenant for life and remainderman may possibly agree to contribute toward the fine out of their own pockets, at the time of the renewal; or if the tenant for life and remainderman cannot agree to *join* in raising the fine, one of them may be willing to advance the whole amount *pro tempore* out of his own pocket, and then an apportionment on the principles adopted by the court may be compelled between the tenant for life's estate and the remainderman at the tenant for life's decease, and either party advancing the fine will have a lien on the renewed lease for the amount expended beyond his proportional part. If tenant for life and remainderman will neither jointly nor either of them singly advance the fine, then it is said the trustees must raise the expenses out of the estate by way of mortgage;<sup>(q)</sup> and at the tenant for life's decease the apportionment must be made in like manner. However, a mortgage, where neither the tenant for life nor remainderman will make the advance, is more easily to be suggested than to be carried into effect, for few persons would be disposed to lend their money on such a security, in the absence of any express power to mortgage.

[\*394] In such a case, therefore, it seems necessary to have recourse to the court. Thus, in a recent case,<sup>(r)</sup> where leaseholds \*for

(l) See *Colegrave v. Manby*, 6 Mad. 86, 87; S. C. 2 Russ. 252; *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 231; but see *Richardson v. Moore*, and *Tardiff v. Robinson*, cited *Colegrave v. Manby*, 6 Mad. 82, 83.

(m) *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; S. C. 19 Ves. 635; and see *Wadley v. Wadley*, 2 Coll. 11.

(n) *Colegrave v. Manby*, 6 Mad. 72; S. C. 2 Russ. 238.

(o) *Lord Montfort v. Lord Cadogan*, ubi supra; *Townley v. Bond*, 2 Conn. & Laws. 403, 406, per Sir E. Sugden; and see *Wadley v. Wadley*, 2 Coll. 11.

(p) *Milles v. Milles*, 6 Ves. 761.

(q) *Bee Buckeridge v. Ingram*, 2 Ves. jun. 666; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121; *Allan v. Backhouse*, 2 V. & B. 72.

(r) *Reeves v. Creswick*, 3 Y. & C. 715. It is stated in the report that "there

lives were devised to trustees upon trust for A. for life, with remainder to her children, and a bill was filed by the trustees for the purpose of having the expenses of renewal raised, the following scheme, which had been approved by the master, was directed to be carried into effect. The period of enjoyment of the property by the tenant for life under each of the old leases, being the joint duration of her own life, and that of the then surviving *cestui que vie* named in such lease, and the period of her enjoyment of the property under each corresponding renewed lease being in like manner the joint duration of her life and those of the new *cestuis que vie*, or the longest liver of them; the difference between the values of the estates of these two periods gave the benefit derived by the tenant for life from the renewals in question. The residue of the increased value of the property necessarily expressed the benefit derived from the renewals by the remainderman. Calculations were accordingly made by the actuary of an insurance office, upon the above principles, of the benefit derived by the respective parties from the renewal of each lease, and the fines and expenses of renewal being divided in the proportions so ascertained, the total amount which thereupon appeared to fall to the share of the tenant for life, was directed to be insured upon her own life for the purpose of providing, upon her decease, for the payment of a corresponding part of the principal of the mortgage debt to be raised upon the property. The policy of insurance was ordered to be assigned to the mortgagee, and directions were given for paying the premiums on the policy, and for keeping down the interest on the entire mortgage-debt out of the annual rents and profits of the estates. The only observation that occurs upon the propriety of this arrangement is, whether the tenant for life ought to have been directed to keep down the interest on the *entire* mortgage-debt out of the annual rents as between [\*395] \*him and the remainderman, or only of that part of the principal which fell to the share of the tenant for life. It will be seen also from this statement, that the court made an apportionment according to the speculative benefit, a course which the court has since disclaimed, except for the purpose of raising the fine *in presenti*, without prejudice to the ultimate apportionment on the death of the tenant for life, when the relative benefits derived can be ascertained. It is possible, though it does not so appear from the report, that the decree was without prejudice to an ultimate adjustment.

were no funds provided for the purpose of renewal by the testator's will;" from which it might be supposed that the will was altogether silent upon the subject, but Mr. Shapter, who had occasion to consult the Reg. Lib., has obligingly furnished me with the following extract from the will: "It shall be lawful for my said trustees, and the survivor of them, and the heirs, executors, administrators and assigns respectively of such survivor, to renew, or use their or his endeavours to renew, the leases for the time being of such part of my said estates as shall be accustomably renewable from time to time and as often as occasion shall require, and for that purpose to make such surrenders of the then leases, or any renewed leases, as shall be requisite and necessary in that behalf, and *by and out of the rents, issues and profits* of the premises, the leases whereof may be so renewed, *or by mortgage thereof*, to raise so much moneys as shall be sufficient for paying the several renewal fines and other necessary charges for such renewals."

MARCH, 1858.—23

We proceed to inquire upon what principles the apportionment is regulated upon the tenant for life's decease.

The old rule of contribution was, that the tenant for life should advance one-third, and the remainderman two-thirds;(s) but the question was put by Lord Thurlow, "Is a tenant for life at the age of ninety-nine, whose title accrued in possession when he was ninety-eight, to pay one-third—a great deal more than any possible enjoyment? According to that rule, a man of the age of ninety-nine, who has the enjoyment only of ten days, pays as much as a man of twenty-five."(t)

It might possibly be thought reasonable that the proportion of the expense to fall upon the tenant for life should be regulated by his actual age and probable duration of life; but accident might render such a course unjust to the one party or the other, as the tenant for life happened to live a longer or shorter period than was allowed by the calculation,(u) and the courts, it was observed by Lord Brougham, have made it a maxim not to admit an estimate which the events may afterwards falsify.(v)

\*Lord Alvanley adopted the rule,(w) and from the case of [\*396] *Lawrence v. Maggs* it would seem that Lord Northington had before acted upon the same principle,(x) that the tenant for life should merely *keep down the interest* of the fine: but Lord Eldon said, "he could not agree to that. In the case of tenant for life and remaindermen in *tail* or in *fee*, the *inheritance* being charged with the mortgage, it was fair the tenant for life should only keep down the interest, for the natural division was, that he who had the *corpus* should take the burden, and he who had only the fruit should pay to the extent of the fruit of the debt: but leases, whether for lives or years, were in their nature temporary, and therefore the position that the tenant for life was bound to pay the interest was to be understood with this qualification, that he was further bound to contribute a due proportion of the principal according to the benefit he derived from the renewed interest."(y)

The rule now in operation was first clearly laid down by Lord Thurlow in *Nightingale v. Lawson*,(z) a case, said Lord Eldon who was one of the counsel in it, to which, from the intricacy of the subject, the reports have failed to do justice.(a)

The circumstances may be very briefly stated as follows:—A widow, tenant for life of a term which had twelve years to run, renewed for a further term of twenty-eight years, to commence from the expiration of

(s) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 118, per Sir J. Leach; *Lock v. Lock*, 2 Vern. 666, R. L. 1710, B. fol. 120; *Verney v. Verney*, 1 Ves. 428; *Limbros v. Francia*, cited ib.; *Graham v. Lord Londonderry*, cited *Stone v. Theed*, 2 B. C. C. 246; and see *Rowel v. Walley*, 1 Ch. Rep. 218; *Ballet v. Spranger*, Pr. Ch. 62; *Cornish v. Mew*, 1 Ch. Ca. 271.

(t) See *White v. White*, 9 Ves. 555.

(u) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 119, per Sir J. Leach.

(v) *Bennett v. Colley*, 2 M. & K. 234.

(w) *Buckeridge v. Ingram*, 2 Ves. jun. 652, see 666; *White v. White*, 4 Ves. 24, see 33.

(x) *White v. White*, 9 Ves. 560.

(y) 1 Ed. 453, see 455.

(z) *White v. White*, 9 Ves. 556.

(a) 1 B. C. C. 440.



the twelve years, and afterwards renewed for the additional term of fourteen years to commence from the expiration of the twenty-eight years. The widow lived through the original term of twelve years, and through nine of the renewed term of twenty-eight years. The question was raised after the death of the widow, in what proportions the tenant for life and the remainderman should contribute to the fines. The following points were resolved by Lord Thurlow, after a very anxious, frequent, and grave consideration of the subject,<sup>(b)</sup> and have ever since been acquiesced in by the courts.

\*1. "That, as the widow had lived nine years after the expiration of the twelve leaving nineteen years to run of the twenty-eight, the master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased, that is, of the term of twenty-eight years, to commence at the expiration of the twelve years; he should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and the nine years was worth, and the latter was the proportion to be paid by the remainderman."<sup>(c)</sup> Upon which resolution Lord Eldon thus comments:—"It was first considered," he said, "what the interest of the tenant for life was in that term which had to run out at the time of the renewal, and then what benefit the tenant for life had received by the enjoyment of the renewed term from the period when the old term would have expired: and Lord Thurlow determined that the remainderman took that interest in the renewed term which was *ultra* so much of the renewed term as expired in the lifetime of the person who renewed, and the value of that interest he made the remainderman pay."<sup>(d)</sup>

2. "That as to the *kind of interest* to be allowed, *simple* interest would not be a satisfaction, as the widow had laid out her money totally, and the value of the lease was calculated upon the ground of compound interest: compound interest was therefore to be computed upon the proportional value of the nineteen years' term to the whole expense of renewal."<sup>(e)</sup>

3. "That as to the *rate of interest*, in computing compound interest, you go upon the idea that the interest is paid upon the exact day and immediately laid out; but as this was impossible, it would be sufficient to compute interest at 4 per cent."<sup>(f)</sup>

4. "That such interest was only to be paid till the widow's death, for after that her executors had the demand upon the \*remainderman, and it became a common debt, and must carry simple interest only."<sup>(g)</sup> [\*398]

5. "With respect to the second renewal, as the widow had not lived to enjoy any part of that term, her executors were entitled to the whole

(b) See *White v. White*, 9 Ves. 560.

(c) See *Coppin v. Fernyhough*, 2 B. C. C. 291; *Barnard v. Heaton*, cited *White v. White*, 4 Ves. 29; *Playters v. Abbott*, 2 M. & K. 108; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 118; *Lanauze v. Malone*, 3 Ir. Ch. Re. 354.

(d) *White v. White*, 9 Ves. 558.

(e) See *White v. White*, 4 Ves. 35, 36; S. C. 9 Ves. 557, 558.

(f) See *Giddings v. Giddings*, 3 Russ. 260.

(g) See *Giddings v. Giddings*, 3 Russ. 260.

of the expenses, with interest to be computed on the same principle as before.”<sup>(h)</sup>

In this case it will be observed, the *tenant for life* had disbursed the fine, and, the payment being a charge upon the property, the widow was in no danger of eventually losing her demand. But where the tenant for life has not the means of renewing, but the remainderman comes forward with the money, if the contribution is to be suspended till the death of the tenant for life, it may happen, that, when the proportions can at last be ascertained, the estate of the tenant for life may be insolvent, and so the contribution be lost. “I admit,” says Lord Eldon, “there is this difficulty in the case; but perhaps from the nature of the thing it cannot be helped: the utmost extent you can go is to make the tenant for life give security for the sum which may eventually be due.”<sup>(i)</sup>

There occurs, also, this other difficulty, viz. how to apply the principle to the case of leaseholds for *lives*. The new *cestui que vie* may die in the lifetime of the original *cestui que vie*, and then no actual benefit accrues either to the tenant for life or to the remainderman. If the tenant for life paid the fine, is the remainderman to contribute nothing, because he took no benefit? If the remainderman paid the fine, is the tenant for life to contribute nothing, because he can excuse himself under the same plea?

From the nature of leaseholds for lives it seems difficult to discover any better principle than one of the following:—

First, That the tenant for life and the remainderman should contribute according to their *chance of benefit at the time of the renewal*, in which case the proportions would be settled thus:—The chance of benefit to the tenant for life is the value of the new life commencing from the death of the last surviving \*original *cestui que vie*, and determining on the death of the tenant for life. The chance of benefit to the remainderman is the value of the new life commencing on the death of the original *cestuis que vie* after the death of the tenant for life. In the proportion of these two values would be the respective contributions.

Secondly, That the remainderman's proportion should be regulated by the *actual benefit* derived. Thus, if the new *cestui que vie* die in the lifetime of any of the original *cestuis que vie* or of the tenant for life, the remainderman takes no benefit and has nothing to pay. In this case the tenant for life is the loser. Should the new *cestui que vie* survive the original *cestuis que vie* and also the tenant for life, the value of the new life should be taken at the tenant for life's death, and that interest be paid for by the remainderman. It might happen that the original *cestuis que vie* and the tenant for life might die soon after the renewal, and then the estimated value of the new life would be greater than the whole fine. In such a case the tenant for life would be a gainer. Thus the tenant for life might sometimes be a gainer, sometimes a loser: the

<sup>(h)</sup> *Coppin v. Fernyhough*, 2 B. C. C. 291.

<sup>(i)</sup> See *White v. White*, 9 Ves. 558, 559; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 122.

remainderman would never either gain or lose, but would pay the exact value of the interest which he actually took.

The authority of Lord Eldon upon the subject is so obscurely worded, that little light can be gained from it.

"There is no difference," he said, "between a renewable term for years and a lease for lives renewable. In the former case the difficulty does not arise so much, upon the probable value of a term certain, as upon an estate for lives in estimating what is the value of that life which may survive the three *cestuis que vie*, and that interest to be paid for by the remainderman, as the case may happen that one, two, or three lives may determine in the life of the man entitled to the beneficial interest." (*k*)

In the recent case of *Jones v. Jones*, (*l*) before Vice-Chancellor Wigram, and involving leaseholds for lives as well as leaseholds for years, and where the fines were to be raised out of the rents or by mortgage, or by such other means as should be advisable, the mode of raising and ultimately apportioning the \*fines was fully considered, and the importance of the subject may justify a somewhat lengthened extract from the judgment. "The rule," said the vice-chancellor, (*m*) "is that the parties are to pay in proportion to their enjoyment, by which I understand their actual enjoyment to be meant, and not an extent of enjoyment to be determined by mere speculation, or by a calculation of probabilities, and the question is, how that apportionment is to be effected. If the tenant for life is willing to take upon himself to renew, it appears to me according to the cases there is very little difficulty in carrying out the transaction. He will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the term for any overpayment which may have been made. The tenant for life having paid the whole, if he has not the whole enjoyment his estate will have a lien for whatever ought to be paid by the remainderman. The case is one of much greater difficulty where the renewal is made by the remainderman, or (which as to this difficulty is the same thing,) where the trustee is to raise the money and charge it on the *corpus*. In that case, unless some course be taken to protect the interest of the remainderman, the tenant for life may enjoy the estate during his whole life without bearing any greater charge than the interest on the debt created by the renewal, and he may leave no assets to pay his proportion of the principal money. That inconvenience may perhaps be avoided by requiring the tenant for life to give security. The late cases of *Greenwood v. Evans*, (*n*) and *Reeves v. Creswick*, (*o*) are authorities which recognize the course of giving security as a course proper to be pursued where no other means are open for providing for a proper apportionment. It is not to be disputed that there is a practical difficulty even in this mode of proceeding; the difficulty is in determining for what sum the tenant for life is to give security. If he gives security for the whole amount of the fine, because by possibility he may enjoy the whole benefit resulting from the renewal, the difficulty is got

(*k*) *White v. White*, 9 Ves. 559.

(*m*) Page 496.

(*o*) 3 Y. & C. 715.

(*l*) 5 Hare, 440.

(*n*) 4 Beav. 44.



[\*401] over; but the tenant for life may not be able to give security for \*the whole although he might for a part, and how is the court in such a case to deal with the interests of the parties? I do not mean to give any opinion as to the way in which the court would proceed in cases that might be suggested, but in considering what is proposed as a general rule, it is right not to disregard the inconvenience or difficulty which in some cases might arise in its application. I do not, however, think that the difficulty to which I have adverted is insuperable. The tenant for life may in the first instance be required to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease. If he should die within the time during which it was assumed that his life would last, the security would of course be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess. If he outlived that time he might, if necessary, be called upon to give a further security to cover the additional proportion then to be attributed to him. In the case of *Allan v. Backhouse*,<sup>(p)</sup> and other cases, it would appear that the party was not called upon in the first instance to pay the whole, but it was apportioned, and I presume on the principle that he should be required to pay the apportioned sum in the first instance without prejudice to the question whether he might not ultimately be liable to pay more. It appears to me, being guided by the light which the cases afforded me, proper to declare that each party is to bear the burden of the renewal in the proportion of his actual enjoyment of the estate. There will be a direction for the tenant for life to keep down the interest, and a reference, as in *Allan v. Backhouse*,<sup>(p)</sup> to ascertain what proportion of the fine was properly payable by him. This inquiry is necessarily by anticipation. There will then be a reference, as in *Greenwood v. Evans*,<sup>(q)</sup> for the master to approve of a security, and these directions must be followed by a declaration that the reference and security are to be without prejudice to the question whether the tenant for life may or may not be liable to pay less or more than the sum for which the security is given." The doctrines enunciated in this [\*402] case have been since \*approved as sound law, and the tenant for life, where the fine has been paid out of the trust fund, has been ordered to give security for his contribution to the fine in proportion to the benefit which he should derive from the new life.<sup>(r)</sup>

Where the legal estate of renewable leaseholds is devised without the interposition of a trustee, but the testator at the same time directs, either expressly or by implication, that the leases should be renewed, the tenant for life is then himself a trustee,<sup>(s)</sup> and as such is compellable to obtain renewals,<sup>(t)</sup> and ought before applying for a renewal to consult the remainderman.<sup>(u)</sup>

It has been said, that if from the threats or acts of the tenant for life there appears the intention of suffering the lease to expire, the court

(p) 2 Ves. & Be. 65.

(q) 4 Beav. 44.

(r) *Huddleston v. Whelpdale*, 9 Hare, 775.

(s) *White v. White*, 5 Ves. 554.

(t) *Lock v. Lock*, 2 Vern. 666; and see *White v. White*, 4 Ves. 24.

(u) *White v. White*, 5 Ves. 554.

would appoint a receiver of the estate to provide a fund for the renewal;(v) and that if the tenant for life has already allowed the period of renewal to pass, the rents and profits may be sequestered for either procuring a renewal,(w) or finding the remainderman a compensation.(x) But no suit *for damages* can be effectually prosecuted before the tenant for life's decease; for so long as it remains uncertain how much of the renewed term will survive to the remainderman, the amount of the injury done to him cannot be ascertained.(y) It follows that the mere forbearance of the remainderman to bring a suit during the continuance of the life estate cannot be construed into *laches* or acquiescence.(z)

We may remark in conclusion, that the admission fines of trustees of copyholds are regulated by the same principles as fines on renewal of leaseholds. Thus a testator devises copyholds to A. and his trustees upon trust for B. for life, with remainder to C. in fee. A. pays a fine on his admission and dies. His \*heir is admitted and pays a fine and [\*403] dies, and his heir again is admitted and pays a fine. Thus the fine for the admission of the trustee is a kind of purchase-money for an estate for the life of that trustee. The burthen must of course be borne by the *cestuis que trust* of the estate, and they contribute to the fines in proportion to their actual enjoyment, as in the case of leaseholds.(u) These observations are on the assumption that the will or settlement contains no express directions how the fines are to be raised.

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## \*CHAPTER XV.

[\*404]

### DUTIES OF TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.(aa)

SETTLEMENTS which embrace limitations to trustees to preserve contingent remainders are usually penned in one of the two following forms: either, First, the estate is limited to the use of the parent for 99 years if he should so long live, with remainder to the use of trustees and their heirs during the life of the parent upon trust to preserve contingent limitations with remainders over; or to the use of trustees and their heirs during the life of the parent in trust for him with remainders over; or, Secondly, it is settled to the use of the parent for life, with remainder to trustees and their heirs during the life of the parent upon trust to preserve contingent limitations, with remainders over.

In the first form of settlement the object in view by the interposition of trustees is not merely to preserve the contingent estates from the

(v) See *Bennett v. Colley*, 2 M. & K. 233.

(w) See S. C. 5 Sim. 192.

(x) S. C. 5 Sim. 181; 2 M. & K. 225; and see *Lord Montfort v. Lord Cadogan*, 17 Ves. 490.

(y) *Bennett v. Colley*, 5 Sim. 181; S. C. 2 M. & K. 225. (z) S. C.

(a) See *Playters v. Abbott*, 2 M. & K. 108; *Bull v. Birkbeck*, 2 Y. & C. Ch. Ca. 447; *Jones v. Jones*, 5 Hare, 461.

(aa) The law upon the subject has since been most materially altered by recent acts, as will be noticed at the end of the chapter.

parent's *legal* power to destroy them, but also to prevent the exercise of any undue influence of the father over the son, which, if the father were tenant of the first freehold, he might be disposed to practise, in order to induce the son to join in barring the entail for purposes not authorised by the spirit of the settlement.<sup>(b)</sup>

In the second form it is imposed upon the trustees, as before, to preserve the contingent limitations; but as the freehold in possession is vested in the parent, the trustees can have no power to prevent a recovery by the father and son so \*soon as the son has attained the age of twenty-one; but should the tenant for life commit a forfeiture, and so the freehold in possession become vested in the trustees, it would then be their duty, though the settlor himself might not have contemplated such a purpose, not to allow the interests of the child to be prejudiced by any improper exercise of the authority of the parent.

The duties of these trustees may be regarded, first as the case stands before the eldest son has attained twenty-one; and, secondly, as the obligations of the trustees are varied by the occurrence of that event.

I. *Until the eldest son has attained twenty-one* the duty of the trustees not to join in any act to destroy the contingent remainders is *express* and *imperative*.<sup>(c)</sup> "When trustees," it was once observed by the court, "are appointed to preserve an estate in a family and for no other purpose, and they, instead of pursuing it, do a wilful act with an intent and in order to destroy it, how can this be otherwise than a plain breach of trust, or how can it be rendered clearer than by barely putting the case? Should the court hold it no breach of trust, or pass it by with impunity, it would be making proclamation that the trustees in all the great settlements in England were at liberty to destroy what they had been entrusted only to preserve. Where an estate is limited to A. for life, remainder to his first and other sons in tail, though it be a plain wrong and *tort* in A. to do any act which will destroy those remainders before the birth of a son, notwithstanding his legal power of doing so, yet, as in this case there is no trustee, there can be no trust, nor consequently any breach of trust, and therefore a court of equity may have no cognisance of such a case nor handle for relief, the matter being left purely at the common law. To prevent this inconvenience, the remedy of appointing trustees was invented on purpose to disable the tenant for [\*406] life from doing such an injury to his issue, which is not a very \*old invention. Now as it was a *tort* in the tenant for life where there were no trustees to destroy contingent remainders, so must it more plainly be one in trustees to join in the destruction of them being contrary to their trust, upon which account only is such act of theirs punishable in a court of equity."<sup>(d)</sup>

It was formerly contended, that in settlements upon *marriage*, or for other *valuable consideration*, it would be a breach of duty to join in the

(b) See *Woodhouse v. Hoskins*, 3 Atk. 24; *Woolmore v. Burrows*, 1 Sim. 527.

(c) *Mansell v. Mansell*, 2 P. W. 678; *Moody v. Walter*, 16 Ves. 302 and 307, per Lord Eldon; *Biscoe v. Perkins*, 1 V. & B. 491, *per eundem*; *Tipping v. Piggott*, 1 Eq. Ca. Ab. 385, per Lord Harcourt; *Pye v. Gorge*, 1 P. W. 128, *per eundem*; S. C. 7 B. P. C. 221.

(d) *Mansell v. Mansell*, 2 P. W. 680.



destruction of the remainders, but that in limitations created by *will* or other *voluntary settlement* the same doctrine was not applicable; but in *Mansell v. Mansell*(*e*) the distinction was unhesitatingly over-ruled, for "whether the trustee did it on a voluntary conveyance or not was immaterial, for still every trustee ought to be faithful to his trust."(*f*)

If the trustees destroy the contingent remainders in favour of a volunteer or purchaser with notice, the specific estate may be followed into the hands of such volunteer or purchaser; but if the trustees pass the property into the hands of a purchaser without notice, then, as the identical estate cannot be recovered, the trustees will be decreed to buy other lands of equal value to be settled to the same uses.(*g*)

Where the ultimate limitation of a marriage settlement is to the *heirs of the husband*, if the trustee join with the husband and wife in the destruction of that remainder, and there is no issue of the marriage, the heir of the husband is not entitled to come upon the trustee to compensate him for the loss of the estate: relief is extended to those only who come in and claim as *purchasers*, as first and other sons; not to all the subsequent remaindermen, as the right heirs of the husband, who are regarded in the light of volunteers, and not to be aided in a court of equity.(*h*)

And in a limitation to trustees and their heirs during \*the life of the husband, remainder to the heirs of the body of the husband, [\*407] remainder to the husband in fee, the *issue of the marriage* cannot claim compensation for a breach of trust during the lifetime of the husband, for *nemo est hæres viventis*.(*i*)

As any disturbance of the settlement before the eldest son has attained twenty-one is a clear breach of trust, it follows that even the court cannot sanction such a proceeding, though very particular circumstances may be alleged in support of the reasonableness of the demand. Thus, where the plaintiff and his wife had been married twelve years without issue, and the prayer of the bill was that part of the estate might be sold for payment of debts, and the trustees submitted to act as the court should direct, Lord North said "he could not justify to decree a breach of trust: he had known where people had been married near twenty years without issue, and afterwards had children."(*k*)

But two cases are to be noticed, in which the court did conceive itself justified, from the great particularity of the circumstances, in departing from this rule.

The first is the case of *Platt v. Sprigg*,(*l*) in which R. mortgaged lands to M. for 1000 years, to secure 1000*l.* and interest, and afterwards upon his marriage made a settlement, subject to the incumbrance, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to the first and other sons. The mortgagee threatened to enter, and the lands were in consequence

(*e*) 2 P. W. 678.

(*f*) Id. 683.

(*g*) *Mansell v. Mansell*, 2 P. W. 681, per Cur.; *Parkes v. White*, 11 Ves. 209, see 220, 236; *Pye v. Gorge*, Pr. Ch. 308; S. C. 1 P. W. 128.

(*h*) *Tipping v. Piggott*, 1 Eq. Ca. Ab. 385.

(*i*) *Else v. Osborn*, 1 P. W. 387.

(*k*) *Davies v. Weld*, 1 Vern. 181; S. C. 2 Ch. Ca. 144.

(*l*) 2 Vern. 303.

articled to be sold. The purchaser filed a bill praying specific performance, and that the trustees might be directed to join in the conveyance, and so it was decreed by the court. But the ground of this decision was, that, as the mortgagee was not bound by the subsequent settlement, he might have foreclosed the estate, and so have precluded the parties entitled under the settlement from all interest in the property; but if the lands were sold, the surplus proceeds, after discharging the mortgage, [\*408] \*would be so much gained to the uses of the settlement. Thus the principle acted upon was not that trustees to preserve contingent remainders might join in the destruction of them, but that the best mode of executing the trust, under the circumstances, was to substitute a sale for a foreclosure, and to lay out the surplus in lands to be settled to the same uses.(m)

In the case of *Basset v. Clapham*(n) A., after marriage, made a voluntary settlement of lands to himself for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, remainder to himself in fee, and afterwards, becoming insolvent, executed a conveyance of the same premises to trustees for payment of his debts. The creditors filed a bill for the purpose of obtaining a sale, and prayed that the trustees might join in destroying the contingent remainders. Sir Joseph Jekyll at first refused the application, saying there was no precedent for such a direction; but afterwards, a precedent being produced to him, he granted the relief, "it being," he said, "at the suit of creditors, and for raising money for payment of debts."

It should also be mentioned as another duty of this class of trustees, that if an estate be limited to A. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail, &c., should A. threaten to commit waste it would be the duty of the trustees to file a bill for an injunction for the benefit of the contingent remaindermen.(o)

II. Of the duties of trustees to preserve contingent remainders *after the eldest son has attained twenty-one.*

Upon the occurrence of this event the joining or not joining of the trustees in the destruction of the remainders ceases to be *imperative*, and becomes *matter of discretion*: they are said to be *honorary trustees*,(p) that is bound in *honour* only to \*decide on the most proper and prudential course. However, the court, where application was made to it, would always, as the general trustee in these cases, exercise the discretion vicariously for the trustees;(q) and, where the trustees had abused the discretion, would, whatever might have been the ancient doctrine,(r) hold them responsible as for a breach of trust.(s)

(m) See *Barnard v. Large*, 1 B. C. C. 536; *Moody v. Walters*, 16 Ves. 303.

(n) 1 P. W. 358.

(o) *Perrot v. Perrot*, 3 Atk. 95, per Lord Hardwicke; *Garth v. Cotton*, 2 Ves. 555, *per eundem*.

(p) See *Barnard v. Large*, 1 B. C. C. 535; *Biscoe v. Perkins*, 1 V. & B. 492; *Woodhouse v. Hoskins*, 3 Atk. 24.

(q) See *Moody v. Walters*, 16 Ves. 307; *Biscoe v. Perkins*, 1 V. & B. 492.

(r) See *Symance v. Tattan*, 1 Atk. 614.

(s) *Barnard v. Large*, 1 B. C. C. 535, per Sir T. Sewell.

The only case in which the court has directed the contingent limitations to be destroyed, has been where the object of the parties was to re-settle the property upon the marriage of the eldest son.<sup>(t)</sup> Thus in *Winnington v. Foley*, it was reported by the master that the marriage of the eldest son was beneficial, and that it was necessary a new settlement should be made of the estate, and Lord Chancellor Parker said, "It would be greatly mischievous if the trustee should stand out, and not join with the father and son in cutting off the old settlement and making a new one: it was plainly for the benefit of the family; for by the intended settlement the son was to be but tenant for life, instead of tenant in tail;" and so decreed the trustee to join in the recovery.<sup>(u)</sup>

Where the court has been called upon to disturb the settlement, and for no other purpose than merely to disturb it, the application has of course been refused.<sup>(v)</sup>

And *à fortiori* the court would not lend its sanction if the object of the parties were such as the court ought positively to discourage, as where the intention of defeating the settlement was to pay off the father's incumbrances at the expense of the child.<sup>(w)</sup> "The reason of making the father tenant for ninety-nine years only," said Lord Hardwicke, "is in order to preserve the estate: it may likewise be the design of such \*settlements to prevent the father's influence over the son when of age, if the father was seised of the freehold, to get the son to [410] destroy the settlement. Here the intention is to pay the debts of the father. It is the very case which was intended to be prevented by the trust."<sup>(x)</sup> And Sir T. Sewell observed, "Trustees to preserve contingent remainders, who have the freehold in possession, are appointed for two purposes—one to preserve the estate against the father's power to destroy it, and the other to prevent the injury of any improper influence of the father over the son to induce him to join in destroying the entail created, in cases where he ought not to join."<sup>(y)</sup>

From the conduct of the court on these occasions, may be inferred the duties imposed upon the trustees. However, should the trustees exercise their discretion where the court would not have interfered, it does not therefore follow that they are liable as for a breach of trust: it is one thing for the court to say the object of barring the entail is not so clearly beneficial as to justify the court in overturning the settlement; it is another to hold the object so absolutely mischievous as to make the trustees responsible on the ground of a breach of duty.<sup>(z)</sup>

The preceding remarks have been general, without distinguishing between marriage settlements and wills; but upon principle, perhaps,

(t) *Frewin v. Charleton*, 1 Eq. Ca. Ab. 386; *Townsend v. Lawton*, Sel. Ch. Ca. 71; *Barnard v. Large*, 1 B. C. C. 536, per Sir T. Sewell; and see *Symance v. Tattam*, 1 Atk. 614; *Dormer v. Fortescue*, 3 Atk. 129.

(u) 1 P. W. 536; and see *Townsend v. Lawton*, 2 P. W. 380.

(v) *Barnard v. Large*, 1 B. C. C. 534.

(w) *Townsend v. Lawton*, 2 P. W. 379; *Woodhouse v. Hoskins*, 3 Atk. 22.

(x) *Woodhouse v. Hoskins*, 3 Atk. 24.

(y) *Barnard v. Large*, 1 B. C. C. 535.

(z) See *Biscoe v. Perkins*, 1 V. & B. 491; *Woodhouse v. Hoskins*, 3 Atk. 24; *Barnard v. Large*, 1 B. C. C. 535; *Moody v. Walters*, 16 Ves. 309.



the two instruments ought not to be confounded. The object of a marriage settlement is to preserve the estate in the family, and, were it not for the rule against perpetuities, the limitation to the eldest son would be not in tail, but for life, with remainder to his eldest son; and if on the marriage of the eldest son, the trustee has joined in a new settlement for the purpose of further tying up the estate, he has undoubtedly acted in conformity with the original intention. But in a will, as all the devisees are volunteers, and the trustee does not hold upon trust for the first tenant in tail more than for the successive remaindermen, if the trustee [\*411] has \*enabled an eldest son to get possession of the fee simple at the expense of the remainderman's interest, it might be argued he has overstepped his duty, and ought to answer for it as for a breach of trust. The distinction was thus observed upon by Sir T. Sewell, in the case of *Barnard v. Large*. (a) "The trustee," he said, "though properly appointed to preserve contingent remainders only, is, in effect, a trustee for all vested as well as contingent remainders, and has been so considered; but with respect to vested remainders if they have been to remote relations upon *settlements*, where the persons to whom they are limited are not the immediate objects of the parties, or where they stand in opposition to the first tenant in tail desiring a reasonable benefit consistent with the intention of the creators of the limitations, their pretensions have not been much considered: in a *will* all take as volunteers, and are equally to be considered."

But this distinction, though supported by the authority we have mentioned, was not noticed by Lord Eldon in the discussion of *Biscoe v. Perkins*, the case of a devise. (b)

The law upon the duties of trustees to preserve contingent remainders has recently undergone great alterations.

By the 15th section of the fines and recoveries act (c) it is declared, that every tenant in tail, whether *in possession, remainder, contingency*, or *otherwise*, shall have power to dispose of the lands entailed for an estate in fee simple absolute; but by the 40th and two following sections, the disposition must be by *deed inrolled*, and must be made with the *consent of the protector of the settlement*.

Under the old law, the key of the settlement was in the hands of the person who was owner of the freehold in possession; but now, by the 32d section, any settlor entailing lands may *appoint* any number of persons *in esse*, not exceeding three and not being aliens, to be protector of the settlement during the period therein specified, and may perpetuate the protectorship by means of a power of appointment of new protectors. If the settlor has not taken advantage of this permission, then, by the [\*412] 22d section, if there be subsisting \*under the settlement any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, the owner of such prior estate, or of the first of such prior estates if more than one, or *the person who would have been owner had he not disposed of his interest*, is constituted the protector of the settlement;

(a) 1 B. C. C. 535.

(b) 1 V. & B. 485.

(c) 3 & 4 Will. 4, c. 74.

but, by the 27th section, no dowress, *bare trustee*, heir, executor, or administrator shall be protector. However, by the 31st section, it is enacted, that "where, *under a settlement made before the passing of the act*, the person, who under the old law should have made the tenant to the *præcipe*, shall be a *bare trustee*, such trustee during the continuance of the estate conferring the right to make the tenant to the *præcipe* shall be the protector;" but, by the 36th section, the protector of a settlement shall not be deemed to be a *trustee* in respect of his power of consent, and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving his consent as a breach of trust.

Under the provisions, therefore, of this act, as regards settlements made *since* the passing of the act, a bare trustee cannot be protector in any case; and as regards settlements made *before* the passing of the act, though the trustee may become protector by the operation of the 31st section, he is not accountable to a court of equity for the exercise of his discretion.

By the 7 & 8 Vict. c. 76, s. 8, it was declared that no estate should be created by way of *contingent remainder*; but that every estate which before that time would have taken effect as a contingent remainder, should take effect as an executory devise, or if in a deed, as an estate having the same properties as an executory devise, and that *contingent remainders* already created should not be defeated by the destruction or merger of the preceding estate.

But this sweeping clause was repealed by 8 & 9 Vict. c. 106, s. 1; and in lieu thereof it was enacted (s. 8,) that a *contingent remainder* should be deemed capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, in *the same manner in all respects as if such determination* [\*413] had not happened.

It is consequently now unnecessary to make use of any machinery for preserving contingent remainders from destruction by the forfeiture, surrender, or merger of the preceding estate. But limitations to trustees, during the lives of the tenants for life, are still frequently introduced in settlements for the purpose of creating a check upon the tenants for life, as, in cases of waste by them, it would be the duty of the trustees to interfere as protectors of the remaindermen's interests.

Moreover, in the absence of such limitations, questions of considerable difficulty would arise in reference to the right of protectorship of an entailed estate, in cases where the estate which would otherwise confer the protectorship became extinguished by forfeiture or otherwise; so that, on the whole, the insertion of such limitations is conceived to be the safer course.

It must, of course, be borne in mind, in connection with this question, that contingent remainders are still liable to be defeated should the preceding life estate determine, *in due course*, before they become vested. And, in this point of view, the limitation of life estates adequate to support the contingent remainders is still a matter of considerable importance.

[\*414]

## \*CHAPTER XVI.

## DUTIES OF TRUSTEES FOR SALE.

THE subject of trusts for sale may be conveniently distributed into three branches: first, The general duties of trustees for sale; secondly, The power of trustees to sign discharges for the purchase-money; and, thirdly, The disability of trustees to become purchasers of the trust property.

## SECTION I.

## THE GENERAL DUTIES OF TRUSTEES FOR SALE.

It need scarcely be observed that trustees for sale, whether expressly such, or only by implication, as persons enabled to sell by virtue of a charge,<sup>(a)</sup> are authorized to enter into contracts without the previous sanction of the court;<sup>(b)</sup> but where a bill has been filed for the execution of the trust, *that* attracts the jurisdiction of the court, and the trustee would not be justified in proceeding to a sale out of court.<sup>(c)</sup>

The trustee will remember that he is bound by his office to bring the estate to a sale under every possible advantage to his *cestui que trust*,<sup>(d)</sup> and in the case of several *cestuis que trust*, with a fair and impartial attention to the interests of all the parties concerned.<sup>(e)</sup> If the trustee, or those who act *\*by his authority*, fail in reasonable diligence in [\*415] the management of the sale, as if he contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another, he will be personally responsible for the loss to the suffering party;<sup>(f)</sup> and the court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement.<sup>(g)</sup> In no case will the court enforce the specific performance of a contract where a breach of trust is involved.<sup>(h)</sup>

A trustee who takes no active part in the business cannot excuse himself by saying he had nothing to do with the conduct of the other to whom the management was confided; for where several trustees commit

(a) *Shaw v. Borrer*, 1 Keen, 559.

(b) *Earl of Bath v. Earl of Bradford*, 2 Ves. 590, per Lord Hardwicke.

(c) *Walker v. Smalwood*, Amb. 676: and see *Raymond v. Webb*, Lofft, 66; *Drayson v. Pocock*, 4 Sim. 283; *Culpepper v. Aston*, 2 Ch. Ca. 116, 223; and see further, *infra*, pp. 523, 524.

(d) *Downes v. Grazebrook*, 3 Mer. 208, per Lord Eldon; and see *Matthie v. Edwards*, 2 Coll. 480.

(e) *Ord v. Noel*, 5 Mad. 440, per Sir J. Leach; and see *Anon. case*, 6 Mad. 11.

(f) See *Pechel v. Fowler*, 2 Anst. 550.

(g) *Ord v. Noel*, 5 Mad. 440, per Sir J. Leach; *Turner v. Harvey*, Jac. 178, per Lord Eldon; *Bridger v. Rice*, 1 Jac. & Walk. 74; *Mortlock v. Buller*, 10 Ves. 292; and see *Hill v. Buckley*, 17 Ves. 394; *White v. Cuddon*, 8 Cl. & Fin. 766.

(h) *Wood v. Richardson*, 4 Beav. 176, per Lord Langdale; *Fuller v. Knight*, 6 Beav. 205; *Thompson v. Blackstone*, 6 Beav. 470.



the entire administration of the trust to the hands of one, they are all equally responsible for the faithful discharge of their joint duty by that one whom they have substituted.(i)

The trustees will be allowed a reasonable time for disposing of the estate, and though the instrument creating the trust direct them to sell "with all convenient speed," that is no more than is implied by law, and does not render an immediate sale imperative.(k) On the other hand, if the trust be to sell "at such time and in such manner as the trustees shall think fit," this will not authorize the trustees to postpone the sale arbitrarily to an indefinite period; at all events the trustees cannot by such postponement vary the relative rights of the tenant for life and remaindermen, and so interfere with the settlor's intention.(l)

\*If the trust be "with all convenient speed and within [\*416] five years" to sell the estate and apply the funds in payment of debts, &c., the proviso as to the five years is considered as directory only, and the trustees can sell and make a good title after the lapse of that period. The court could scarcely impute to the settlor the intention that the sale at the end of the five years should be made by the court, which would be the case if the power in the trustees were extinguished.(m)

In a case where the trustees had endeavoured for some time to sell, and not having succeeded, they agreed to execute a *lease*, the court, on a bill filed by the trustees to compel specific performance, refused to decree the lease, as the trust for sale did not *prima facie* imply a power to grant leases.(n) And so executors, although *quasi* trustees for sale, may, under special circumstances, be justified in granting a lease;(o) but such an act is not regularly within their province, and therefore it is incumbent on the persons taking a lease from them to show that it was called for by the interests of the parties entitled to the property.(p)

A trust for sale, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorize the trustees to execute a *mortgage*.(q) But where an estate is devised to trustees, charged with debts, and subject thereto, upon trust for certain parties, so that a sale, though it may be required, is not the testator's object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell.(r) "A power of sale out and out," observed Lord St. Leonards, "for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage; but where it is for raising a particular charge, and the estate is settled subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the court

(i) *Oliver v. Court*, 8 Price, 166, per Lord Chief Baron Richards; *In re Chertsey Market*, 6 Price, 285, *per eundem*.

(k) *Buxton v. Buxton*, 1 M. & C. 80; *Garrett v. Noble*, 6 Sim. 504; and see *Fitzgerald v. Jervoise*, 5 Mad. 25; *Vickers v. Scott*, 3 M. & K. 500.

(l) See *Walker v. Shore*, 19 Ves. 391; *Hawkins v. Chappell*, 1 Atk. 623.

(m) *Pearce v. Gardner*, 10 Hare, 287; and see *Cuff v. Hall*, 1 Jur. N. S. 973.

(n) *Evans v. Jackson*, 8 Sim. 217.

(o) *Hackett v. M'Namara*, Ll. & G. Rep. t. Plunket, 283.

(p) *Keating v. Keating*, Ll. & G. Rep. t. Sugden, 133.

(q) *Haldenby v. Spafforth*, 1 Beav. 390; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Devaynes v. Robinson*, 5 Weekly Rep. 509.

(r) *Ball v. Harris*, 4 M. & Cr. 264.

[\*417] will support it \*as a conditional sale, as something within the power, and as a proper mode of raising the money.(s)

A testator devised an estate to trustees upon trust to apply the rents for fifteen years in payment of incumbrances charged thereon, and if, by any reason whatever, in the opinion of the trustees a sale should become necessary, "they were authorized to sell." The purchaser objected that the amount of the incumbrances would not justify a sale of the whole estate, but it was held that the power of sale depended on the opinion of the trustees, and the fact that they thought it necessary would be evidenced by the conveyance.(t)

A trust to raise money by *mortgage* will not authorize a sale, though the latter may be more beneficial to the estate; and the court itself has no jurisdiction to substitute a sale for a mortgage.(u)

A power to trustees to *sell* will not authorize a *partition*, though whether a power to sell and exchange will do so remains at present doubtful.(v)

In settlements of real estate a power of sale is usually given to trustees, to be exercised with the consent of the tenant for life, with a direction to lay out the proceeds, with all convenient speed, in another purchase, and in the mean time to invest them upon some proper security. For determining upon what occasions the trustees would be justified in proceeding to a sale, it will be proper to notice, in the words of Lord Eldon, the intention of the settlement in so framing the power: "The most improvident course that could be adopted," he said, "would be to intrust the tenant for life with the execution of the power; for it is generally the interest of the tenant for life to convert the estate into money, either with a view to sell another estate to his family, or for the ordinary purpose of getting a better income during his life. The mode of settlement, therefore, in such a case, is, that the trustees are to sell, but not without calling to their aid all fair attention to the nature of the subject and the convenience of the \*property; they are to sell, [\*418] therefore, with the consent of the tenant for life; and as he is a purchaser for the future family, the providence of the settlement requires that the fact of such consent and approbation should be evidenced by deed, &c. With that consent and approbation necessary to protect the interest of the tenant for life, the trustees, bound to a due attention to the interest of the children, have a power of selling for such price as shall appear to them to be reasonable, that is, after they have with due diligence examined." His lordship then proceeds to lay down the rule that ought to regulate the conduct of trustees in the following terms:—"The object of the sale," he said, "must be to invest the money in the purchase of another estate, to be settled to the same uses, and they are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this

(s) *Stroughill v. Anstey*, 1 De G. M. & G. 645; *Page v. Cooper*, 16 Beav. 400.

(t) *Rendlesham v. Meux*, 14 Sim. 249.

(u) *Drake v. Whitmore*, 5 De G. & Sm. 619.

(v) *Brassey v. Chalmers*, 16 Beav. 223; 4 De G. M. & G. 528; *Bradshaw v. Fane*, 2 Jur. N. S. 247.

court would expect some strong purpose of family prudence justifying the conversion, if it is likely to continue money."<sup>(w)</sup> Sir W. Grant is said to have concurred in the same sentiments,<sup>(x)</sup> so that clearly the trustees would not be justified in selling to gratify the caprice or promote the exclusive interest of the tenant for life. It might happen that particular circumstances might call for an immediate sale, as where an extremely advantageous offer is made, or there is a prospect of great deterioration by abstaining from exercising the power; but, generally speaking, the trustees ought not to convert the estate without having another specific purchase in view, and then not for the mere purpose of conversion, but in the honest exercise of their discretion, for the benefit of all parties claiming under the settlement.<sup>(y)</sup> The power of investing the proceeds upon some security in the mean time was not meant to authorize the continuance of the property as money, but only to meet the exigencies of particular circumstances, as where the trustees are disappointed of the contemplated new purchase, or the state of the title leads to necessary delay.

\*Trustees for sale at the request and by the direction of another party, to be testified by writing, &c., cannot obtain a decree for [\*419] specific performance without first proving that the contract was entered into at such request and by such direction, and that such request and direction have, either before or since the contract, been testified by the requisite writing.<sup>(z)</sup>

If an estate be vested in trustees upon trust for A. for life, and then to sell, the trustees have no power to sell during the life of A., however beneficial it may be to the parties interested in the trust.<sup>(a)</sup>

Where an estate is vested in two or more trustees upon trust to raise a sum by sale or mortgage, and one of the trustees dies, the survivors or survivor may sell or mortgage, unless there be words in the settlement which expressly declare that the trust shall not be exercised by the survivors or survivor, for the execution of a trust is not treated on the footing of a power; but the presumption is that, as the estate, so the discretionary part of the trust passes to the survivors or survivor.<sup>(b)</sup>

The objection is sometimes taken that, where there is a power of appointment of new trustees, and one of the trustees has died and a new trustee has not been substituted, the survivor is incompetent to execute a valid conveyance. But the legal estate passes to the surviving joint tenant at law,<sup>(c)</sup> and the trust, as we have seen, shifts to the survivor in equity:<sup>(d)</sup> and though a proviso for appointment of new trustees may certainly be so framed that the execution of the trust should, until a new trustee has been substituted, remain in suspense,<sup>(e)</sup> yet the clause, as

(w) *Mortlock v. Buller*, 10 Ves. 308, 309.

(x) *Lord Mahon v. Earl Stanhope*, cited 2 Sug. Pow. 512.

(y) See *Cowgill v. Lord Oxmantown*, 3 Y. & C. 369; *Watts v. Girdlestone*, 6 Beav. 188; *Marshall v. Sladden*, 4 De Gex & Sm. 468.

(z) *Adams v. Broke*, 1 Y. & C. Ch. Ca. 627; see the decree at the foot of the case, and see *Blackwood v. Borrowes*, 2 Conn. & Laws, 459.

(a) *Johnstone v. Baber*, 8 Beav. 233.

(b) *Lane v. Debenham*, 17 Jur. 1004.

(c) *Doe v. Godwin*, 1 D. & R. 259.

(d) See *supra*, pp. 299, 300.

(e) See *Foley v. Wontner*, 2 Jac. & Walk. 246.



usually penned in settlements, is considered by the courts to be merely of a directory character. *(f)*

In a mortgage to two persons where there is a *power of sale* to "them, [\*420] their heirs and assigns," and one dies, the survivor may \*sell: *(g)* and in a mortgage to A. in fee, with a power of sale to him, "his heirs, administrators, executors and assigns," the administrator of the assign of A., though the legal estate of the lands be not in himself, but in a trustee for him under a conveyance from the heir of the assign, is, together with such trustee, an assign within the meaning of the power, and can, therefore, sell. *(h)*

In respect of sales and mortgages for raising portions, if a specific sum be given to A., payable on her age of twenty-one years, or day of marriage, the money cannot be raised until the interest has become vested; for should the fund created by the money raised prove deficient, the portionist might still have recourse to the estate: *(i)* and so where the trust of a term was to raise 3000*l.* for younger children, payable at their respective ages of twenty-one years, or days of marriage, it was held the trustees were not authorized, when one child had attained his age of twenty-one years, to raise the entire sum; for the infant children could not be deprived of the real security for their shares. *(k)* But from the manifest convenience of raising the portions at once, it seems the court will lean to that construction where any thing appears upon the instrument to contemplate such a course. Thus the trustees of a marriage settlement were directed, after the death of the husband, to levy and raise by mortgage, sale, or other disposition of the estate, if there should be more than three children, the sum of 10,000*l.* for their portions, the shares of the sons to be vested in, and payable to them at the age of twenty-one, and the shares of the daughters at twenty-one or marriage; and it was provided that *no mortgage should be made until some one of the portions should become payable*; and four of the children had attained twenty-one and three were under age; the vice-chancellor said, "In this settlement there is a clause that no mortgage is to be made until some one of the portions shall become payable. The whole 10,000*l.* must therefore be raised at once.

[\*421] It is objected that some of the shares may become \*diminished in amount: the answer to that is, that the court considers the investment in the three per cent. consols as equivalent to payment. If there is any rise in the funds the children under age will have the benefit of it. *(l)*

A trustee for sale will of course inform himself of the real value of the property, and for that purpose, will, if it be necessary, employ some experienced person to furnish him with an estimate. *(m)*

And as a trustee, like any ordinary vendor, is bound to make the pur-

*(f)* See *supra*, p. 301.

*(g)* *Hind v. Poole*, 1 Kay & Johns. 383.

*(h)* *Saloway v. Strawbridge*, 1 Kay & Johns. 371.

*(i)* *Dickenson v. Dickenson*, 3 B. C. C. 19.

*(k)* *Wynter v. Bold*, 1 S. & S. 507.

*(l)* *Gillibrand v. Goold*, 5 Sim. 149.

*(m)* See *Oliver v. Court*, 8 Price, 165; *Campbell v. Walker*, 5 Ves. 680; *Conolly v. Parsons*, 3 Ves. 628, note; *Sugd. Vend. & Purch.* 55, 11th ed.

chaser a good title,<sup>(n)</sup> it would be prudent, before proceeding to the execution of the trust, to take the opinion of some professional person whether a good title can be deduced. Should the contract for sale be unconditional and the title prove bad, the purchaser in a suit for specific performance would be allowed his costs against the trustee,<sup>(o)</sup> though the trustee, where his conduct was excusable, might charge them upon the trust estate under the head of expenses.

If lands be devised to trustees in trust to sell for payment of debts, and subject to that charge be given to A. for life without impeachment of waste, with remainders over, the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, but by a sale of part of the estate itself; and should they have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds.<sup>(p)</sup> And, on the other hand, if there be a sum given to be laid out in the purchase of an estate to be settled on A. for life without impeachment of waste, with remainders over, the trustees would not be justified in purchasing a wood-estate, so that the tenant for life when put in possession could, by a fall of the timber, possess himself of a great part of the capital or *corpus* of the fund. But it is presumed that the trustees might purchase an estate where the timber standing formed no very considerable part <sup>\*of</sup> [422] the value, for it can hardly be supposed that the trustees were meant to purchase land without a tree upon it.

The sale may be conducted by public auction or private contract, as the one or the other mode may be most advantageous, according to the circumstances of the case.<sup>(q)</sup> And it was held under the old Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 20, directing a sale by auction, that the assignees of an insolvent might sell a real estate by private contract, after an ineffectual attempt to dispose of it by auction.<sup>(r)</sup> And so, under the subsequent Insolvent Debtors' Act (1 & 2 Vict. c. 110, s. 47, which directs the assignees of insolvents to sell "in such manner" as the major part, in value, of the creditors should direct,) in a case where the creditors resolved that there should be a reserved bidding of 325*l.*, and the assignees sold by auction for 310*l.*, the clause was held to be merely directory, and that the deviation from the resolution of the creditors did not, therefore, vitiate the sale.<sup>(s)</sup>

The trustee cannot without responsibility delegate the general trust for sale;<sup>(t)</sup> but there seems to be no objection to the employment of agents by him, where such a course is conformable to the common usage of business, and the trustee acts as prudently for the *cestui que trust* as he would

(n) *White v. Foljambe*, 11 Ves. 343, 345, per Lord Eldon; and see *McDonald v. Hanson*, 12 Ves. 277; *Vend. & Purch.* 61, 11th ed.

(o) *Edwards v. Harvey*, Coop. 40.

(p) *Davies v. Westcomb*, 2 Sim. 425.

(q) See *Ex parte Dunman*, 2 Rose, 66; *Ex parte Hurly*, 2 D. & C. 631; *Ex parte Ladbroke*, 1 Mont. & A. 384.

(r) *Mather v. Priestman*, 9 Sim. 352.

(s) *Wright v. Maunder*, 4 Beav. 512; and see *Sidebotham v. Barrington*, 4 Beav. 110.

(t) *Hardwick v. Mynd*, 1 Anst. 109.

have done for himself.(u) But an agent for sale must not be allowed to receive the purchase-money.

If the trustee think a sale by auction the more eligible mode, he must see that all proper advertisements are made, and due notice given. It was ruled in an old case,(v) that a *cestui que trust* could not, by alleging the want of these preliminary steps, obtain an injunction against the sale; for, the trustee being personally responsible to the *cestui que trust* for any consequential damage, the court could not regard it as a case of irreparable injury. But, in a more recent case, where a mortgage deed [\*423] contained a power of sale, and the mortgagor, \*alleging that due notice had not been given, applied for an injunction against the sale, though Sir John Leach in the first instance, *on the assumption that the power was vested in the mortgagee*,(w) refused the motion, considering that, as the plaintiff might give notice to the purchaser of the institution of the suit, it was better there should be an additional party to the cause than a possible injury be risked to the mortgagee by the interruption of the sale, yet it afterwards appearing that the power was limited to a trustee, and that the mortgagor had not been apprised of the intended sale, his honor granted the injunction. "It was the duty," he said, "of the trustee to attend equally to the interests of both *cestuis que trust*, and to apprise both of the intention of selling, that each might take the means to procure an advantageous sale."(x)

A trustee may sell subject to any reasonable conditions of sale,(y) but would not be justified in clogging the property with restrictions that were evidently uncalled for by the state of the title.(z) It is not unusual in penning a trust for sale to authorise the trustees expressly to insert special conditions of sale; but still this would be no warrant for the introduction of stipulations plainly a breach of trust as not rendered necessary by the state of the title, and calculated to damp the success of the sale.

There seems to be no rule to prevent trustees from selling in lots, should the auctioneer or other experienced person recommend it as the most advisable course.(a)

It is certain that *assignees of a bankrupt* cannot buy in at the auction without the authority of the creditors. Where the assignees had put up the estate in two lots, and bought them in, and afterwards upon a re-sale there was a gain upon one lot and a loss upon the other, the balance upon the whole being in favour of the estate, Lord Eldon compelled the assignees to account for the diminution of price on the one lot, and would not allow them to set off the increase of price on the other.(b) It

(u) *Ex parte Belchier*, Amb. 218; and see *Ord v. Noel*, 5 Mad. 438.

(v) *Pechal v. Fowler*, 2 Anst. 549.

(w) As to restraining a *mortgagee* from selling, see *Matthie v. Edwards*, 2 Coll. 465, S. C. on appeal nomine *Jones v. Matthie*, 11 Jurist, 504.

(x) *Anon. case*, 6 Mad. 10; *Blennerhasset v. Day*, 2 B. & B. 133.

(y) *Hobson v. Bell*, 2 Beav. 17.

(z) *Wilkins v. Fry*, 2 Rose, 375; S. C. 1 Mer. 268.

(a) See *Co. Lit.* 113 a; *Ord v. Noel*, 5 Mad. 438; and see *Ex parte Lewis*, 1 Gl. & J. 69.

(b) *Ex parte Lewis*, 1 Gl. & J. 69; and see *Ex parte Buxton*, id. 355; *Ex parte Baldock*, 2 D. & C. 60; *Ex parte Gover*, 1 De Gex, 349.



\*may be thought perhaps that assignees acting under a statute have less discretionary power than belongs to ordinary trustees; [\*424] but in *Taylor v. Tabrum*(c) the same principle was applied to trustees in the proper sense of the word. An estate had been devised upon trust to sell, and soon after the testator's death, the trustees put up the property to auction, and 6000*l.* was bid, but one of the parties interested desiring it might not be sold under 7000*l.*, the property was bought in. Four or five years afterwards they sold it for 3600*l.* and they were held responsible for the consequent loss to the estate. It was said by Sir J. Leach, that, "if the sale be made with all the circumstances of caution which a provident owner would have applied in the case of his own property, it could not be a breach of trust that the estate did not produce a full price, for the very nature of an auction was that the adequacy of price should be submitted to the chance of competition."(*d*)

Trustees for sale under an act of parliament are chargeable with auction duty in the same manner as any other vendor.(*e*)

The court will not enforce a contract against trustees where it presses with extreme hardship. Thus, where trustees, not being apprised of the real amount of the incumbrances upon an estate, entered into a personal engagement with the purchaser to clear off all incumbrances, the court would not compel the trustees to fulfil their contract, but left the parties to law,(*f*) and the bill was dismissed without costs.(*g*)

The purchaser, after the contract, should not be let into possession of the estate until the completion of the sale by payment of the full purchase money.(*h*)

In drawing the conveyance, the word "grant" being commonly (though erroneously) supposed to contain a warranty,(*i*) the trustee, instead of "granting, bargaining, selling, and releasing," is made to "bargain, sell, and release," with \*the omission of the word ["\*425] "grant:" and it is usual, in order to secure the trustees from the possibility of parting with any interest to which they may be entitled beneficially, to insert in the operative part of the instrument the words "according to their estate and interest as such trustees."

A trustee cannot be compelled to enter into any other covenant for title than against incumbrances by his own acts.(*k*) But it would be

(c) 6 Sim. 281.

(d) *Ord v. Noel*, 5 Mad. 440; but see *Conolly v. Parsons*, 3 Ves. 628, note.

(e) *King v. Winstanley*, 8 Price, 180.

(f) *Wedgwood v. Adams*, 6 Beav. 600.

(g) 8 Beav. 103.

(h) *Oliver v. Court*, 8 Price, 166, per Chief Baron Richards; see *Browell v. Reed*, 1 Hare, 434.

(i) See Co. Lit. 384 a, note (1), *Hargrave and Butler's Ed.*; and see 8 & 9 V. c. 106, s. 4.

(k) *White v. Foljambe*, 11 Ves. 345, per Lord Eldon; *Onslow v. Lord Londesborough*, 10 Hare, 74, per Cur.; *Worley v. Frampton*, 5 Hare, 560; *Stephens v. Hotham*, 1 Kay & Johns. 571; and *Page v. Broom*, 3 Beav. 36. This is carried to such an extent that, where a lessor grants a lease with a covenant for perpetual renewal, devisees in trust of the lessor, though bound to grant a new lease, are not bound to enter into a similar covenant. In these cases the court has, in order to secure the lessee without making the trustees personally liable, declared the right of the lessee to a perpetual renewal, and directed the new lease to con-

prudent in trustees to apprise the public that they sell in that character, that the purchaser may not say he was led to suppose from the advertisements of sale, that the vendors were the beneficial proprietors, that the contract must, therefore, draw with it the usual incidents, and that the purchaser ought to have the benefit of the ordinary covenants.

Mortgagees with a power of sale are regarded as trustees, and covenant only against their own acts.<sup>(l)</sup> To the extent of their mortgage money they are beneficially interested, but not as owners of the estate, but only as incumbrancers entitled to a charge.

It was laid down by Lord Eldon, that *assignees of bankrupts* were bound, in case they could not deliver up the title deeds, to furnish the purchaser with attested copies and to covenant for the production of the originals, the covenant to be confined to the period during which the assignees should continue in office.<sup>(m)</sup> And trustees, where they retain the title deeds, are equally required to give attested copies, and to covenant for the production of the documents in the common form, with a [\*426] \*proviso, that on lawfully parting with the deeds, and obtaining a similar covenant from the person to whom they are delivered, the covenant shall be void.

In a sale of *leaseholds* by trustees who take under a settlement they cannot, in any case, require from a purchaser a covenant of indemnity against a breach of the covenants; for, as regards *themselves*, they took the lease by assignment, and therefore cease to be liable on the assignment over; and, as regards a covenant for the protection of the *settlor*, he has become a stranger by the execution of the trust deed, and the trustees could neither, in the absence of an express stipulation, insist upon a benefit to one with whom there is no existing privity, nor as they are bound to make the sale the most beneficial to the *cestuis que trust*, could they insert a condition in favour of a stranger, which might operate as a discouragement to purchasers.<sup>(n)</sup> But the *executor* of a lessee upon assigning the term would be entitled to such a covenant, his testator's estate being liable under the original covenants of his testator.

Indeed an executor is, in such a case, entitled *prima facie* not merely to the vendee's covenant to indemnify, but also where the estate is in course of distribution to have a portion of the estate itself reserved for the purpose of forming an indemnity fund,<sup>(o)</sup> though not so where the risk is inconsiderable.<sup>(p)</sup> But of course there can be no claim to an indemnity where the testator's estate is not liable, as where the testator himself was not a *lessee*, but the *assignee* of a lease who had entered into

tain a recital of the old lease, and of the declaration of the court, in obedience to which the trustees purport to demise; *Copper Mining Company v. Beach*, 13 Beav. 478; *Hodges v. Blagrove*, 18 Beav. 405. So, if A. agrees to grant a lease to B., and B. dies, A. can compel the executors of B. to accept the lease, but the lease is so framed that the executors of B. are guarded against all personal liability; *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 Kay & Johns. 571; and see *Staines v. Morris*, 1 V. & B. 12.

(l) Vend. and Pur. p. 61, 11th ed.

(m) Ex parte Stuart, 2 Rose, 215.

(n) See *Wilkins v. Fry*, 1 Mer. 244.

(o) *Cochrane v. Robinson*, 11 Sim. 378; *Fletcher v. Stevenson*, 3 Hare, 360; *Dobson v. Carpenter*, 12 Beavan; *Hickling v. Boyer*, 3 Mac. & Gor. 635.

(p) *Dean v. Allen*, 20 Beav. 1.

no covenants.(q) And if the executor has assented to the bequest unconditionally, he has waived his claim to indemnity.(r)

In the assignment of a *chose in action*, the trustee may be required to give a power of attorney to receive the money and to sue in his name, but this should be accompanied with a \*proviso, that no action or suit shall be commenced without the assignor's consent, or else [\*427] tendering a sufficient indemnity.(s)

As in a mortgage accompanied with a power of sale, the mortgagee, who is a *quasi* trustee, can under the power make a title to the purchaser without the concurrence of the mortgagor,(t) a clause in the mortgage deed that the mortgagor shall, if required, be a party to the conveyance, is considered a contract for the exclusive benefit of the mortgagee, and not as imposing the necessity of procuring the mortgagor's consent to the sale.(u)

If the trustees have a power of signing discharges for the purchase-money, the *cestuis que trust* need not necessarily be made parties to the conveyance;(v) but, as trustees are bound to covenant against their own incumbrances only, the *cestuis que trust*, where it is practicable, are usually made parties to the deed, that the purchaser may have the benefit of their covenants for title according to the extent of their respective interests.(w) In sales, however, under the direction of the Court of Chancery, it is the rule *not* to make the *cestuis que trust* parties; for this would involve the necessity of previously inquiring *who* were beneficially interested, and in what proportions, whereas it is a common proceeding of the court to order a sale in the first instance, and leave the rights of the respective parties to be settled by a subsequent adjustment.(x)

Where trustees sell by auction, the auctioneer, until the sale is completed, is the agent of both vendor and purchaser; but after completion of the purchase he is the agent of the vendor only, and the trustees will be answerable if by any unnecessary delay the deposit be lost.(y)

Trustees for sale and payment of debts are of course bound at any time to answer inquiries by the author of the trust, or \*the persons claiming under him, as to what estates have been sold and [\*428] what debts have been paid.(z)

When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the vouchers as their discharge to

(q) *Garratt v. Lancefield*, 2 Jur. N.S. 177. N.B. It may be collected from the judgment that the ordinary covenant to indemnify had not been entered into by the testator on the occasion of the assignment to him.

(r) *Shadbolt v. Woodfall*, 2 Coll. 30.

(s) *Ex parte Little*, 3 Moll. 67.

(t) *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, cited *id.* 346, note (b); *Alexander v. Crosbie*, 6 Ir. Eq. Rep. 518.

(u) *Corder v. Morgan*, 18 Ves. 347, per Sir W. Grant.

(v) See *Binks v. Lord Rokeby*, 2 Mad. 227.

(w) See *In re London Bridge Acts*, 13 Sim. 176.

(x) *Wakeman v. Duchess of Rutland*, 3 Ves. 233, 504; affirmed in D. P. 8 B. P. C. 145; *Colston v. Lilley*, 3 May, 1855, V. C. Stuart at chambers; and see *Loyd v. Griffith*, 3 Atk. 264.

(y) *Edmonds v. Peake*, 7 Beav. 239.

(z) *Clarke v. Earl of Ormonde*, Jac. 120, per Lord Eldon.



the *cestui que trust*; but the *cestui que trust* will have a right to the inspection of them.(a) But not to copies without paying for them.

The *land* is discharged so soon as the fund has been actually raised, even though the proceeds may be misapplied, and not reach their proper destination. The remedy of the parties aggrieved is against the trustees personally, and they have no *lien* upon the estate.(b)

## SECTION II.

### THE POWER OF TRUSTEES TO SIGN DISCHARGES FOR THE PURCHASE-MONEY.

The power of trustees to sign discharges for the purchase-money resolves itself into two questions:—First. Are the trustees justified in making the sale? and, Secondly. Supposing the sale itself to be proper, is the purchaser bound to see to the application of his purchase-money?

First. Are the trustees justified in proceeding to the sale?

If a testator direct a sale of his real estate for payment of debts *on the insufficiency of the personal assets*, the trustee ought not of course to dispose of the realty, until it appears the personal fund is not equal to meet the demands of the creditors. But the point we have here to consider is, how will the purchaser be affected, and, as he has no means of investigating the accounts, it is held he is not to be prejudiced should it be proved that eventually the personal is sufficient.(c) All that could [\*129] reasonably, and which perhaps *would* be required \*of him, is, that he should apply to the executor, where the trustee does not sustain that character, and ask if the necessity of the sale has arisen.(d) However, a purchaser is prevented from dealing with the trustee out of court, where a suit has been instituted for the administration of the estate,(e) provided at least the suit be *bona fide*, and not collusive.(f) But if a testator give a *power* of sale only to his trustees on the insufficiency of the personal estate, then the purchaser must at his peril ascertain that the power can be exercised.(g) The difference between a trust and a power is this. In the former case, the trustees, having the legal estate, can transfer it to the purchaser by their ownership; and equity, as the purchaser had no opportunity of discovering the true state of things, will not impeach his title. But where there is a power merely,

(a) Supra, note (z), *per eundem*.

(b) Anon. 1 Salk. 153; Juxon v. Brian, Pr. Ch. 143; Carter v. Barnardiston, 1 P. W. 505, see 518; Hutchinson v. Massareene, 2 B. & B. 49; and see Omerod v. Hardman, 5 Ves. 736; Dunch v. Kent, 1 Vern. 260; Culpepper v. Aston, 2 Ch. Ca. 115; Harrison v. Cage, 2 Vern. 85.

(c) Culpepper v. Aston, 2 Ch. Ca. 115, per Lord Nottingham; Keane v. Robarts, 4 Med. 356, per Sir J. Leach; Co. Lit. 290 b, note by Butler, sect. 14; Shaw v. Borrer, 1 Keen, 559; but see Fearne's P. W. 121.

(d) See Shaw v. Borrer, *ubi supra*.

(e) Culpepper v. Aston, 2 Ch. Ca. 116, 223, per Lord Nottingham; and see Walker v. Smallwood, Amb. 676; and *supra*, p. 328.

(f) Culpepper v. Aston, 2 Ch. Ca. 116, per Lord Nottingham.

(g) Culpepper v. Aston, 2 Ch. Ca. 221; Dike v. Ricks, Cr. Car. 335; S. C. Sir W. Jones, 327.

the insufficiency of the personal estate is a condition precedent; and if it did not pre-exist in fact, the power never arose, and the purchaser took nothing by the pretended execution of it.

Nor is a purchaser bound to ascertain whether *more* is offered for sale than is sufficient to answer the purposes of the trust; for how is the purchaser to know what exact sum is wanted, without investigating the accounts? Besides, the trustees are entitled, as incident to their office, to raise their costs and expenses.<sup>(h)</sup>

But where a testator directed, on the insufficiency of his personal estate, a sale in the first instance of A., and should that not answer the purpose, then of B., and the trustees, *fifteen* years after the testator's death, contracted for the sale of B. first, and then filed a bill for specific performance, alleging the existence of debts, and that A. was already in mortgage, or otherwise charged to the full value, the court, considering it was unlikely that creditors would have lain by for so many years, and that the non-existence of debts might therefore be suspected, and that what was ground for suspicion might be deemed notice to a purchaser, determined against the title.<sup>(i)</sup>

\*If an estate be devised, charged with legacies payable at twenty-one, the devisee cannot sell the land discharged of the legacies until the time of payment has arrived. The execution of the trust is uncalled for till that period, and it cannot be anticipated for the convenience of other parties. Should the legacies be raised, and invested by anticipation, the funds might afterwards become deteriorated, and the legatees be defrauded of the bounty intended them.<sup>(k)</sup> But where a term was created, and the trustees were directed to raise, if there should be one child, 6000*l.*; if two, 8000*l.*; if three or more, 10,000*l.*; and it was provided that no mortgage should be made *until some one of the said portions should become payable*; there being seven children, four of whom were of age, and three minors, it was held that the trustees might raise the whole 10,000*l.*<sup>(l)</sup>

Secondly. Supposing the sale to be proper, is the purchaser bound to see to the application of his purchase-money?

It is a rule requiring no elucidation, that if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the rightful owner. If an estate be vested in A. upon trust to sell and divide the proceeds between B. and C., in a court of law the absolute ownership is in A., and his receipt, therefore, will discharge the purchaser; but in equity B. and C., the *cestuis que trust*, are the true and beneficial proprietors, and A. is merely the instrument for the execution of the settlor's purpose. The receipt, therefore, to be effectual, must be signed by B. and C.;<sup>(m)</sup> and the power of the vendor to sign a discharge for the purchase-money is a question, not of *conveyance*, but of *title*.<sup>(n)</sup>

Such is the *prima facie* rule in trusts; but in every instance it is

(h) Spalding v. Shalmer, 1 Vern. 301.

(i) Pierce v. Scott, 1 Y. & C. 257.

(k) Dickenson v. Dickenson, 3 B. C. C. 19.

(l) Gillibrand v. Goold, 5 Sim. 149.

(m) See Weatherby v. St. Giorgio, 2 Hare, 624.

(n) Forbes v. Peacock, 12 Sim. 521.

liable to be controlled and defeated by an intention to the contrary collected from the instrument creating the trust, whether that intention be *expressed* or *implied*.

The former is the case, if the settlor direct in *express* terms [\*431] \*that the receipts of A., the trustee, shall discharge the purchaser from seeing to the application of the purchase-money; for B. and C. cannot at the same moment claim under and contradict the instrument—they cannot avail themselves of the sale, and reject the proviso affecting the receipt, and the words in the ordinary power of attorney, viz. “to sign discharges for the money to be recovered under the power, and to do all other acts as the principal might have done,” have been held to carry such a direction<sup>(o)</sup> where not controlled by a subsequent receipt clause tending to negative that intent.<sup>(p)</sup>

In what cases the like intention will be *implied*, has never been satisfactorily ascertained. However, two principles appear to be the basis upon which most of the distinctions taken by the courts have been founded.

1. In the creation of a trust for immediate sale, it is clearly implied, that a legal and equitable discharge for the purchase-money shall be *signed by some one at the time of the sale*. There can be no conveyance of the estate without payment of the money, and there can be no such payment without a complete discharge. Should the settlor appear to have contemplated a sale at a time when the *cestuis que trust*, or some of them, were either not in existence, or not of capacity to execute legal acts, the intention must be presumed that the receipts of the trustees should be a release to the purchaser.

Thus, where a deed was executed in India for payment of debts, with a proviso that creditors in India should be allowed six months to come in, and those in Europe eighteen months, and if any were under disability, they should be further allowed the like periods from the time the disability ceased, Sir W. Grant said, “the deed very clearly confers an *immediate* power of sale for a purpose that cannot be immediately defined. It is impossible to contend that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed, and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was [\*432] to be distributed. If the \*sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should of themselves be able to give a discharge for the produce, for the money could not be paid to any other person than the trustees.”<sup>(q)</sup>

So where A. devised certain lands to his children, “the same to be sold when the executors and trustees of his will should see proper, and the purchase-money to be equally and severally divided amongst his above-named children,” Sir J. Leach said, “It is plain the testator intended that the trustees should have an immediate power of sale.

(o) Binks v. Lord Rokeby, 2 Mad. 227, see 238, 239.

(p) Brasier v. Hudson, 9 Sim. 1.

(q) Balfour v. Welland, 16 Ves. 151, see 156.



Some of the children were infants, and not capable of signing receipts. I must therefore infer, that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose.”(r)

As to *cestuis que trust* who, after the date of the instrument, go out of the jurisdiction the general rule does not apply, for it cannot be said that the settlor *meant* the trustees to sign receipts for them, the presumption being the other way; but though a power of signing receipts cannot in this case be implied, it may be contended that the rule of equity obliging a purchaser to see to the application of his purchase-money, operates only where the *cestui que trust* is accessible to receive the money, and that when he is abroad the purchaser may pay to the trustee, and need not look to the application. Of this opinion appears to be Lord St. Leonards, who remarks, “The receipt of the trustee would certainly have been a sufficient discharge for the shares of the infant, and also, it is conceived, for the share of the *cestui que trust* who was abroad. It would be difficult to maintain that the absence of a *cestui que trust* in a foreign country should, in a case of this nature, impede the sale of the estate.”(s)

2. If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a *special* trust annexed, the presumption must be that the settlor meant to \*confide the execution of the trust to the hands of the trustee, and not of the purchaser.(t) [\*433]

Thus, Lord Thurlow, where a settlement contained a power of sale, and it was directed that the trustees should receive the purchase-money, and lay it out on a new purchase to the like uses, and till that was done should invest it in government funds, observed, “As to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, I know of no case which lays down, or any reasoning in any case which goes the length of saying, that a purchaser is so bound.”(u) So where a trust was created for payment of debts, Sir W. Grant, in holding the receipt of the trustees to be a release to the purchaser, said, “it was evident from the whole tenor of the deed that the parties contemplated and intended that all the money to be produced by the sale should come into the hands of the trustees; should be managed by them until distribution; should be placed out in their names; and

(r) *Sowarsby v. Lacy*, 4 Mad. 142; *Lavender v. Stanton*, 6 Mad. 46; and see *Breedon v. Breedon*, 1 R. & M. 413; *Cuthbert v. Baker*, Vend. & Purch. 842, 843, 11th ed.

(s) Vend. & Purch. 844, 11th ed.

(t) See *Glynn v. Locke*, 2 Drur. & War. 11; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342.

(u) *Doran v. Wiltshire*, 3 Sw. 699. In *Cox v. Cox*, 1 Kay & John. 251, Vice-Chancellor Wood held, that powers of sale and exchange do not imply a power of signing receipts; that the latter power was by no means one inserted as of course in legal instruments, but often excluded, and when excluded was never implied, except under very special circumstances. The question in that case arose upon the construction of a will which gave to the tenants for life the like powers of selling and exchanging as were contained in a settlement referred to, and in which were, not only powers of sale and exchange, but also a power of signing receipts, and the vice-chancellor was of opinion that the powers of sale and exchange only, without the power of signing receipts, were incorporated by reference.

should by them be ultimately distributed.”(v) And again, where a person directed his executors to convert all his real and personal estate into money, and lend the same upon good security upon trust to pay the interest to his wife for life, with remainder over, Sir J. Leach held, “that the authority given by the testator to lay out and invest the money [\*434] was an authority to do all acts essential to \*the trust, and necessarily therefore to give discharges to the borrowers of the money.”(w) And an opinion of Mr. Booth shows the practice of the profession, even in his time, to have been in conformity with these doctrines. A testator had directed his trustees to sell and invest the proceeds upon the trusts thereafter mentioned, and then gave his wife an annuity of 50*l.* a year, for her life, to be paid out of the proceeds, and, subject thereto, gave the fund to his son; but in case of his death under twenty-one, to the person entitled to his Taunton lands. Mr. Booth wrote, “I am of opinion, that all that will be incumbent on the purchaser to see done will be to see that the trustees invest the purchase-money, in their names, in some of the public stocks or funds, or on government securities, and in such case the purchaser will not be answerable for any misapplication, after such investment of the money, of any moneys which may arise by the dividends or interest, or by any disposition of such funds, stocks, or securities, *it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchase was carrying on, and therefore the testator must be supposed to place his sole confidence in the trustees*, and this is the settled practice in these cases, and I have often advised so much, and no more, to be done.” And in this opinion Mr. Wilbraham also concurred.(x)

To the principle under consideration must be referred the well-known rule, that a purchaser is not bound to see to the application of his money where the trust is for payment of debts generally; for to ascertain who are the creditors, and what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers, which the purchaser would have no right to [\*435] require.(y) So if the trust be for payment of a particular \*debt named, and of the testator’s other debts.(z) So if the trust

(v) *Balfour v. Welland*, 16 Ves. 511, see 157.

(w) *Wood v. Harman*, 5 Mad. 368; *Locke v. Lomas*, 5 De Gex & Sm. 326.

(x) 2 Cas. & Op. 114.

(y) *Forbes v. Peacock*, 11 Sim. 152; and see S. C. 12 Sim. 528; 1 Phill. 717; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Dowling v. Hudson*, 17 Beav. 248; *Culpepper v. Aston*, 2 Ch. Ca. 223; *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *Anon. Mose.* 96; *Hardwick v. Mynd*, 1 Anst. 109; *Johnson v. Kennett*, 3 M. & K. 630, per Lord Lyndhurst; *Rogers v. Shillicorne*, Amb. 189, per Lord Hardwicke; *Walker v. Smallwood*, id. 677, per Lord Camden; *Barker v. Duke of Devonshire*, 3 Mer. 310; *Abbot v. Gibbs*, 1 Eq. Ca. Ab. 358; *Binks v. Rokeby*, 2 Mad. 238, per Sir T. Plumer; *Dunch v. Kent*, 1 Vern. 260, admitted; *Elliot v. Merryman*, Barn. 78; *Smith v. Guyon*, 1 B. C. C. 186, and cases cited, ib. note; *Ithell v. Beane*, 1 Ves. 215, per Lord Hardwicke; *Lloyd v. Baldwin*, ib. 173, per eundem; *Dolton v. Hewen*, 6 Mad. 9; Ex parte *Turner*, 9 Mod. 418, per Lord Hardwicke; *Gosling v. Carter*, 1 Coll. 644; *Eland v. Eland*, 1 Beav. 235; S. C. 4 M. & Cr. 420; *Jones v. Price*, 11 Sim. 557; and see *Currer v. Walkley*, 2 Dick. 649, corrected from Reg. Lib. 3 Vend. and Purch. 168, 10th ed.

(z) *Robinson v. Lowater*, 17 Beav. 592; 5 De Gex, Mac. & Gord. 272.

be for payment of debts and *legacies*, the purchaser is equally protected ; for as the discharge of the debts must precede that of the legacies, and the purchaser is not called upon to mix himself up with the settlement of the debts, he is necessarily absolved from all liabilities in respect of the legacies.<sup>(a)</sup> But where the trust is for payment of *particular* or *scheduled debts* only,<sup>(b)</sup> or of *legacies only*,<sup>(c)</sup> then, as there is no trust to be executed requiring time or discretion, but the purchase-money is simply to be distributed amongst certain parties, there is no reason why the purchaser should not, under the general rule, be expected to see that the purchase-money finds its way into the proper channel. And the purchaser, where legacies only are charged, is still bound to see to the application of his money, though by a late act,<sup>(d)</sup> the real estate of all persons deceased since the 29th of August, 1833, is liable (in the hands of the heir or devisee, but not by \*way of lien to bind purchasers) [\*436] to the payment of debts generally, whether by specialty or simple contract.<sup>(e)</sup> And even where the estate is subjected by the testator to a trust for payment of debts generally, the purchaser will not be indemnified by the receipt of the trustee if there be any collusion between them ;<sup>(f)</sup> or if the purchaser have notice from the intrinsic evidence of the transaction that the purchase-money is intended to be misapplied ;<sup>(g)</sup> or if a suit has been instituted which takes the administration of the estate out of the hands of the trustees.<sup>(h)</sup>

And if the purchaser is dealing with trustees at a great distance of time, and when the trust ought long since to have been executed, the purchaser is bound to inquire and satisfy himself to a fair and reasonable extent, that the trustees are acting in the discharge of their duty.<sup>(i)</sup>

It is evident, from what has been stated, that the exemption of the purchaser from seeing to the application of the purchase-money depends as a general rule upon the settlor's *intention* ; and if so, the question must be viewed with reference to the date of the instrument, and not as affected by circumstances which have subsequently transpired. "The deed," said Sir W. Grant, "must receive its construction as from the

(a) *Rogers v. Skillicorne*, Amb. 188 ; *Smith v. Guyon*, 1 B. C. C. 186 ; *Jebb v. Abbott*, and *Beynon v. Gollins*, cited Co. Lit. 296 b, note by Butler ; *Williamson v. Curtis*, 3 B. C. C. 96 ; *Johnson v. Kennett*, 3 M. & K. 630, per Lord Lyndhurst ; 6 Ves. 654, note (a) ; *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach ; *Eland v. Eland*, 1 Beav. 235 ; S. C. 4 M. & Cr. 420 ; *Page v. Adam*, 4 Beav. 269 ; *Forbes v. Peacock*, 12 Sim. 528 ; 1 Phill. 717.

(b) *Doran v. Wiltshire*, 3 Sw. 701, per Lord Thurlow ; *Smith v. Guyon*, 1 B. C. C. 186, *per eundem*, and cases cited, ib. note ; *Rogers v. Skillicorne*, Amb. 189, per Lord Hardwicke ; *Humble v. Bill*, 1 Eq. Ca. Ab. 359, per Sir N. Wright ; *Anon. Mosc.* 96 ; *Spalding v. Shalmer*, 1 Vern. 303, per Lord North ; *Abbot v. Gibbs*, 1 Eq. Ca. Ab. 358 ; *Elliot v. Merryman*, Barn. 81, per Sir J. Jekyll ; *Binks v. Rokeby*, 2 Mad. 238, per Sir T. Plumer ; *Ithell v. Beane*, 1 Ves. 215, per Lord Hardwicke ; *Lloyd v. Baldwin*, 1 Ves. 173, *per eundem* ; and see *Dunch v. Kent*, 1 Vern. 260 ; *Culpepper v. Aston*, 2 Ch. Ca. 223.

(c) *Johnson v. Kennett*, 3 M. & K. 630, per Lord Lyndhurst ; *Horn v. Horn*, 2 S. & S. 448. (d) 3 & 4 W. 4, c. 104. (e) *Horn v. Horn*, 2 S. & S. 448.

(f) *Rogers v. Skillicorne*, Amb. 189, per Lord Hardwicke ; *Eland v. Eland*, 4 M. & Cr. 427, per Lord Cottenham.

(g) *Watkins v. Cheek*, 2 S. & S. 199 ; *Eland v. Eland*, 4 M. & Cr. 427, per Lord Cottenham ; and see *Stroughill v. Anstey*, 1 De G. M. & G. 648.

(h) *Lloyd v. Baldwin*, 1 Ves. 173.

(i) *Stroughill v. Anstey*, 1 De G. M. & G. 654, per Lord St. Leonards.



moment of its execution. According to the frame of the deed, the purchaser is or is not liable to see to the application of the money, and that liability cannot depend on any subsequent event.”<sup>(k)</sup> Thus, if a trust be created for payment of debts and legacies, and the trustees, after full payment of the debts contract for the sale of the estate, the purchaser will not, upon this principle, be answerable for the application of the money in payment of the legacies. And so it has been held in [\*437] several cases.<sup>(l)</sup> “It is said,” observed Lord Lyndhurst, “that the \*debts having been paid out of the personal estate, and nothing remaining but the legacies, the case falls within the general rule applicable to cases where legacies alone are charged upon the real estate. I find no authority for such a proposition. The rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule.”<sup>(m)</sup> “Otherwise,” said Lord Cottenham, “the purchaser must, in every case, go into an investigation of the fact of how far the debts have been discharged—exactly that liability to which the law considers that he should not be subjected.”<sup>(n)</sup>

In *Forbes v. Peacock*,<sup>(o)</sup> a testator directed his debts to be paid, and gave the estate to his wife, (whom he appointed his executrix) for life, subject to his debts and certain legacies, and empowered her to sell the estate in her lifetime, and directed that if it were not sold in her lifetime, it should be sold at her death, and the proceeds applied in a manner showing that they were intended to pass through the hands of the executors, and the testator requested certain persons to act as executors and *trustees* with his wife. The widow lived twenty-five years, and after her death the surviving executor contracted for the sale of the estate. The vice-chancellor of England held that, after so long lapse of time from the testator's death, the purchaser had a right to ask if the debts had been paid, and if he received no answer, it amounted to notice that they had been paid, and he must see to the application of his purchase-money. “My notion,” he said, “of the law is, that where a testator has directed all his debts to be paid, and then appoints certain persons his executors and trustees, if, at any time after his death, those who have the power sell any part of the testator's real estates, and nothing is said about the matter, the purchaser will have a good title, because upon the [\*438] face of \*the will there is a charge of debts, and *non constat* that all the debts have been paid. At the same time I think that if it should appear to be highly probable, at the time when the executors propose to sell, that the debts have been paid, a very important question may arise, whether a good conveyance can be made by them alone, and whether the concurrence of the persons interested in the proceeds of the

(k) *Balfour v. Welland*, 16 Ves. 156.

(l) *Johnson v. Kennett*, 3 M. & K. 624, reversing S. C. 6 Sim. 384; *Eland v. Eland*, 4 M. & Cr. 420; *Page v. Adam*, 4 Beav. 269; *Stroughill v. Anstey*, 1 De G. M. & G. 635.

(m) *Johnson v. Kennett*, 3 M. & K. 631.

(n) *Eland v. Eland*, 4 M. & Cr. 428.

(o) 11 Sim. 152; 12 Sim. 528; 11 M. & W. 637; 1 Phill. 717; see 1 De G. M. & G. 650.

sale may not be necessary. It strikes me, therefore, that when the objection is made by the purchaser that the executors cannot make a good title because all the debts have been paid, *if the question is put by him simply, are there or are there not any debts remaining unpaid, he has a right to an answer.*"(p) And on a subsequent day he observed, "Here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, *and the executors refused to give him an answer.* Under these circumstances, if it should turn out that all the debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied.(q) What is the general principle? The court has drawn a distinction from an early time. It has said that if there is a mere direction to sell, and to divide the proceeds, the purchaser of the estate must see to the application of the purchase-money, and the parties amongst whom the proceeds are to be divided must give receipts to the purchaser. But in a case where a testator charges his estate with debts, and directs that there shall be a sale either by an express trust, or a general power, the court says, it is quite impossible for the purchaser to ascertain who are the creditors of the testator, and to see that they are paid, and if he is not bound to look to the persons whose claims are first to be satisfied, of course he is exempted from looking to the claims of the persons who take as *cestuis que trust.* That is the principle of the rule, and I am yet to learn how that principle does not apply to a case where the purchaser is in effect informed that the debts have been paid; and I consider that what is stated to have taken place in this case between the vendor and purchaser does amount to that."(r)

\*It is evident that this doctrine was not in accordance with former decisions, and the cause was carried upon appeal to the [\*439] lord-chancellor, when the decision below was reversed. Lord Lyndhurst observed, "If the purchaser had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible. But assuming that the facts relied upon in this case amount to notice that the debts had been paid; yet, as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this; if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not. In *Johnson v. Kennett*, I held that the rule had reference to the death of the testator, and therefore, that even supposing the debts were paid before the sale took place, and that the legacies alone remained as a charge, that circumstance would not vary the general rule. I see no reason to depart from what I then stated."(s) Lord St. Leonards, with reference to the

(p) 12 Sim. 537.

(q) Ib. 542.

(r) Ib. 546.

(s) 1 Phill. 717, and note, p. 722.

judgment of Lord Lyndhurst, and to the note appended thereto by his lordship's authority, observed,<sup>(t)</sup> "The case must stand upon one of two grounds;—either that there are no debts within the knowledge of the purchaser, and then it is indifferent whether there were no debts at the death of the testator, or no debts at the time of the purchase, or, which is more satisfactory, and open to no ambiguity, on the ground that when a testator by his will charges his debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is, by implication, a declaration by the testator that [\*440] he intends to entrust the trustees with the \*receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.* It remains just as much if there are no debts as if there are debts. The consistent rule would be that if a trust be created for payment of debts and legacies, the purchaser or mortgagee should in no case (in the absence of fraud,) be bound to see to the application of the money raised. To this rule," his lordship emphatically added, "I shall adhere as long as I sit in this court."

The cases in which the the testator, instead of devising the estate upon an exprees trust for payment of debts, creates a *charge* of debts upon his real estates, seem to require a particular examination. It might have been a simple and useful rule to hold under such circumstances that the *executor*, and the executor only as the person who had administration of the personal assets, should, by virtue of an implied power, sell the real estate for payment of the debts; but no such rule exists, and we proceed to ascertain as far as we can by what principles the court has been governed.

1. If a testator *charge* his real estate with debts, and then devises it to *trustees* upon certain trusts, which do not include or perhaps negative a power of sale, can the *trustees* give a good title to a purchaser? It is clear that the trustees and the executor can sell together,<sup>(u)</sup> and the question is, upon what principle this proceeds. Is the *executor* the vendor, and if so, has he a *legal* power which enables him to pass the estate at law independently of the trustee? Vice-Chancellor Bruce seemed, on one occasion to think that the cases of *Shaw v. Borrer* and *Ball v. Harris* might have been decided on this \*footing,<sup>(v)</sup> and [\*441] some recent cases lean in the same direction.<sup>(w)</sup> But the notion

(t) *Stroughill v. Anster*, 1 De G. M. & G. 653; see *Mather v. Norton*, 16 Jur. 309.

(u) *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 8 Sim. 485; S. C. 4 Myl. & C. 264; *Page v. Adam*, 4 Beav. 269; and see *Forbes v. Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Phill. 717. In *Shaw v. Borrer*, the trustees and executors were co-plaintiffs, and the prayer of the bill was, that the purchase-money might be paid to the executors. This, if done by the order of the court, would indemnify the trustees; but it does not follow that the trustees, on the completion of the sale *out of court*, could have allowed the executors to receive the money. The question to whom the money should be paid, was not adverted to in the argument, nor does it appear to whom it was paid.

(v) *Gosling v. Carter*, 1 Coll. 649.

(w) See *Robinson v. Lowater*, 17 Beav. 592; 5 De Gex, Mac. & Gor. 272; *Eidsforth v. Armstead*, 2 Kay & Johns. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Storrey v. Walsh*, 18 Beav. 568.



of the executor passing the legal estate in such a case was never suggested until the last few years, and what was said by the Court of Exchequer in *Doe v. Hughes*, was at least true at the time it was spoken, viz., that not a single case could be produced in which a mere charge had been held to give the executors a legal power.<sup>(x)</sup> Have the executors then an *equitable* power, and is the trustee who had the legal estate bound to convey it as the executor directs? This doctrine would be a very rational one, but there is no trace of it in the cases themselves. Apparently they were decided on the familiar principle, that in a court of equity there is no difference between a charge of debts and a trust for payment of debts,<sup>(y)</sup> and that the trustees therefore took the legal estate upon the trusts of the will, the first of which was to pay the testator's debts. It is certainly not a little remarkable that after an examination of all the authorities upon the subject, there does not appear to be one in which the trustee has sold alone without the concurrence of the executor. This circumstance, however, may be easily accounted for, as trustees of the will are almost invariably appointed executors also, and where that is not the case, the purchaser naturally requires the concurrence of the executor, not on the ground that he is the vendor, but to satisfy the purchaser that the sale of the real estate is *bona fide* from the insufficiency of the personal assets. In some of the cases the court has noticed, but not laid any stress upon, the circumstance of the personal representative concurring,<sup>(z)</sup> or of the characters of trustee and personal \*representative being combined, but in others that fact [\*442] has been passed over in silence as a mere accident, and the court has relied on the general doctrine that a trustee of the estate charged with debts could sell and sign a valid discharge for the purchase-money.<sup>(a)</sup> In *Doe v. Hughes*,<sup>(b)</sup> the case most adverse to the powers arising from a charge of debts, it was admitted that by a devise to trustees of the real estate, subject to a charge of debts, the trustees had thereby imposed upon them the duty of raising the money to pay the debts, and this was the opinion of Lord Hardwicke, as expressed in a case which we do not remember to have seen cited. In *Ex parte Turner*,<sup>(c)</sup> where the estate had been given subject to debts, but no express trust created for the purpose, he observed, "Where a devise is general 'in trust,' or 'subject to pay debts,' the *devisee* may sell or mortgage, but *he* must pay the money to the creditors of his devisor; but if he do

(x) *Doe v. Hughes*, 6 Exch. Rep. 231.

(y) *Elliot v. Merryman*, Barn. 81; *Ex parte Turner*, 9 Mod. 418; *Jenkins v. Hiles*, 6 Ves. 654, note (a); *Bailey v. Ekins*, 7 Ves. 323; *Ball v. Harris*, 4 Myl. & C. 267; *Wood v. White*, 4 Myl. & C. 482; *Commissioners of Donations v. Wybrants*, 2 Jones & Lat. 197.

(z) See *Shaw v. Borrer*, 1 Keen, 559; *Forbes v. Peacock*, 12 Sim. 537; and see V. C. K. Bruce's remarks upon *Shaw v. Borrer*, and *Ball v. Harris*, in *Gosling v. Carter*, 1 Coll. 649. But in *Ball v. Harris*, the V. C. of England observed, "It is manifest that Harris (the trustee), who had the legal fee, was competent to mortgage that estate to any person who would advance money for the benefit of the testator's estate," 8 Sim. 497; and it is equally clear that Lord Cottenham was of opinion Harris was a trustee for payment of debts; 4 M. & Cr. 267.

(a) See *Ball v. Harris*, at the passages referred to in last previous note; *Forbes v. Peacock*, 12 Sim. 546.

(b) 6 Exch. Rep. 231.

(c) 9 Mod. Rep. 418.

not, the mortgagee is not to suffer, for in cases of these general devises he is not obliged to see to the application of the money he advances. But even in this case inconveniences often arise, for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally, and *pari passu*. However, if the *trustee* prefer one creditor to another, where he ought not, the remedy usually is against the trustee, and not the lender of the money, for if the latter was to see to the application of his money upon so general a trust, he could not safely advance his money without a decree in this court."

If the trustees of an estate charged with debts can, by virtue not of the express trust but of the trust implied by the charge, sell the estate, and sign a receipt for the purchase-money, it would seem to follow that they must not allow the proceeds to be paid to the *executor* as not being [\*443] the proper hand to receive,<sup>(d)</sup> \*the executor in that character having no privity with the real estate. The necessity, if it exist, of requiring the concurrence of the personal representative would often lead to practical inconvenience, for on the death of the executor intestate there would be no personal representative of the testator, and the personal assets having been exhausted, there would be no fund for taking out letters of administration; not to mention that should the executor be held to have any concern with the proceeds of the real estate, by virtue of the *will*, the administrator, not being appointed by the will, would not succeed to the power of the executor, which should be borne in mind as of some importance in considering whether the sale is substantially that of the executor or of the trustee who takes subject to the charge.

The practical result is, that in the present state of the law a purchaser cannot be advised to accept a title even from trustees *who sell under the charge* without the concurrence of the executor, but numerous purchases must have been taken from the trustee only, and it is hoped, as is probable, that such purchases would be supported.

2. If a testator charge his debts and devise the estate subject to the charge to A. and his heirs not upon trusts but for his own use, can the beneficiary in this case make a good title? The preceding question is in fact identical with this, for if where the express trust negatives a sale the trustee can still make a good title, it is evident that he can only do so by virtue of the charge. Any distinction between the two cases would be in favour of the beneficial devisee, for if the trustee in defiance of the express trust can sell, *a fortiori* the devisee can, who is fettered by no such restriction. In both instances the charge operates as a trust for payment of debts, and is attended with all the same consequences. "A charge," said Lord Eldon, "is in substance and effect *pro tanto* a devise of the estate upon trust to pay the debts,"<sup>(e)</sup> and "this," observed Lord St. Leonards, on citing the dictum, "is supported by the current

(d) See *Gosling v. Carter*, 1 Coll. 650, where V. C. Knight Bruce says, "If payment ought to be made to one, it is not, necessarily, a good payment to make that payment to one and another."

(e) *Bailey v. Ekins*, 7 Ves. 323.

of authorities.”(f) It is clear that the devisee \*can, where he also fills the character of executor, make a good title,(g) and in [\*444] some of the cases the court did not in terms rely on the characters being combined,(h) but it is singular that no authority can be found in which the question whether the devisee alone can make a good title has arisen.

In the Court of Exchequer(i) it was said that in a devise to *trustees*, subject to a charge of debts, the trustees could sell; but that a charge in the hands of a *devisee* if the lands were devised, or in the hands of the *heir-at-law* if the lands descended, was a charge only in equity. The court was there considering, more particularly, the question of legal powers; but if it was intended to be said that a devisee, subject to a charge, could not sell and sign a receipt for the money, the doctrine is inconsistent with the nature of a charge of debts in equity as commonly understood. The prevalent opinion hitherto is believed to have been that a devisee subject to debts could sign a receipt for the purchase-money,(k) and the cases in which the court has upheld purchases from a devisee with the concurrence of the executor, but without relying upon such concurrence, would be a trap for purchasers should the court now refuse to uphold a purchase from a devisee only. Here, again, the practical result is that a purchaser cannot be advised at present to accept a title from the devisee without the concurrence of the executor, though in the author’s opinion the devisee could give a good title.

3. If a testator charge his debts on the real estate, and does not devise the estate at all, but allows it to descend to the *heir*, can the heir sell and sign a receipt for the purchase-money? It appears to be clear that he cannot, for he takes nothing under the will, and cannot therefore be regarded as a person constituted by the testator the trustee by implication for payment of debts;(l) he can pass the legal estate, but he could \*not sign a receipt; i. e., if the heir misapplied the money the [\*445] creditors might still come upon the estate.

But in this case, if the heir is disabled from selling, can the *executor* sell? for otherwise the charge of debts amounts to a direction for a chancery suit. The legal question arose in *Doe v. Hughes*,(m) before the Court of Exchequer. A testator charged his Bala houses with his debts, and died intestate as to them, and appointed his wife his executrix. The executrix, in order to meet the debts of the testator, appointed and conveyed the Bala houses to John Jones in fee in trust, by sale or mortgage, to raise money for payment of the debts. The heir of the testator brought ejectment, and recovered. The way in which the

(f) *Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 198.

(g) *Elton v. Harrison*, 2 Swan. 276, note; *Elliot v. Merryman*, Barn. 78; *Dolton v. Young*, 6 Madd. 9; *Johnson v. Kennet*, 6 Sim. 384; 3 Myl. & K. 624; *Eland v. Eland*, 1 Beav. 235, 4 Myl. & C. 420; *Page v. Adam*, 4 Beav. 269.

(h) *Elliot v. Merryman*, *Dolton v. Young*, *Johnson v. Kennet*, *Eland v. Eland*, ubi supra.

(i) *Doe v. Hughes*, 6 Exch. Rep. 231.

(k) See the cases cited in note (y), p. 441, supra.

(l) See *Gosling v. Carter*, 1 Coll. 650, where the V. C. said that the intention to be collected was, that the heir at law should have nothing to do with it: *Doe v. Hughes*, 6 Exch. Rep. 231; *Forbes v. Peacock*, 11 Mee. & W. 637, 638.

(m) 6 Exch. Rep. 223.



power was executed was peculiar, as not being a sale or mortgage in itself, but the question discussed and decided was, whether, in such a case, the executrix had a power of sale or mortgage, and the court held that *a charge had no operation at law but must be enforced in equity*. This decision has been found much fault with. The master of the rolls said that before the case in the Exchequer he had considered the law to be that a charge of debts gave the *executors* an implied power of sale.<sup>(n)</sup> Otherwise, it is said, in the case of a charge where the estate descends, there can be no sale without the aid of the court. But this does not appear to follow. If a testator *expressly direct that his estate shall be sold* (without naming the person,) and the fund is to be distributed in a way in which the executors alone can distribute it, a power of sale is given to the executors by implication over the legal estate even in courts of law.<sup>(o)</sup> By analogy to this, where there is no direction to sell, but only a charge of debts, this last, though an *umbra* in a court of law, creates an *equitable* power of sale or mortgage in the view of a court of equity, *i. e.*, the executor may contract for the sale, and on the acceptance <sup>\*of the title by the purchaser, the person in whom the legal</sup> [446] estate is vested will, as being a trustee for the executor, be compellable to convey as the executor directs, and if he refuse, the legal estate may be vested in the purchaser by the aid of the Trustee Acts.<sup>(p)</sup> In *Gosling v. Carter*,<sup>(pp)</sup> Vice-Chancellor K. Bruce declined to give an opinion whether a mere charge of debts gave to the executors a power of sale either at law or in equity, but would not compel a purchaser to take the title from the executor without the concurrence of the heir-at-law. In *Robinson v. Lowater*,<sup>(q)</sup> the legal estate was already in the purchaser, so that the legal question did not arise, but it was held that the executors had given the purchaser a good title. In *Eidsforth v. Armstead*,<sup>(r)</sup> Vice-Chancellor Wood professed to follow *Robinson v. Lowater*, and held the power of sale to be, according to the report, in the *trustees*, but which appears to be a mistake for the *executors*. The surviving trustee had devised the trust estates, and the devisee therefore could not sell, but the surviving trustee was also surviving executor, and appointed the devisee his executor, and in the character of executor the devisee might be thought to represent the original testator, though it is by no means

(n) *Robinson v. Lowater*, 17 Beav. 601; and see *Wrigley v. Sykes*, 21 Beav. 337; *Storry v. Walsh*, 18 Beav. 568.

(o) *Forbes v. Peacock*, 11 M. & W. 630; *Tylden v. Hyde*, 2 Sim. & St. 238; *Bentham v. Wiltshire*, 4 Madd. 44.

(p) In reference to obtaining a vesting order in such a case, see *Re Wise*, 5 De Gex & Sm. 415.

(pp) 1 Coll. 650, 652.

(q) 17 Beav. 592; 5 De G. M. & G. 272; and see *Storry v. Walsh*, 18 Beav. 568.

(r) 2 Kay & Johns. 333. It does not appear how the purchaser had got or was to get the legal estate, whether from the executor, as having a legal power, or from the trustee, on the construction that the legal fee simple vested in the trustee under the will, or from the trustee, as having the legal estate during the life of H. Toulmin, with the concurrence of H. Toulmin, as having the legal estate in remainder, so as to extinguish his power of appointing by will. The case loses much of its force from the amicable manner in which the point was submitted to the court.

clear that even then the power of sale would pass to him.<sup>(s)</sup> In *Wrigley v. Sykes*,<sup>(t)</sup> the master of the rolls decided that the executors could contract for the sale of the estate, but guarded himself by saying that the court, as far as it could, would certainly secure to the purchaser a good legal estate when the conveyance was made. Thus the law stands at present, and it is conceived that *Doe v. Jones* was a perfectly sound decision upon the legal question, and that no inconvenience will arise if the courts \*hold as the master of the rolls has decided, that the executors have an equitable power of sale, and consequently that [\*447] the holder of the legal estate is a trustee for them.

4. Should a testator charge his debts on the real estate, and then devise the estate to A. and his heirs beneficially, and the devisee dies in the testator's lifetime, so that the estate descends, can the heir in this case sell and sign a receipt? If the heir cannot sell where the estate was never devised, but left to descend, *à fortiori* he cannot in this case, for here not only the heir is not invested with the character of trustee under the will, but the estate, subject to the charge, was devised to another person who was therefore intended to execute the implied trust. The machinery contemplated by the testator failed by the act of God, and no alternative remains but that the trust should be executed by the Court of Chancery.<sup>(u)</sup> It is presumed that under these circumstances it could not be held that the executors have a power of sale. The devisee, had he lived, would have been the proper person to execute the trust, and a power of sale can not belong to the executors, as the testator could not be taken to have contemplated his own intestacy.

5. Suppose a testator to charge his debts, and to devise the estate to A. for life, with contingent remainders or other limitations, which render it impossible that the implied power of sale can be executed by the devisees. This has occurred in several cases,<sup>(v)</sup> and the result appears to be that the court, if it can possibly avoid it, will not construe a charge as a direction for a chancery suit, but will assume that a power of sale for payment of the debts was given to some one, and that as it was not given to the devisees it must have been intended for the executors. In such a case the executors must be considered as having an equitable power of sale. The case in the exchequer<sup>(w)</sup> directly decided that the executors have no power themselves to pass the legal estate. Where, in the case \*supposed, the executors take an implied equitable power of sale upon the face of the will, it is immaterial whether the devised [\*448] estates do or not lapse, except that the legal estate will, as the event happens, be in the devisees or in the heir-at-law. If the concurrence of the devisees or heir in the sale cannot be obtained, recourse must be had to the Trustee Acts for the transfer of the legal estate.

The true principle which ought to govern these cases would appear to be, that where a testator devises the estate to trustees, or to a beneficiary,

(s) See 1 Sugd. Powers, 145, 6th ed.

(t) 21 Beav. 337.

(u) But see *Hardwick v. Mynd*, 1 Anst. 109.

(v) *Gosling v. Carter*, 1 Coll. 644; *Eidsforth v. Armstead*, 2 Kay & John. 353; *Wrigley v. Sykes*, 21 Beav. 337; and see *Robinson v. Lowater*, 17 Beav. 592; *De Gex, M. & G.* 272.

(w) *Doe v. Hughes*, 6 Exch. Rep. 223.

and charges his debts, there the trustees or the beneficiary should have a power of sale and signing receipts, but that where a testator charges his debts, and does not devise the estate, or devises it in such a manner that there is no one who can execute the trust, there the executors should have an equitable power of sale and signing receipts, and that the depositaries of the legal estate should be trustees for them, and bound to convey as they direct; but that where the testator devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee died in the testator's life-time, there, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the court.

It remains to notice in connection with this subject the recent case of *Storry v. Walsh*,<sup>(x)</sup> in which the master of the rolls held that a devisee, subject to a charge of debts and legacies, may, with the concurrence of the executors, declaring that all debts and legacies have been paid, sell for his own private purposes, and give a good title to a purchaser. This case resembles that of an executor, who is also specific or residuary legatee, selling a chattel interest for his own private debt.<sup>(y)</sup> The authority of *Storry v. Walsh* has, however, not received the entire approbation of the profession.<sup>(yy)</sup>

To return to the subject of trustees' receipts in general. As the trust for sale is a joint office, the receipt must be signed by all the trustees who have undertaken to act. And where a *power* is given to trustees [<sup>\*449</sup>] to discharge the purchaser from seeing to the application of his purchase-money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees; for the transfer of the estate at law carries not along with it the confidence in equity.<sup>(z)</sup> But the receipt need not be signed by a trustee who has disclaimed, for by the effect of disclaimer the acting trustees are put exactly in the same plight as if the renouncing trustee had never been mentioned.<sup>(a)</sup> It was formerly held, that a trustee who, with the intention of disclaiming, *released* the estate to his co-trustees should be considered to have acted;<sup>(b)</sup> but the more liberal construction of the present day appears to be, that a conveyance *bona fide* executed with the intention of disclaiming shall, in despite of the want of formality, have the force and effect of a disclaimer.<sup>(c)</sup>

As a trust cannot be delegated, it follows that if A. and B. be trustees for payment of debts, and they convey the estate to C. upon the like trusts, the purchaser would not be safe in payment of his purchase-money upon the receipt of C. Such would appear to be the correct doctrine upon principle; but in *Hardwick v. Mynd*<sup>(d)</sup> it was ruled by the Court of Exchequer to the contrary. In this case the executors and trustees

(x) 18 Beav. 559.

(y) See *infra*.

(yy) *Colyer v. Finch*, 3 Jur. N. S. 25, argument of Lord Chancellor in moving the House.

(z) *Crewe v. Dicken*, 4 Ves. 97.

(a) *Adams v. Taunton*, 5 Mad. 435; *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Vent. 128.

(b) *Crewe v. Dicken*, *ubi supra*.

(c) See *supra*, p. 233.

(d) 1 Anst. 109; and see *Braybroke v. Inskip*, 8 Ves. 432.



renounced probate, and (probably with the intention of disclaiming) conveyed the estates to C., the heir-at-law. It might therefore be argued that as the trustees, by disclaiming, vested the estate in the heir, he was properly the trustee to sell or mortgage. It would be difficult, however, to maintain that the heir under such circumstances could sign a receipt, and certainly the court did not put it upon this ground, but said that the mortgages if made by the trustees would have been good, and that they were in fact made by them, as they had deputed C. to act for them in the trust. Such a doctrine at the present day could not be supported.

As a general rule, if a power be given to trustees, the exercise of which is arbitrary, and the settlement contains no \*proviso for the appointment of new trustees with similar powers, it is not [450] competent for the court, on the substitution of new trustees by its own inherent jurisdiction, to invest such trustees with that arbitrary power. But an authority to sign receipts is not a mere power, but enters into the substance of the trust; that is, it is so interwoven with the trust itself that there can be no execution of the trust without the accession of the power; and in such cases the appointment of new trustees by the court may be taken to include the power. Thus, suppose A. and B. are trustees of an estate to sell for payment of debts, or to sell for the purpose of distribution, at their discretion, amongst children who are infants, and on the death of A. and B. the court appoints C. and D. upon the like trusts; if C. and D. cannot sign receipts, they cannot sell, and their appointment as trustees was nugatory. The court must have intended them to act in the execution of the trust; and if so, they must be authorized to give discharges to the purchaser.<sup>(e)</sup> If, indeed, the trust can be effectuated without the intervention of the power, as where the proceeds are to be distributed between E. and F., who are capable of signing receipts, there the argument has no application, and the necessity for the power does not exist.

It sometimes happens that the trustees had clearly at first a power of signing receipts, but subsequently, by a breach of trust or some irregularity in the administration of the estate, the fund has got out of its proper channel, and then the question arises, whether, if the person who ought never to have had possession of the fund intend to restore it to its proper state, the trustees can sign a receipt. It may be said that as the power never contemplated a breach of trust, it would not be safe to consider the exercise of the power as an indemnity, if the money cannot be properly paid to the trustees upon any other ground: on the other hand, if the fund be reinstated *in specie*, so that it is standing in the exact form in which the trust required it, and in the names of the persons whom the \*settlement appointed the trustees, how can it be said that in such a state of things any liability can remain? <sup>(f)</sup> [451]

Where the trust estate is in mortgage, and the money receivable by the trustees is applicable either wholly or in part in payment of the

(e) See *Drayson v. Pocock*, 4 Sim. 283; *Byam v. Byam*, 19 Beav. 58; *Bartley v. Bartley*, 3 Drew. 385; *Lord v. Bunn*, 2 Y. & C. Ch. Ca. 98.

(f) See *Lander v. Weston*, 3 Drew. 389; *Hanson v. Beverley*, *Vend. & Purch.* 848, 11th ed.

mortgage, of course the trustees may sell and sign a receipt for the difference, or, if there be no surplus beyond the mortgage, may sell without signing any receipt; for the circumstances to which the receipt clause was meant to apply, have, in the one case, arisen only partially, and in the case other not at all.

Where the trustees have a power of signing receipts, it has been held not to be necessary that the trustees who sign the receipts should themselves actually receive the money, provided it be paid to some person by their direction, and the transaction does not on the face of it imply a breach of trust. Thus, where the purchase-money was expressed in the deed to be paid to the trustee, and a receipt by the trustee was endorsed, but in fact the money was paid, by the direction of the trustee, to the tenant for life; the master of the rolls said, that the purchaser was bound to pay the money as the trustee directed, and having obeyed that direction was exonerated from the consequences. Various transactions might have occurred between the trustee and *cestuis que trust*, (such as the execution of a previous mortgage on sufficient security,) which would make such a payment perfectly legitimate.<sup>(g)</sup> The court in this case was protecting a *bona fide* purchaser, and the principle here laid down must be applied with great caution. A purchaser who has paid his money to another by the direction of the trustee may be protected under the special circumstances of the case, but no purchaser who has the money still in his pocket can be advised to pay to any one but to the trustee personally.<sup>(h)</sup>

The following observations of Lord St. Leonard's upon the subject of trustees' receipts, deserve every attention. "Where," he say, "a purchaser is bound to see the money applied \*according to the trust, [\*452] and the trust is for payment of debts or legacies, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one; or if the creditors or legatees are but few they may be made parties to the conveyance. Another mode by which the purchasers may be secured is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges, and then the trustee can be made a party to the several conveyances. Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into court, and this is the surest mode, because the money will not be paid out of court without the knowledge of the purchaser."<sup>(i)</sup>

In the preceding discussion it has been stated as the fundamental principle, that a purchaser is in all cases bound to see to the application of his purchase-money, unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust. Such indeed is the conclusion to which the authorities would seem to conduct us; but, independently of precedent, it may be suggested that the better principle would be, that, *prima facie*, a

(g) *Hope v. Liddell*, 21 Beav. 202-3.

(h) See *In re Fishbourne*, 9 Ir. Eq. Rep. 340. (i) *Vend. & Purch.* 848, 11th ed.

direction to sell should imply in all cases a power of signing discharges ; but that where it was practicable, and no impediment to the execution of the trust was thereby created, the purchaser should pay his money directly to the party beneficially entitled. The distinction between the two principles is very material. According to the former rule, if a trust be created for payment of debts and legacies, and the debts be paid, and then the trustee sell, though the purchaser have notice of all debts having been discharged, he is nevertheless not bound to see to the application of his purchase-money, because there was an implied intention by the settlor that the receipts of trustees should be sufficient acquittances ;<sup>(k)</sup> but, by the operation of the latter \*rule, the purchaser *would* be bound, for the necessity of his paying the money immediately to [\*453] the legatees would not, if they were of age, prevent the completion of the sale, and therefore no reason appears why the purchaser should be exempted from seeing to the application. Again, suppose a trust for sale, with a direction to distribute the proceeds between A., B., and C., and that, after the date of the instrument, C. quits the country or cannot be found. According to the first principle, as the absence of C. was not an event in the contemplation of the settlor, and no inference can be drawn that he meant the trustees to sign receipts, it follows that the sale is rendered impossible, and the contradiction arises, that the settlor having in *express* terms directed a sale, and it being admitted that the will of the settlor is authoritative, yet the execution of that intention is intercepted by the construction of equity. "It were difficult," says Sir E. Sugden, "to maintain that the absence of a *cestui que trust* in a foreign country should, in a case of this nature, impede the sale of the estate,"<sup>(l)</sup> yet to such a result the rule in question, if there were no exception to it, would apparently lead. But according to the other principle suggested, no such obstacle arises. The receipts of the trustees would then *prima facie* be discharges, as necessary to the execution of the sale ; and as C. is not at hand, the purchaser in respect of C.'s share in the purchase-money could not be called upon to observe a rule that would interpose a bar to the accomplishment of the expressed purpose of the settlor.

As *executors* are invested with the character of trustees, it may be proper to introduce a few remarks upon the large powers allowed to them in disposing of the assets.

On the death of the testator the personal estate vests wholly in the executor, and to enable him to execute the office with facility, the law permits him, with or without the concurrence of any co-executor,<sup>(m)</sup> to sell or even to mortgage,<sup>(n)</sup> by actual \*assignment or [\*454]

(k) See *supra*, 439, 440.

(l) *Vend. & Purch.* 844, 11th ed.; and see *Forbes v. Peacock*, 12 Sim. 545; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342.

(m) *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow.

(n) *Bonney v. Ridgard*, 1 Cox, 145, see 148; *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow; *Mead v. Orrery*, 3 Atk. 240, per Lord Hardwicke; *Andrew v. Wrigley*, 4 B. C. C. 138, per Lord Alvanley; *McLeod v. Drummond*, 17 Ves. 154, per Lord Eldon; *Keane v. Robarts*, 4 Mad. 357, per Sir J. Leach; and see *Hum-*



by equitable deposit, *(o)* with or without a power of sale, *(p)* all or any part of the assets, legal or equitable; *(q)* and though liable to render an account to the court, he cannot be interrupted in the discharge of his office by any person claiming either *dehors* the will, as a creditor, or under it, as a legatee. The creditor has merely a demand against the executor personally, *(r)* the *pecuniary* or *specific legatee* is not entitled to the legacy or bequest until the executor has assented, *(s)* and the *residuary legatee* has no lien until the estate has been liquidated and cleared of all liabilities, both *dehors* and under the will. *(t)* Upon the sale of the chattel, the purchaser is not concerned to see to the application of his purchase-money: it need not be recited in the conveyance that the money was wanted for the discharge of liabilities: *(u)* it is sufficient that the purchaser trusts him whom the testator has trusted: *(v)* if there be any misapplication, the remedy of the creditor or legatee is not against the purchaser, but the executor. *(w)* It is impossible for the purchaser to ascertain the necessity of the sale, for this must depend upon the state of the accounts, which he has no means of investigating without the powers annexed only to the executorship. *(x)* Even [\*455] express notice of the will, and of the bequests contained in it, works the purchaser no prejudice; for "every person," said Sir. J. Leach, "who deals with an executor has necessarily implied if not express notice of the will: but all dispositions of personal property are by law subject to a prior charge for payment of debts; and as a purchaser of real estate, devised in aid for payment of debts, is not bound to inquire into the fact whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry, so he who deals for personal assets is, for the same reason, absolved from all inquiry with respect to debts: he has a right to assume that the executor sells in the necessary course of his administration; and it is upon this principle altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether it be specifically given or be part of the residuary estate, it is equally charged by law with the payment of debts." *(y)*

Thus nothing can be clearer than that an executor may go to market  
*ble v. Bill*, 2 Vern. 444; *Sanders v. Richards*, 2 Coll. 568; *Miles v. Durnford*, 2 De Gex, Mac. & Gor. 641.

*(o)* *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow; and see *M'Leod v. Drummond*, 14 Ves. 360; S. C. 17 Ves. 167; *Ball v. Harris*, 8 Sim. 485.

*(p)* *Russell v. Plaice*, 18 Beav. 21.

*(q)* *M'Leod v. Drummond*, 14 Ves. 360, per Sir J. Leach; *Nugent v. Gifford*, 1 Atk. 463.

*(r)* *Nugent v. Gifford*, 1 Atk. 463, per Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 238, *per eundem*; *M'Leod v. Drummond*, 17 Ves. 163, *per eundem*.

*(s)* *Mead v. Orrery*, 3 Atk. 238, 240, per Lord Hardwicke.

*(t)* *M'Leod v. Drummond*, 17 Ves. 163, 169, per Lord Eldon; and see *Mead v. Orrery*, 3 Atk. 238, 240.

*(u)* *Bonney v. Ridgard*, 1 Cox, 148, per Lord Kenyon.

*(v)* *Id.*

*(w)* *Humble v. Bill*, 2 Vern. 445, per Cur.; *Ewer v. Corbet*, 2 P. W. 149, per Sir J. Jekyll; *Watts v. Kancie*, Toth. 77; *Nurton v. Nurton*, *id.*

*(x)* *Ewer v. Corbet*, 2 P. W. 149, per Sir J. Jekyll; *Humble v. Bill*, 2 Vern. 445, per Cur.; *Nugent v. Gifford*, 1 Atk. 464, per Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 242, *per eundem*; *Clarke v. Panopticon*, 3 Jur. N.S. 178.

*(y)* *Keane v. Roberts*, 4 Mad. 356.

with his testator's assets, even with a chattel specifically bequeathed,<sup>(z)</sup> and the purchaser will not be bound to see to the application of his purchase-money.<sup>(a)</sup>

But fraud and collusion will vitiate any transaction, and turn it to a mere colour,<sup>(b)</sup> and therefore if fraud be proved, either express or implied, the parties cannot protect themselves by pleading the general rule.<sup>(c)</sup> The only question is, What will amount to such a case of fraud?

\*1. The sale cannot stand if the chattel be sold at a nominal price, or a fraudulent undervalue.<sup>(d)</sup> [\*456]

2. The executor may not sell or pledge the assets to pay or secure his own debt,<sup>(e)</sup> or for a debt wrongfully contracted by him as executor,<sup>(f)</sup> for *prima facie* this is a diversion of the assets to a purpose wholly foreign to the administration, and therefore a *devastavit*. "Though," observed Sir W. Grant, "it may be dangerous at all to restrain the power of purchasing from the executor, what inconvenience can there be in holding that the assets known to be such should not be applied in any case for the *executor's debt*, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to *sell* the assets, but it is not essential that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debt."<sup>(g)</sup>

But if the executor be also the specific,<sup>(h)</sup> or residuary legatee,<sup>(i)</sup> then it seems to be established upon the authority of several cases that he may dispose of the chattel in payment of his own debt, for as soon as the debts and legacies of the testator have been discharged, the property is the executor's; and how is a purchaser to ascertain, but from the mouth of the executor, whether such prior liabilities upon the estate have been fully satisfied? Unless the purchaser were indemnified, under

(z) *Watts v. Kancie*, Toth. 77, 161; *Nurton v. Nurton*, id.; *Ewer v. Corbet*, 2 P. W. 148. As to *Humble v. Bill*, 2 Vern. 444, 1 B. P. C. 71, see *Ewer v. Corbet*, ubi supra; *Andrew v. Wrigley*, 4 B. C. C. 137; *M'Leod v. Drummond*, 17 Ves. 160.

(a) *Bonney v. Ridgard*, 1 Cox, 147, per Lord Kenyon.

(b) *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow.

(c) *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *M'Leod v. Drummond*, 17 Ves. 154, per Lord Eldon; *Hill v. Simpson*, 7 Ves. 166, per Sir W. Grant; *Taner v. Ivie*, 2 Ves. 469, per Lord Hardwicke; *Keane v. Roberts*, 4 Mad. 357, per Sir J. Leach; *Crane v. Drake*, 2 Vern. 616; *Nugent v. Gifford*, 1 Atk. 463, per Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 240, *per eundem*; *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow; *Whale v. Booth*, 4 T. R. 625, note (a), per Lord Mansfield; *Elliot v. Merryman*, Barn. 81, per Sir J. Jekyll; *Bonney v. Ridgard*, 1 Cox, 147, per Lord Kenyon; &c.

(d) *Scott v. Tyler*, 2 Dick. 725, per Lord Thurlow; *Ewer v. Corbet*, 2 P. W. 149, per Sir J. Jekyll; and see *Drohan v. Drohan*, 1 B. & B. 185.

(e) *Scott v. Tylor*, 2 Dick. 712; *Hill v. Simpson*, 7 Ves. 152; *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *Keane v. Roberts*, 4 Mad. 357, *per eundem*; *Crane v. Drake*, 2 Vern. 616; *Anon. case*, cited Pr. Ch. 434; *Andrew v. Wrigley*, 4 B. C. C. 137, per Lord Alvanley; and see *Eland v. Eland*, 4 M. & Cr. 427; *Miles v. Durnford*, 2 De Gex, Mac. & Gor. 641.

(f) *Collinson v. Lister*, 20 Beav. 356.

(g) *Hill v. Simpson*, 7 Ves. 169.

(h) *Taylor v. Hawkins*, 8 Ves. 209.

(i) *Nugent v. Gifford*, 1 Atk. 463, corrected from Reg. Lib. 4 B. C. C. 136; *Mead v. Orrery*, 3 Atk. 235; *Whale v. Booth*, 4 T. R. 625, note (a). See the comments of Lord Eldon, *M'Leod v. Drummond*, 17 Ves. 163; and see *Bedford v. Woodham*, 4 Ves. 40, note.

these circumstances, there could be no sale of the chattel without an investigation on the part of the purchaser into the testator's accounts, a [\*457] proceeding attended with so much \*labour and intricacy, that no stranger has ever yet been called upon by the court to undertake the burden of it.

But if the executor be specific or residuary legatee *jointly with others*, or *subject to certain charges under the will*, then he has no power by himself to offer the chattel in payment of his own debt. For in what character does the executor sell? It must be either as executor or as legatee. Not as executor, for then he cannot pay his own debt with the testator's assets, and not as legatee, for he is not exclusively such, but only jointly with others, or subject to certain charges; the creditor therefore cannot deal for the chattel without the concurrence of the co-legatees, or of the other persons jointly entitled.<sup>(l)</sup> And the *mere representation* by the executor that he is absolute owner under the will is no protection, for common prudence requires that the purchaser should look at the will himself and ascertain the fact; and if he neglect this precaution, and assume the executor's veracity, he must incur the hazard of the executor's falsehood.<sup>(m)</sup>

And again, the executor in his character of specific or residuary legatee cannot pay or secure the debt of his own creditor out of the testator's assets, if such creditor have express notice that any debt of the testator still remains unsatisfied.<sup>(n)</sup>

3. If the executor sell or mortgage for money either advanced at the time or to be advanced, the dealing *prima facie* is in a due course of administration.<sup>(o)</sup> "Where," observed Sir W. Grant, "a party having a debt due to him by the executor takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character, undoubtedly suspicion of fraud must always arise; but where a man is applied to for a loan of money there is no motive of fraud, for he may keep his money if not satisfied with the security."<sup>(p)</sup> However, such is [\*458] the *prima facie* presumption \*only, for if there be legal evidence to the purchaser or mortgagee that the immediate or future advance is not on account of the testator's estate, but is meant to be applied to the private purposes of the executor, the court must regard the transaction as fraudulent, and will not allow it to stand.<sup>(q)</sup>

4. A purchaser cannot deal with an executor for the purchase of a chattel specifically bequeathed, if the purchaser have notice, (a fact however not easily to be proved, and not lightly to be presumed,) that there were no debts of the testator, or that they have since been discharged.<sup>(r)</sup>

(l) *Bonney v. Ridgard*, 1 Cox, 145; *Hill v. Simpson*, 7 Ves. 152, see 170.

(m) *Hill v. Simpson*, 7 Ves. 152, see 170.

(n) See *Nugent v. Gifford*, 1 Atk. 464; *Whale v. Booth*, 4 T. R. 625, note (a); *M'Leod v. Drummond*, 17 Ves. 163.

(o) *M'Leod v. Drummond*, 17 Ves. 155, per Lord Eldon.

(p) *M'Leod v. Drummond*, 14 Ves. 362.

(q) *M'Leod v. Drummond*, 14 Ves. 353; S. C. reversed 17 Ves. 152; *Scott v. Tyler*, 2 Dick. 712, compare 17 Ves. 166; and see *Keane v. Robarts*, 4 Mad. 358.

(r) *Ewer v. Corbet*, 2 P. W. 149, per Sir J. Jekyll.



5. If a person owe money to a testator's estate, and be apprised that the executor *means to misapply it*, he cannot safely hand it over.<sup>(s)</sup>

If there be merely a *presumption from length of time that all debts are paid*, it may be argued, indeed, that the executor is a trustee for the next of kin, and that the money cannot be paid safely to any other than the next of kin as the *cestuis que trust*. However, the better opinion probably is, that in the absence of all *mala fides* the executor's receipt would be sufficient. The late vice-chancellor of England appeared, on the argument of a case in which the author was counsel, to concur in this view, for he asked, "If the executor could not sign the receipt, who could?" In the case alluded to, there had been a lapse of thirty-five years from the testator's death, and no allegation of debts.<sup>(t)</sup> As regards an administrator it will be remembered, that all necessary protection is thrown around the estate by the bond taken for due administration, and also by the form of proceeding in the ecclesiastical court; for if A. (to whose estate the money is owing) die, leaving B. his next of kin, who afterwards dies, leaving C. his next of kin, who afterwards dies, leaving D. his next of kin, in order to take out letters of administration to A., you must first show yourself to have an interest [\*459] by taking out letters to B. And again, to take out letters to B. you must first, for the same reason, take out letters to C.; so that, in fact, letters cannot be taken out to A. without previously taking out letters to B. and C. If, in such a case, the receipt of A.'s administrator, even after the lapse of twenty years, were not sufficient, it would be necessary in a suit to make the administrators of B. and C. parties as *cestuis que trust*, a thing quite unheard of in practice.

6. An *agent* is accountable to his principal only, and therefore if an executor employ a banker to sell out part of the testator's stock and remit the proceeds to him, it seems the banker, though he has reason to believe that a misapplication is intended, is bound to transfer the money to the executor, and does not thereby render himself accountable. A contrary doctrine would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length.<sup>(u)</sup> But an agent who derives a personal benefit from the breach of trust of his principal will be accountable.<sup>(v)</sup>

Wherever, as in the several cases mentioned, there is suspicion of fraud, the transaction may be impeached by creditors,<sup>(w)</sup> or specific,<sup>(x)</sup>

(s) See *Watkins v. Cheek*, 2 S. & S. 199; *Eland v. Eland*, 4 M. & Cr. 427; *Stroughill v. Anstey*, 1 De Gex, Mac. & Gor. 648.

(t) *Gough v. Birch*, July 10, 1839, MS.; see *Stroughill v. Anstey*, 1 De G. M. & G. 654; *Ewer v. Corbet*, 2 P. W. 148; *Court v. Jeffery*, 1 S. & S. 105; *Orrok v. Binney*, Jac. 523; *Pierce v. Scott*, 1 Y. & C. 257; *Forbes v. Peacock*, 11 Sim. 152.

(u) *Keane v. Robarts*, 4 Mad. 332, see 356, 359; and see *Davis v. Spurling*, 1 R. & M. 64; *S. C. Taml.* 199; *Crisp v. Spranger*, Nels. 109; *Saville v. Tancred*, 3 Sw. 141, note.

(v) *Pannell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De Gex, Mac. & Gor. 241.

(w) *Crane v. Drake*, 2 Vern. 616; *Anon.* case, cited Pr. Ch. 434; and see *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Orrery*, 3 Atk. 238.

(x) *Humble v. Bill*, 2 Vern. 444; *Scott v. Tyler*, 2 Dick. 712.

residuary,(y) or even pecuniary legatees.(z) But where two co-executors made a fraudulent alienation, and they having become bankrupt, a suit was instituted by two other co-executors who had not interfered for fourteen years, and did not state on their bill any interest in themselves, and hardly a duty they had to perform in behalf of others not parties on the record, the application was refused.(a) And in no case will the court grant relief where \*the right of unravelling the transaction has [\*460] been neglected for a lapse of twenty years.(b)

### SECTION III.

#### DISABILITY OF TRUSTEES FOR SALE TO BECOME PURCHASERS OF THE TRUST PROPERTY.

We now come to the subject of purchases by trustees of the property vested in them upon trust.

Under this head it will be proper to consider, 1, The extent and operation of the rule, that a trustee shall not purchase the trust estate; 2, The species of relief to which the *cestui que trust* will be entitled; 3, The time within which the *cestui que trust* must apply to the court.

1. The general rule is, that a *trustee for sale*,(c) (however the case may stand with respect to mere nominal trustees, or trustees who have no active duties to perform, as trustees to preserve contingent remainders),(d) is disabled from purchasing the trust property,(e) whether it be real estate or a chattel personal,(f) land, or a ground rent,(g) in reversion or possession,(h) whether the purchase be made in the trustee's own name or in the name of a trustee for him,(i) by private \*contract [\*461] or public auction,(k) from himself as the single trustee, or with

(y) See *Burting v. Stonard*, 2 P. W. 150; *Mead v. Orrery*, 3 Atk. 235, see 238; *M<sup>c</sup>Leod v. Drummond*, 17 Ves. 161, 169.

(z) *Hill v. Simpson*, 7 Ves. 152; and see *M<sup>c</sup>Leod v. Drummond*, 17 Ves. 169.

(a) *M<sup>c</sup>Leod v. Drummond*, 14 Ves. 353; reversed 17 Ves. 152, see 171.

(b) *Andrew v. Wrigley*, 4 B. C. C. 125; *Bonney v. Ridgard*, 1 Cox, 145; *Mead v. Orrery*, 3 Atk. 235, see 243.

(c) See *Parkes v. White*, 11 Ves. 226; *Randall v. Errington*, 10 Ves. 426; *Ayliffe v. Murray*, 2 Atk. 59; *Davidson v. Gardner*, cited *Vend. & Purch.* 890, 11th Ed.

(d) *Sutton v. Jones*, 15 Ves. 587; *Naylor v. Winch*, 1 S. & S. 567.

(e) *Fox v. Mackreth*, 2 B. C. C. 400; S. C. 2 Cox, 320; affirmed in D. P. 4 B. P. C. 258, &c. That *Fox v. Mackreth* was decided upon this ground, see *Gibson v. Jeyes*, 6 Ves. 277; *Ex parte Lacey*, id. 627; *Ex parte James*, 8 Ves. 353; *Coles v. Trecothick*, 9 Ves. 247; *Ex parte Bennett*, 10 Ves. 394.

(f) *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Killick v. Flexney*, 4 B. C. C. 161; *Hall v. Hallet*, 1 Cox, 134; *Whatton v. Toone*, 5 Mad. 54; 6 Mad. 153.

(g) *Price v. Byrn*, cited *Campbell v. Walker*, 5 Ves. 681.

(h) *Re Bloye's Trust*, 1 Mac. & Gor. 488, see 492, 495.

(i) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Randall v. Errington*, 10 Ves. 423; *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Hall v. Hallet*, 1 Cox, 134; *Watson v. Toone*, 6 Mad. 153; *Baker v. Carter*, 1 Y. & Coll. 250; *Knight v. Majoribanks*, 2 Mac. & Gor. 12.

(k) *Campbell v. Walker*, *Randall v. Errington*, ubi supra; *Ex parte Bennett*, 10 Ves. 381, see 393; *Ex parte James*, 8 Ves. 337, see 349; *Whelpdale v. Cookson*, 1 Ves. 9; S. C. stated from R. L.; *Campbell v. Walker*, 5 Ves. 682; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, id. 625; *Lister v. Lister*, id. 631; *Whitchote*.

the sanction of his co-trustees ;(*l*) for he who undertakes to act for another in any matter cannot, in the same matter, act for himself.(*m*) The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui's que trust* benefit.(*n*) Besides, if the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who, seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled.(*o*)

Lord Rosslyn is said to have considered that to invalidate a purchase by a trustee it was necessary to show he had gained an actual advantage ;(*p*) but the doctrine, (if any such was ever held by his lordship,)(*q*) has since been expressly and unequivocally denied.(*r*) The rule is now universal, that, *however fair the transaction*, the *cestui que trust* is at liberty to set aside the sale and take back the property.(*s*) If a trustee were permitted to buy in an *honest* case, he might buy \*in a case [*\*462*] *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise*.(*t*) Thus, a trustee for the sale of an estate may, by the knowledge acquired by him in that character, have discovered a valuable coal-mine under it, and, locking that up in his own breast, might enter into a contract for the purchase to himself. In such a case, if the trustee chose to deny it, how could the court establish the fact against the denial? The probability is, that a trustee who had once conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded.(*u*)

As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as *agent* for a third person: the court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other.(*v*)

v. Lawrence, 3 Ves. 740; Attorney-General v. Lord Dudley, Coop. 146; Downes v. Grazebrook, 3 Mer. 200.

(*l*) Whichcote v. Lawrence, 3 Ves. 740; Hall v. Noyes, cited id. 748; and see Morse v. Royal, 12 Ves. 374.

(*m*) Whichcote v. Lawrence, 3 Ves. 750, per Lord Rosslyn; Ex parte Lacey, 6 Ves. 626, per Lord Eldon; Re Bloye's Trust, 1 Mac. & Gor. 495.

(*n*) See Ex parte James, 8 Ves. 348. (*o*) See Ex parte Lacey, 6 Ves. 629.

(*p*) See Whichcote v. Lawrence, 3 Ves. 750.

(*q*) See Ex parte Lacey, 6 Ves. 626; Lister v. Lister, id. 632.

(*r*) Ex parte Bennett, 10 Ves. 385; Ex parte Lacey, 6 Ves. 627; Attorney-General v. Lord Dudley, Coop. 148; Ex parte James, 8 Ves. 348; Mulvany v. Dillon, 1 B. & B. 409, see 418.

(*s*) Ex parte Lacey, 6 Ves. 625, see 627; Owen v. Foulkes, cited id. 630, note (*b*); Ex parte Bennett, 10 Ves. 393, per Lord Eldon; Randall v. Errington, 10 Ves. 423, see 428; Campbell v. Walker, 5 Ves. 678, see 680; Ex parte James, 8 Ves. 347, 348, per Lord Eldon; Lister v. Lister, 6 Ves. 631; Gibson v. Jeyes, 6 Ves. 277, per Lord Eldon; but see Kilbee v. Sneyd, 2 Moll. 186.

(*t*) Ex parte Bennett, 10 Ves. 385, per Lord Eldon.

(*u*) Ex parte Lacey, 6 Ves. 627, per Lord Eldon; and see Ex parte Bennett, 10 Ves. 385, 394, 400; Ex parte James, 8 Ves. 348, 349; Parkes v. White, 11 Ves. 226; Campbell v. Walker, 5 Ves. 681; Lister v. Lister, 6 Ves. 632; Ex parte Badcock, 1 Mont. & Mac. 239.

(*v*) Ex parte Bennett, 10 Ves. 381, see 400; Coles v. Trecothick, 9 Ves. 248, per Lord Eldon; and see Gregory v. Gregory, Coop. 204.



And the rule against purchasing the trust property applies to an agent employed by the trustee for the purposes of the sale, as strongly as to the trustee himself.<sup>(w)</sup>

The lease of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot grant a demise to one of themselves, but the lessee, while he shall be held to his bargain if disadvantageous to him, shall be made to account for the profits if it be in his favour.<sup>(x)</sup>

There can be no objection to a purchase by a person named as trustee, but who has disclaimed without having acted in the trust,<sup>(y)</sup> or by a tenant for life whose consent to the sale is required by the terms of the power.<sup>(z)</sup>

[\*463] \*But when it is said a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee may not *purchase from himself*; for there is no rule that a trustee may not *purchase from his cestui que trust*.<sup>(a)</sup> However, a purchase by the trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the courts will watch with the utmost diligence :<sup>(b)</sup> the exception runs, it is said, so near the verge of the rule, that it might as well be included within it.<sup>(c)</sup>

Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust*, must be *actually* or *virtually* dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character,<sup>(d)</sup> or, if he retain the situation, the parties must be put so much at arm's length, that they agree to stand in the adverse situations of vendor and purchaser,<sup>(e)</sup> the *cestui que trust* distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that ground.<sup>(f)</sup> and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information :<sup>(g)</sup> the trustee will not be

(w) *Whitcomb v. Minchin*, 5 Mad. 91; *In re Bloye's Trust*, 1 Mac. & Gor. 488, see 495.

(x) *Ex parte Hughes*, 6 Ves. 617; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 500.

(y) *Stacey v. Elph*, 1 M. & K. 195; and see *Chambers v. Waters*, 3 Sim. 42.

(z) *Howard v. Ducane*, 1 Turn. & R. 81.

(a) *Ex parte Lacey*, 6 Ves. 626, per Lord Eldon; *Coles v. Trecothick*, 9 Ves. 244, 246; *per eundem*; *Gibson v. Jeyes*, 6 Ves. 277, *per eundem*; *Downes v. Grazebrook*, 3 Mer. 208, *per eundem*; *Randall v. Errington*, 10 Ves. 426, per Sir W. Grant; *Whichcote v. Lawrence*, 3 Ves. 750, per Lord Rosselyn; *Sanderson v. Walker*, 13 Ves. 601, per Lord Eldon; *Ayliffe v. Murray*, 2 Atk. 59, per Lord Hardwicke; *Kilbee v. Sneyd*, 2 Moll. 214, per Sir A. Hart.

(b) *Coles v. Trecothick*, 9 Ves. 244, per Lord Eldon; *Ex parte Lacey*, 6 Ves. 626, *per eundem*; *Downes v. Grazebrook*, 3 Mer. 209, *per eundem*.

(c) *Morse v. Royal*, 12 Ves. 372, per Lord Erskine.

(d) *Downes v. Grazebrook*, 3 Mer. 208, per Lord Eldon.

(e) *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; and see *Ex parte Lacey*, 6 Ves. 626, 627; *Ex parte Bennett*, 10 Ves. 394; *Morse v. Royal*, 12 Ves. 373; *Sanderson v. Walker*, 13 Ves. 601.

(f) See *Randall v. Errington*, 10 Ves. 427.

(g) *Coles v. Trecothick*, 9 Ves. 247, per Lord Eldon; *Morse v. Royal*, 12 Ves. 373, 377, per Lord Erskine; *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; *Randall v. Errington*, 10 Ves. 427, per Sir W. Grant.

allowed to go on acquainting himself with the nature of the property \*up to the moment of sale, and then, casting aside his character of trustee, turn his experience to his own account. <sup>[\*464]</sup> (h)

In what cases a trustee will be at liberty to become a purchaser may be best illustrated by a few instances.

Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, and then by his agent, but with his own personal consent, agreed to sell a lot which had been bought in to one of the trustees acting as agent for another, Lord Eldon said, that if in any instance the rule was to be relaxed by consent of the parties, this was the case, and decreed the agreement to be specifically performed. (i)

Again, a *cestui que trust* had urged the purchase upon the trustee, who at first expressed an unwillingness, but afterwards agreed to the terms; and the sale was supported. (k)

So, where the trustee had endeavoured in vain to dispose of the estate, and then purchased himself of the *cestui que trust* at a fair and adequate price, and there was no imputation of fraud or concealment, Lord Northington said, "He did not like the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole, he did not see any principle upon which he could set the transaction aside." (l)

It has been pronounced too dangerous to allow the *cestui's que trust* solicitor, without a special authority, to bind his employer by such a contract with the trustee. (m)

Where the *cestuis que trust* are creditors, the trustee cannot purchase with the sanction of the major part of them, but the liberty must in strictness be given by the unanimous voice of the whole body, (n) though the court is in the habit of \*sanctioning purchases of a bankrupt's estate by *assignees*, provided the assent of a general meeting of creditors be obtained. (o) <sup>[\*465]</sup>

The court has no jurisdiction to authorize a trustee to bid where the *cestuis que trust* are *sui juris*, for that is a question the *cestuis que trust* are entitled to decide for themselves. (p)

If the *cestuis que trust* be under disability, as infants, the trustee, as he cannot be released from the liabilities of his situation, cannot by any act *in pais* become the purchaser of the estate; (q) but, if it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may file a bill in Chancery, and apply by motion to be allowed to purchase, and the court will then examine

(h) See *Ex parte James*, 8 Ves. 352.

(i) *Coles v. Trecothick*, 9 Ves. 234.

(k) *Morse v. Royal*, 12 Ves. 355.

(l) *Clarke v. Swaile*, 2 Ed. 134.

(m) *Downes v. Grazebrook*, 3 Mer. 209, per Lord Eldon.

(n) See Sir G. Colebrook's case, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, id. 628; the cases cited id. 630, note (b). *Whelpdale v. Cookson*, cited *Campbell v. Walker*, 5 Ves. 682, must be considered as shaken. Sugd. V. & P. 894, 11th Edn.

(o) *Anon. case*, 2 Russ. 350; *Ex parte Bage*, 4 Mad. 459.

(p) See *Ex parte James*, 8 Ves. 352.

(q) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601.

into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particular sale, and allow the trustee to bid.(r)

The principles laid down with reference to trustees for sale are of course applicable to all who, though differing in name, are invested with the like fiduciary character, as executors and administrators,(s) an executor in his own wrong,(t) assignees of bankrupts,(u) a receiver,(v) &c.; but a mortgagee may purchase from his mortgagor,(w) and a creditor taking out execution is not precluded from becoming the purchaser of the property upon a sale by the sheriff.(x)

2. Next as to the terms upon which the sale will be set aside.

[\*466] \*The *cestui que trust*, if he choose it, may have the specific estate reconveyed to him by the trustee,(y) or, where the trustee has sold it with notice, by the party who purchased,(z) the *cestui que trust* on the one hand repaying the price at which the trustee bought with interest at 4 per cent.,(a) and the trustee or purchaser on the other accounting for the profits of the estate,(b) but not with interest,(c) and, if he was in actual possession, submitting to be charged with an occupation rent.(d)

The trustee will have all just allowances made to him for improvements and repairs that are substantial and lasting,(e) or such as have a tendency to bring the estate to a better sale,(f) as in one case for a mansion house erected, plantations of shrubs, &c.:(g) and in estimating the improvements, the buildings pulled down, if they were incapable of

(r) *Campbell v. Walker*, 5 Ves. 681, 682, per Lord Alvanley.

(s) *Hall v. Hallet*, 1 Cox, 134; *Killick v. Flexney*, 4 B. C. C. 161; *Watson v. Toone*, 6 Mad. 153; *Kilbee v. Sneyd*, 2 Moll. 186; *Baker v. Carter*, 1 Y. & C. 250; and see *Naylor v. Winch*, 1 S. & S. 566.

(t) *Mulvany v. Dillon*, 1 B. & B. 408.

(u) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, id. 625, and the cases cited, id. 630, note (b); *Ex parte Bennett*, 10 Ves. 395, per Lord Eldon; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte James*, 8 Ves. 346, per Lord Eldon; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Bage*, 4 Mad. 459; *Ex parte Badcock*, 1 Mont. & Mac. 231.

(v) *Alven v. Bond*, 1 Fl. & Kell. 196; *White v. Tommy*, referred to ib. 224.

(w) *Knight v. Majoribanks*, 11 Beav. 322; 2 Mac. & Gor. 10.

(x) *Stratford v. Twynam*, Jac. 418.

(y) See *Ex parte James*, 8 Ves. 351; *Ex parte Bennett*, 10 Ves. 400; *Lord Hardwicke v. Vernon*, 4 Ves. 411; *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42.

(z) *Attorney-General v. Lord Dudley*, Coop. 146; *Dunbar v. Tredennick*, 2 B. & B. 304.

(a) *Watson v. Toone*, 6 Mad. 153; *Ex parte James*, 8 Ves. 351, per Lord Eldon; *Whelpdale v. Cookson*, stated from *R. L. Campbell v. Walker*, 5 Ves. 682; *Hall v. Hallet*, 1 Cox, 134, see 139; *York Buildings' Company v. Mackenzie*, ubi supra, &c.

(b) *Ex parte James*, 8 Ves. 351, per Lord Eldon; *Ex parte Lacey*, 6 Ves. 630, *per eundem*; *Watson v. Toone*, 6 Mad. 153; *Whelpdale v. Cookson*, *York Buildings' Company v. Mackenzie*, ubi supra.

(c) *Macartney v. Blackwood*, 1 Ridg. Knapp & Sch. 602.

(d) *Ex parte James*, 8 Ves. 351, per Lord Eldon.

(e) *Ex parte Hughes*, 6 Ves. 624, 625; *Ex parte James*, 8 Ves. 352; *Campbell v. Walker*, 5 Ves. 682.

(f) *Ex parte Bennett*, 10 Ves. 400.

(g) *York Buildings' Company v. Mackenzie*, ubi supra.



repair, will be valued as old materials, but otherwise they will be valued as buildings standing :(*h*) should the property have been *deteriorated* by the acts of the trustee, his purchase-money will suffer a proportionate reduction.(*i*)

But, it seems, where the contract was vitiated by the presence of actual fraud, allowance will be made to the trustee for necessary repairs,(*k*) but not for improvements. "If," said Lord Fitzgibbon, "the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, \*or if he will look on and suffer [*\*467*] such an expenditure without apprising the party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud, the jurisdiction of a Court of Equity will clearly attach upon the case. But does it follow from thence, that, if a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, that therefore he shall retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was *to improve the right owner out of the possession of his estate.*"(*l*)

A trustee, the sale having taken place during the pendency of a suit, had paid part of his purchase-money into court, which had been invested in the funds. On the purchase being set aside, the trustee claimed the benefit of the rise of the stock, but it was held he was only entitled to his purchase-money with interest, for had there occurred a fall of the stock, he could not have been compelled to submit to the loss.(*m*)

If the trustee is to be discharged from the situation of purchaser, he is to be discharged at once, and the court will order an immediate conveyance upon immediate payment of the money.(*n*)

The re-conveyance of the estate will be without prejudice to the titles and interests of lessees and others who have contracted with the trustee *bona fide* before the pendency of the suit.(*o*)

But the bill of the *cestui que trust*, particularly where the assignee of a bankrupt has become the purchaser, may pray, not a re-conveyance of the specific estate, but a re-sale of the property under the direction of the court. The terms of the re-sale have not always been uniform. In *Whelpdale v. Cookson*(*p*) Lord Hardwicke said the majority of the creditors \*should *elect* whether the purchase should stand; so that should they elect to re-sell, and the estate should be sold at a still [*\*468*] lower price, the creditors would suffer. The doctrine of Lord Thurlow appears to have been, that the property should be put up at the price at which the trustee purchased, and if any advance was made, the sale should take effect, but if no bidding, the trustee should be held to his

(*h*) *Robinson v. Ridley*, 6 Mad. 2.

(*i*) *Ex parte Bennett*, 10 Ves. 401.

(*k*) *Baugh v. Price*, 1 Wils. 320.

(*l*) *Kenney v. Browne*, 3 Ridg. 518; but see *Oliver v. Court*, 8 Price, 172.

(*m*) *Ex parte James*, 8 Ves. 337, see 351.

(*n*) See *Ex parte Bennett*, 10 Ves. 400, 401.

(*o*) *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42; see the decree.

(*p*) Cited *Campbell v. Walker*, 5 Ves. 682.

bargain.(q) Lord Alvanley followed the authority of Lord Hardwicke; for in the case of infant *cestui que trust*, he directed an inquiry by the master, whether it was for the benefit of the infants that the premises should be re-sold, and, if for their benefit, that the sale should be made.(r) "To this principle," said Lord Eldon, "the objection is, that a great temptation to purchase is offered to trustees, the question whether the re-sale would be advantageous to the *cestui que trust* being of necessity determined at the hazard of a wrong determination."(s) Lord Eldon therefore conceived it best to adopt the rule of Lord Thurlow, and so he decreed in *Ex parte Hughes*(t) and *Ex parte Lacey*.(u) Sir W. Grant, in a subsequent case,(v) said he was not aware that Lord Eldon had laid down any general rule as to the terms; but a few days after, having consulted the lord chancellor upon the subject, and discovering his mistake, he framed his decree in conformity with the lord chancellor's decisions. The same principle has since been followed in numerous other cases,(w) and the practice may be considered as settled.

Should the trustee have repaired or improved the estate, the expense of the repairs and improvements would be added to the purchase-money, and the estate be put up at the accumulated sum.(x)

Where the trustee has purchased in one lot, the *cestui que trust* cannot insist on a re-sale in different lots. If desirous \*of re-selling the property in that mode, they must pay the trustee his principal and interest, and then, as the absolute owners, they may sell as they please.(y)

In the application of Lord Hardwicke's rule it was a question constantly occurring, whether the body of creditors at large could be bound by the resolution of the majority to insist upon a re-sale; but by the practice of Lord Eldon, the difficulty on that head is avoided,(z) for, as the creditors cannot by possibility sustain an injury, it is competent to any individual creditor to try the experiment.(a)

If, before the *cestui que trust* files his bill for relief, the trustee has passed the estate into the hands of a purchaser, and the purchaser had notice of the equity, the same remedies may be prosecuted against the purchaser as against the trustee;(b) but if the sale was without notice, the *cestui que trust* may then compel the trustee to account for the difference of price,(c) or for the difference between the sum the trustee paid

(q) See *Lister v. Lister*, 6 Ves. 633; *Ex parte James*, 8 Ves. 351.

(r) *Campbell v. Walker*, 5 Ves. 678, see 682.

(s) S. C. 13 Ves. 603.

(t) 6 Ves. 617.

(u) Id. 625; and see *Ex parte Reynolds*, 5 Ves. 707.

(v) *Lister v. Lister*, 6 Ves. 633.

(w) *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381; *Robinson v. Ridley*, 6 Mad. 2.

(x) *Ex parte Bennett*, 10 Ves. 400; *Ex parte Hughes*, 6 Ves. 625; *Robinson v. Ridley*, 6 Mad. 2.

(y) See *Ex parte James*, 8 Ves. 351, 352.

(z) *Ex parte Hughes*, 6 Ves. 624.

(a) *Ex parte James*, 8 Ves. 353; and see *Ex parte Lacey*, 6 Ves. 628.

(b) *Attorney-General v. Lord Dudley, Coop.* 146; *Dunbar v. Tredennick*, 2 B. & B. 304.

(c) *Fox v. Mackreth*, 2 B. C. C. 400; S. C. 2 Cox, 320; *Hall v. Hallet*, 1 Cox, 134; *Whitchote v. Lawrence*, 3 Ves. 740; *Ex parte Reynolds*, 5 Ves. 707; *Randall v. Errington*, 10 Ves. 423.

and the real value of the estate at the time of the purchase,(d) with interest at four per cent.(e)

An administrator had become the purchaser of some shares in Scotch mines, part of the assets, and afterwards sold them to a stranger at a considerable advance of price, and Lord Thurlow decreed the trustee to account for every advantage he had made, but said he could not go the length of ordering the defendant to replace the shares. He conceived the plaintiff, one of the next of kin, had no such election of choosing between the specific thing and the advantage made of it.(f)

The costs of the suit will, as a general rule, follow the decree—that is, if the trustee be compelled to give up his purchase, unless his conduct was perfectly honourable and the \*sale is set aside on the [470] mere dry rule of equity,(g) he must pay the expenses he had himself occasioned;(h) and if the charge be unfounded, the costs must be paid by the plaintiff. But if there be great delay on the part of the *cestui que trust*, the costs will be refused him, though he succeed in the suit;(i) and, on the other hand, if the bill be dismissed, not because the transaction was not originally impeachable, but merely on account of the great interval of time, the court may refuse to order the costs of the defendant.(j)

3. If the *cestui que trust* desire to set aside the purchase, he must make his application to the court in *reasonable time*, or he will not be entitled to relief.(k) A long acquiescence under a sale to a trustee is treated as evidence that the relation between the trustee and *cestui que trust* had been previously abandoned, and that in all other respects the purchase was fairly conducted.(l)

A sale cannot, in general, be set aside after a lapse of twenty years;(m) but in these cases the court does not confine itself to that period by analogy to the Statute of Limitations, for relief has been refused after an acquiescence of eighteen years,(n) and seventeen years;(o) and it is presumed even a shorter period would be a bar to the remedy, where the *cestui que trust* could offer no excuse for his *laches*.(p) However, the

(d) See Lord Hardwicke v. Vernon, 4 Ves. 411.

(e) Hall v. Hallet, 1 Cox, 134, see 139.

(f) S. C.

(g) Baker v. Carter, 1 Y. & C. 250.

(h) Whichcote v. Lawrence, 3 Ves. 752; Hall v. Hallet, 1 Cox, 141; Sanderson v. Walker, 13 Ves. 601, 604; Crowe v. Ballard, 2 Cox, 253; S. C. 3 B. C. C. 117; Dunbar v. Tredennick, 2 B. & B. 304.

(i) Attorney-General v. Lord Dudley, Coop. 146.

(j) Gregory v. Gregory, Coop. 201.

(k) Campbell v. Walker, 5 Ves. 680, 682, per Lord Alvanley; Chalmer v. Bradley, 1 J. & W. 59, per Sir T. Plumber; Ex parte James, 8 Ves. 351, per Lord Eldon; Webb v. Rorke, 2 Sch. & Lef. 672, per Lord Redesdale; Randall v. Errington, 10 Ves. 427, per Sir W. Grant.

(l) Parkes v. White, 11 Ves. 226, per Lord Eldon; and see Morse v. Royal, 12 Ves. 374, 378.

(m) Price v. Byrn, cited Campbell v. Walker, 5 Ves. 681.

(n) Gregory v. Gregory, Coop. 201; Champion v. Rigby, 1 R. & M. 539; Roberts v. Tunstall, 4 Hare, 257.

(o) Baker v. Read, 18 Beav. 398.

(p) See Oliver v. Court, 8 Price, 167, 168.



sale has been opened after an interval of ten years;(q) and even after a much greater lapse of time where the executor had purchased in the  
 [\*471] \*names of trustees for himself, and the transaction was attended with circumstances of disguise and concealment.(r)

Persons not *sui juris*, as *femes covert* and infants, cannot be precluded from relief on the ground of acquiescence during the continuance of the disability.(s) But *femes covert* as to property settled to their separate use, if their power of anticipation be not restricted, are regarded as *femes sole*.(t)

A class of persons, as creditors, cannot be expected in the prosecution of their common interest to exert the same vigour and activity as *individuals* would do in the pursuit of their exclusive rights.(u) Accordingly creditors have succeeded in their suit after a *laches* of twelve years;(v) but even creditors will be barred of their remedy if they be chargeable with very gross *laches*, as with acquiescence in the sale for a period of thirty-three years.(w)

For *laches* to operate as a bar, it must be shown that the *cestui que trust* knew the trustee was the purchaser; for while the *cestui que trust* continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale.(x)

The effect of the length of time may also be materially influenced by the continued *distress* of the *cestui que trust*;(y) but poverty is merely an ingredient in the case, and will not alone displace the bar.(z)

Of course the *cestui que trust* may ratify the sale to the trustee by an express and actual confirmation;(a) and if the *cestui que trust* choose to confirm it, he cannot afterwards annual \*his own act on the  
 [\*472] ground of no adequate consideration.(b) But,

1. The confirming party must be *sui juris*—not labouring under any disability, as infancy or coverture.(c) However, in the case of real estate a *feme covert* can, of course, confirm the purchase under the operation

(q) Hall v. Noyes, cited Whichcote v. Lawrence, 3 Ves. 748.

(r) Watson v. Toone, 6 Mad. 153.

(s) Campbell v. Walker, 5 Ves. 678; S. C. 13 Ves. 601; Roche v. O'Brien, 1 B. & B. 330, see 339.

(t) See *infra*.

(u) Whichcote v. Lawrence, 3 Ves. 740, see 752; Ex parte Smith, 1 D. & C. 267; Hardwick v. Mynd, 1 Anst. 109; and see Kidney v. Coussmaker, 12 Ves. 158; York Buildings' Company v. Mackenzie, 8 B. P. C. 42; Ex parte Smith, 1 D. & C. 267.

(v) Anon. case in the Exchequer cited Lister v. Lister, 6 Ves. 632.

(w) See Hercy v. Dinwoody, 2 Ves. jun. 87; and see Scott v. Nesbitt, 14 Ves. 446.

(x) Randall v. Errington, 10 Ves. 423, see 427; Chalmer v. Bradley, 1 J. & W. 51.

(y) Oliver v. Court, 8 Price, 127, see 167, 168; and see Gregory v. Gregory, Coop. 201; Roche v. O'Brien, 1 B. & B. 342.

(z) Roberts v. Tunstall, 4 Hare, 257; see p. 267.

(a) Morse v. Royal, 12 Ves. 355; Clarke v. Swaile, 2 Ed. 134; and see Chesterfield v. Janssen, 2 Ves. 125; S. C. 1 Atk. 301.

(b) Roche v. O'Brien, 1 B. & B. 353, per Lord Manners.

(c) Campbell v. Walker, 5 Ves. 678; S. C. 13 Ves. 601; Roche v. O'Brien, 1 B. & B. 330, see 339; and see Scott v. Davis, 4 M. & C. 92.

of the fines and recoveries act,(*d*) and if property, whether real or personal, be settled to her separate use (provided her power of anticipation be not restricted) she has, to the extent of the interest so settled to her separate use, all the capacity of a feme sole.(*e*)

2. The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter ;(*f*) and particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence.(*g*)

3. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case.(*h*)

4. The confirming party must not be ignorant of the law, that is, he must be aware that the transaction is of such a character that he could impeach it in a court of equity.(*i*)

\*5. The confirmation must be wholly distinct from and independent of the original contract(*k*)—not a conveyance of the estate [*\*473*] executed in pursuance of a covenant in the original deed for further assurance.(*l*)

6. The confirmation must not be wrung from the *cestui que trust* by distress or terror.(*m*)

7. Where the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest; but the confirmation to be complete, must be the joint act of the whole body.(*n*)

(*d*) 3 & 4 W. 4, c. 74; and see 8 & 9 Vict. c. 106.

(*e*) See *infra*.

(*f*) *Carpenter v. Heriot*, 1 Ed. 338; and see *Montmorency v. Devereux*, 7 Cl. & Fin. 188.

(*g*) *Morse v. Royal*, 12 Ves. 373, per Lord Erskine.

(*h*) See *Murray v. Palmer*, 2 Sch. & Lef. 486; *Baugh v. Price*, 1 Wils. 320; *Morse v. Royal*, 12 Ves. 373; *Cole v. Gibson*, 1 Ves. 507; *Roche v. O'Brien*, 1 B. & B. 338, and following pages; *Adams v. Clifton*, 1 Russ. 297; *Cockerell v. Cholmley*, 1 Russ. & M. 425; S. C. Taml. 444; *Chesterfield v. Janssen*, 2 Ves. 146. 149, 152, 158; *Chalmer v. Bradley*, 1 J. & W. 51.

(*i*) See *Cann v. Cann*, 1 P. W. 727; *Dunbar v. Tredennick*, 2 B. & B. 317; *Burney v. Macdonald*, 15 Sim. 15; *Molony v. L'Estrange*, 1 Beat. 413; *Crowe v. Ballard*, 2 Cox, 257; S. C. 1 Ves. jun. 220; S. C. 3 B. C. C. 120; *Watts v. Hyde*, 2 Coll. 377; *Baugh v. Price*, *Cockerell v. Cholmley*, *Chesterfield v. Janssen*, *Chalmer v. Bradley*, *Murray v. Palmer*, *Roche v. O'Brien*, *ubi supra*.

(*k*) See *Wood v. Downes*, 18 Ves. 128; *Morse v. Royal*, 12 Ves. 373; *Scott v. Davis*, 4 M. & C. 91, 92; *Roberts v. Tunstall*, 4 Hare, 267.

(*l*) *Roche v. O'Brien*, 1 B. & B. 330, see 338; *Wood v. Downes*, 18 Ves. 120, see 123; and see *Fox v. Mackreth*, 2 B. C. C. 400.

(*m*) See *Roche v. O'Brien*, 1 B. & B. 330; *Dunbar v. Tredennick*, *Crowe v. Ballard*, *Chesterfield v. Janssen*, *ubi supra*.

(*n*) *Sir G. Colebrook's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, id. 628; the cases cited, id. 630, note (*b*). *Whelpdale v. Cookson*, cited *Campbell v. Walker*, 5 Ves. 682, must be considered as greatly shaken, if not actually overruled.

[\*474]

## \*CHAPTER XVII.

## DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.

WE shall first premise a few observations upon the *validity* of a trust for payment of debts.

A trust for this purpose may be created either by *will* or by *act inter vivos*.

A trust created by *will* for payment of debts out of *personal estate* is so far a nullity, that the executor is bound, at all events, to provide for the payment of debts out of the assets in due course of administration, and would not be justified in the breach of this legal obligation by pleading any expression of intention on the part of the testator. It is only as respects any *surplus* personal estate after payment of debts that the executor ought to regulate his administration by the directions of the will. A devise, however, of *real estate* for payment of debts is, in all cases, unimpeachable, for the statutes that have avoided devises as against specialty,<sup>(a)</sup> and now as against simple contract creditors,<sup>(b)</sup> have expressly excepted devises for payment of debts.

As to trusts created by *act inter vivos*, a distinction must be observed between non-traders and traders.

1. If the settlor be *not a trader*, and therefore not amenable to the bankrupt laws, he is at perfect liberty to dispose either of the *whole*<sup>(c)</sup> or [\*475] of *part* of his property,<sup>(d)</sup> for payment of *all*<sup>(e)</sup> \*or *any number* of his creditors.<sup>(f)</sup> The argument formerly urged for the invalidity of such a trust was that the 13 Eliz. c. 5,<sup>(g)</sup> avoided "all alienations contrived of *fraud*, to delay creditors and others of their just debts," &c. But with respect to a trust for the satisfaction of creditors *generally*—"How," said Le Blanc, "can it be fraudulent for a person not the object of the bankrupt laws to make the same provision voluntarily for the benefit of all his creditors which the law compels to be done in the case of a bankrupt trader?"<sup>(h)</sup> and if the settlor direct the payment of *particular* debts only, "It is neither illegal nor immoral," said Lord Kenyon, "to prefer one set of creditors to another."<sup>(i)</sup> Nor

(a) 11 G. 4, & 1 W. 4, c. 47.

(b) 3 & 4 W. 4, c. 104.

(c) *Ingliss v. Grant*, 5 T. R. 530; *Nunn v. Wilshire*, 8 T. R. 528, per Lord Kenyon; *Pickstock v. Lyster*, 3 M. & S. 371; *Leonard v. Baker*, 1 M. & S. 251; see *Meux v. Howell*, 4 East, 1. What property will pass by general words in a creditor's deed and whether the trustees can disclaim any part which is a *damnosa possessio*, see *How v. Kennett*, 3 Ad. & Ell. 659; *Carter v. Warne*, M. & M. 479; *West v. Stewart*, 14 M. & W. 47; *Moore v. Petchell*, 22 Beav. 172, in which case, however, *Jones v. Scott*, 1 R. & M. 255, reversed in D. P. 4 Cl. & Fin. 382, appears to have been altogether overlooked.

(d) *Estwick v. Caillaud*, 5 T. R. 420; *Goss v. Neale*, 5 Taunt. 19; see *Meux v. Howell*, 4 East, 1.

(e) *Meux v. Howell*, 4 East, 1; *Ingliss v. Grant*, 5 T. R. 530; *Pickstock v. Lyster*, 3 M. & S. 371; *Leonard v. Baker*, 1 M. & S. 251.

(f) *Estwick v. Caillaud*, 5 T. R. 420; *Nunn v. Wilshire*, 8 T. R. 528, per Lord Kenyon; *Goss v. Neale*, 5 Taunt. 19; *Wood v. Dixie*, 7 Q. B. R. 892.

(g) Perpetuated 29 Eliz. c. 5.

(h) *Meux v. Howell*, 4 East, 9.

(i) *Estwick v. Caillaud*, 5 T. R. 424.



does the creation of such a trust fall within the scope of the act; for "it is not every feoffment, judgment," &c., said Lord Ellenborough, "which will have the effect of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors; every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditor, but the feoffment, judgment, &c., must be devised of *malice, fraud*, or the like, to bring it within the statute. The act was meant to prevent deeds, &c., fraudulent in their *concoction*, and not merely such as in their *effect* might delay or hinder other creditors." (k)

But the act relating to insolvent debtors provides, that if any *insolvent* (l) shall voluntarily (m) convey or assign any estate, real or personal, in trust for creditors, every such conveyance or assignment shall be deemed fraudulent and void as against the assignees, if made "within three calendar months before the commencement of his imprisonment, or with the \*view or intention of petitioning the court for his discharge under the act," (n) and a voluntary deed within the three [\*476] months will be void under this section though made in favour of all the assignor's creditors. (o)

And in all cases a trust for payment of debts will be void, if vitiated by *actual fraud*, as if the debtor by an understanding between him and his trustees be left in possession of the estate, so as to obtain a fictitious credit. (p)

Suppose there is no fraud, but the trust deed is a mere *voluntary* settlement not founded on any arrangement with the creditors, but for the mere convenience of the debtor himself, so that by the recent decisions it is revocable by the debtor at any time until communicated to some creditor; (q) in such a case can a creditor, taking out execution, levy his debt upon the property subject to the trust? It seems, though the deed is *voluntary*, yet it is not to be considered as fraudulent within the statute 13 Eliz. c. 5, and if so, the creditor cannot reach the property at law. (r) However, the Court of Chancery might perhaps hold the deed to be invalid as against the creditor in a court of equity. (s)

And where the trust was originally good, yet a creditor will not be

(k) *Meux v Howell*, 4 East, 13, 14.

(l) The words are, any prisoner, &c., *being in insolvent circumstances*.

(m) *Stuckey v. Drewe*, 2 M. & K. 190; *Mogg v. Baker*, 3 M. & W. 195; 4 M. & W. 348.

(n) 1 & 2 V. c. 110, s. 59.

(o) *Jackson v. Garnett*, 2 Q. B. R. 887; *Thompson v. Jackson*, 3 M. & Gr. 621; S. C. 4 Scott, N. R. 234.

(p) *Twyne's case*, 3 Re. 80 a; *Wilson v. Day*, 2 Burr. 827; *Hungerford v. Earle*, 2 Vern. 261; *Tarback v. Marbury*, 2 Vern. 510; *Law v. Skinner*, W. Black. Re. 996; and see *Worsley v. Demattos*, 1 Burr. 467; *Stone v. Gratham*, 2 Buls. 218; *Pickstock v. Lyster*, 3 M. & S. 371; *Dutton v. Morrison*, 17 Ves. 197.

(q) *Wallwyn v. Coutts*, 3 Mer. 707; S. C. 3 Sim. 14; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Acton v. Woodgate*, 2 M. & K. 492; *Kirwan v. Daniel*, 5 Hare, 500; *Harland v. Binks*, 15 Q. B. R. 713.

(r) *Pickstock v. Lyster*, 3 M. & S. 371; *Estwick v. Caillaud*, 5 T. R. 420. But see *Owen v. Body*, 5 Ad. & Ell. 28.

(s) See *Mackinnon v. Steward*, 1 Sim. N. S. 90, 91.

bound by the arrangement, but may recover his whole debt, if the terms of the composition be not strictly and literally fulfilled; for *cujus est dare ejus est disponere*, the creditor has a right to prescribe the conditions of his indulgence.(t)

[\*477] \*A deed if expressed on the face of it to be voluntary, as for natural love and affection, may yet be proved to have been founded on valuable consideration, and so unimpeachable by creditors. The deed binds as between the parties to it, but does not preclude evidence *aliunde* as regards third persons.(u)

2. If the settlor be a *trader*, then the case is governed by the operation of the bankruptcy laws.

By the 12 & 13 Vict. c. 106, s. 67, (being a re-enactment of the previous statutes,) it is declared that "any *fraudulent* grant or conveyance of any lands, tenements, goods, or chattels, with intent to defeat or delay creditors, shall be deemed an act of bankruptcy." It has been adjudged fraudulent within the meaning of this clause, if a trader assign the *whole* of his property(v) (whether expressed to be the whole or not in the deed),(w) or all but a *colourable* part,(x) or all the stock, without which he cannot carry on his trade;(y) and it is immaterial whether the trust be for any *particular* creditor,(z) or a *certain number* of them,(a) or all the creditors at large.(b) [\*478] \*By the assignment of his whole substance he becomes utterly insolvent; and if the trust be for one or some only of his creditors, it is a fraud upon the rest, and if it be for all the creditors, it is a fraud upon the spirit of the bankruptcy laws, which require a bankrupt's estate to be under the management of certain commissioners and assignees appointed as prescribed by the legislature—not of persons nominated by the debtor himself, and so more likely to

(t) *Sewell v. Musson*, 1 Vern. 210; *Mackenzie v. Mackenzie*, 16 Ves. 374, per Lord Eldon; *Leigh v. Barry*, 3 Atk. 583, per Lord Hardwicke; *Ex parte Bennet*, 2 Atk. 527, *per eundem*; and see *Fuller v. Lance*, 7 Vin. Ab. 136.

(u) *Gale v. Williamson*, 8 M. & W. 405.

(v) *Nunn v. Wilshire*, 8 T. R. 528, per Lord Kenyon; *Alderson v. Temple*, 4 Burr. 2240, per Lord Mansfield; *Hooper v. Smith*, W. Bl. Re. 441, *per eundem*; *Wilson v. Day*, 2 Burr. 827; *Rust v. Cooper*, Cowp. 632, per Lord Mansfield; *Bowker v. Burdekin*, 12 M. & W. 128.

(w) See *Dutton v. Morrison*, 17 Ves. 193; *Lindon v. Sharp*, 6 Man. & Gr. 905. But the assignment of all his property at a certain place is not an act of bankruptcy, unless it be proved that he had no other property. *Chase v. Goble*, 2 Man. & Gr. 930.

(x) *Law v. Skinner*, W. Bl. Re. 996; *Hooper v. Smith*, ib. 442, per Lord Mansfield; *Wilson v. Day*, 2 Burr. 832, *per eundem*; *Alderson v. Temple*, 4 Burr. 2240, *per eundem*; *Estwick v. Caillaud*, 5 T. R. 424, per Lord Kenyon; *Gayner's case*, cited 1 Burr. 477; *Compton v. Bedford*, W. Bl. Re. 362.

(y) *Hooper v. Smith*, Bl. Re. 442; *Law v. Skinner*, W. Bl. Re. 996; *Siebert v. Spooner*, 1 M. & W. 714; *Porter v. Walker*, 1 Man. & Gr. 686; *Ex parte Bailey*, 3 De Gex, M. & G. 534; *Ex parte Taylor*, 5 De Gex, M. & G. 392.

(z) *Wilson v. Day*, 2 Burr. 827; *Hassell v. Simpson*, 1 B. C. C. 99; *S. C. Doug.* 89, note; *Hooper v. Smith*, W. Bl. Re. 442, per Lord Mansfield; *Worsley v. Demattos*, 1 Burr. 467; *Newton v. Chantler*, 7 East, 138.

(a) *Ex parte Foord*, cited *Worsley v. Demattos*, 1 Burr. 477; *Alderson v. Temple*, 4 Burr. 2240, per Lord Mansfield; *Butcher v. Easto*, Doug. 282; *Devon v. Watts*, Doug. 86; *Hooper v. Smith*, W. Bl. Re. 442, per Lord Mansfield.

(b) *Kettle v. Hammond*, 1 Cooke's B. L. 108, 3rd. edit.; *Eckhardt v. Wilson*, 8 T. R. 140; *Tappenden v. Burgess*, 4 East, 230; *Dutton v. Morrison*, 17 Ves. 199, per Lord Eldon; *Simpson v. Sikes*, 6 M. & S. 312.

further his views than promote the interest of the creditors.(c) But in order to avoid the deed there must be in existence a debt due at the time of its execution,(d) and the assignment, though void as against creditors and the assignees in bankruptcy,(e) is good as between the parties themselves;(f) and assignments for valuable consideration, at the full price, where the purchaser is not party or privy to the fraudulent designs of the vendor, are not acts of bankruptcy and cannot be impeached.(g) And where a trader, greatly embarrassed, who had committed acts of bankruptcy, executed a trust deed for the purpose of effecting a conversion of his property and facilitating arrangements with his creditors, the deed was held not to be an act of bankruptcy.(h)

The deed will be an act of bankruptcy, notwithstanding a proviso declaring it void, *if the trustees think fit*,(i) or *if all the creditors shall not execute (the acts of the trustees to be good in the meantime ;)*(k) or *if all the creditors to a certain amount shall not execute by such a time, or a commission of bankruptcy shall issue.*(l) So it will be an act of bankruptcy though the trustees at the time of the execution of the deed did not intend to act upon it (for the fraud must be referred to the *animus* of \*the trader ;)(m) and though the trustees induced the debtor to execute it, with the object of making it an act of bankrupt- [\*479] cy;(n) and though the debtor himself meant it to be taken as such.(o)

But if A., B., and C. agree to execute an assignment as a joint transaction, and A. executes, but B. and C. refuse, then, as the assignment of A. was made on the footing and faith of B. and C.'s concurrence, and therefore cannot be enforced against A. individually and solely, it is no act of bankruptcy.(p)

An assignment executed abroad was held to be no act of bankruptcy in England:(q) but in this respect the law has been altered by statute.(r)

If any creditors either concur in the assignment,(s) or subsequently acquiesce in it,(t) they cannot afterwards treat it as an act of bankruptcy,

(c) See *Dutton v. Morrison*, 17 Ves. 199; *Worsley v. Demattos*, 1 Bur. 476; *Simpson v. Sikes*, 6 M. & S. 312.

(d) *Ex parte Taylor*, 5 De Gex, M. & G. 392; *Ex parte Louch*, 1 De Gex, 612; *Oswald v. Thompson*, 2 Exch. Re. 215.

(e) *Doe v. Ball*, 11 M. & W. 531.

(f) *Bessey v. Windham*, 6 Q. B. Re. 166.

(g) *Baxter v. Pritchard*, 1 Ad. & Ell. 456; *Rose v. Haycock*, ib. 460; *Bittleston v. Cooke*, 2 Jur. N. S. 758; *Hutton v. Crutwell*, 1 Ell. & Bl. 15.

(h) *Greenwood v. Churchill*, 1 M. & K. 546; *Smith v. Hurst*, 11 Hare, 30.

(i) *Tappenden v. Burgess*, 4 East, 230.

(k) *Back v. Gooch*, 4 Campb. 232; S. C. Holt, 13.

(l) *Dutton v. Morrison*, 17 Ves. 193. (m) *Tappenden v. Burgess*, 4 East, 230.

(n) *Id.* (o) *Simpson v. Sikes*, 6 M. & S. 295.

(p) *Dutton v. Morrison*, 17 Ves. 193, see 202; and see *Bowker v. Burdekin*, 11 M. & W. 128.

(q) *Norden v. James*, 2 Dick. 533; *Ingliss v. Grant*, 5 T. R. 530.

(r) 6 G. 4, c. 16, s. 3, repealed and re-enacted by 12 & 13 Vict. c. 106, s. 67.

(s) *Eckhard v. Wilson*, 8 T. R. 142, per Cur.; *Bamford v. Baron*, 2 T. R. 594, note (a); *Tappenden v. Burgess*, 4 East, 230, per Lord Ellenborough; *Ex parte Cawkwell*, 1 Rose, 313.

(t) *Ex parte Crawford*, 1 Chris. B. L. 97, 140; *Ex parte Low*, 1 G. & J. 84, per Lord Eldon; *Ex parte Cawkwell*, 1 Rose, 313; *Ex parte Shaw*, 1 Mad. 598; *Back v. Gooch*, 4 Camp. 432; S. C. Holt, 13.



for it is not fraudulent as to them. Nor can a trust deed which could not have been impeached under a fiat sued out by any creditor be impeached under the bankrupt's own fiat.<sup>(u)</sup>

The late act<sup>(v)</sup> has now provided, that where any trader within the act shall execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of *all* his creditors, it shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within *three months* from the execution thereof; provided that such deed be executed by *every such trustee* within [\*480] *fifteen days* after the execution thereof by the trader; \*and that the execution by such trader and every such trustee be *attested by an attorney or solicitor*; and that *notice* thereof be given within one month after the execution by such trader, in manner therein specified."

If the above requisitions, therefore, be complied with, the trust deed will now be unimpeachable after a period of three months; but until the expiration of that time the trustees must forbear to act, as all their proceedings may be overreached by a subsequent adjudication of bankruptcy. However, the trustees may begin the execution of their office even at an earlier day, if they can only satisfy themselves either that all the creditors have concurred or acquiesced in the arrangement, or that such as have not cannot, either collectively or individually, prove a debt or debts in the requisite amount to support an adjudication of bankruptcy.

Such is the law affecting traders where the assignment is of their *whole* property. If a trader assign *part* only in trust for creditors, then, if the transaction be *fair* and *bona fide*, and in the ordinary course of business, it is not open to objection;<sup>(w)</sup> but if the trader contemplated bankruptcy,<sup>(x)</sup> or even thought it probable, though not inevitable,<sup>(y)</sup> and wished to give an undue preference to certain creditors over others, it is *fraudulent* within the meaning of the statute, and constitutes an act of bankruptcy.

Before proceeding to the *duties* of trustees, it may be convenient to [\*481] enlarge upon the two distinct classes into which \*trusts for payment of debts may be divided, viz.: trusts irrevocable and trusts revocable.

1. The existence of a debt is always a sufficient consideration to support an assurance; and therefore if A. be indebted to B., and convey an

(u) Ex parte Philpot, De Gex, 346; Ex parte Louch, id. 463; Ex parte Lofts, id. 612.

(v) 12 & 13 Vict. c. 106, s. 68.

(w) Hale v. Allnut, 18 Com. B. Re. 505; Wheelwright v. Jackson, 5 Taunt. 109; Hartshorn v. Slodden; 2 B. & P. 582; Fidgeon v. Sharp, 5 Taunt. 539; Small v. Oudley, 2 P. W. 427; Cock v. Goodfellow, 10 Mod. 489; Compton v. Bedford, 1 W. Bl. 362, per Lord Mansfield; Hooper v. Smith, 1 W. Bl. 441; Alderson v. Temple, 4 Burr. 2240, per Lord Mansfield; Wilson v. Day, 2 Burr. 830, *per eundem*; ib. 831, per Forster and Wilmot; Jacob v. Sheppard, cited Worsley v. Demattos, 1 Burr. 478; Harman v. Fisher, Cowp. 123, per Lord Mansfield; Rust v. Cooper, Cowp. 634, *per eundem*; Ex parte Scudamore, 3 Ves. 85; and see Estwick v. Caillaud, 5 T. R. 424; Newton v. Chantler, 7 East, 144.

(x) Linton v. Bartlet, 3 Wils. 47; Morgan v. Horseman, 3 Taunt. 241; Alderson v. Temple, 4 Burr. 2238; Round v. Bye, 1 Cooke, B. L. 114, 3rd. ed.; Devon v. Watts, Doug. 86; Pulling v. Tucker, 4 B. & A. 382; Harman v. Fisher, Cowp. 117.

(y) Poland v. Glyn, 2 D. & R. 310; Guthrie v. Crossley, 2 C. & P. 301.

estate to him by way of security, the deed, though no money passed at the time, cannot be revoked, but B. may insist on the benefit of it. And if the creditor be not a party to the deed, yet if, by arrangement between him and the debtor, an estate is vested in a trustee for securing the debt, he can enforce the trust.<sup>(z)</sup> Even where a debtor entered into an arrangement with three of his creditors, and in pursuance thereof, by a deed between himself of the first part, the three creditors of the second part, and his other creditors of the third part, conveyed all his real and personal estate to the three creditors, in trust for themselves and the other creditors, it was held that the intention was to make the creditors *cestuis que trust*, and that the deed was irrevocable; and no distinction was taken between the three creditors and the other creditors, although the latter apparently had not been in communication with the debtor previous to the deed, and had not executed it until some time afterwards.<sup>(a)</sup>

2. On the other hand, if a debtor, without communication with his creditors, and, indeed, only from motives of personal convenience, as on going abroad,<sup>(b)</sup> vest an estate in trustees upon trust to pay his debts, such a deed confers no right upon the creditors who are neither parties nor privies, and the debtor may at any time, at his pleasure, revoke or vary the trusts, or call for the re-transfer of the property.<sup>(c)</sup> And if two persons have different interests in the same estate, and they, by arrangement between themselves, but without communication with any creditor, convey the property to trustees, upon trust to pay the debts of either party; here, though each may enforce the trust as against the other, yet the creditor, as he neither required the security, nor was an object of bounty, \*cannot compel the execution of the trust in his own favour.<sup>(d)</sup> And *a fortiori*, this is the case if the pay- [\*482] ment of the debt is to be made only on the request of the settlor.<sup>(e)</sup> But, of course, the trust cannot be revoked by the settlor, so as to defeat or prejudice what the trustees may have previously done in the due execution of the trust.<sup>(f)</sup>

In *Garrard v. Lauderdale*, the Duke of York, by indenture between himself of the first part, and trustees of the second part, and the creditors of the third part, conveyed certain property to trustees upon trust for his creditors, and upon the execution of the deed a circular to that effect was sent to each of the creditors. Here there was ground for contending that, as the creditors had been induced by the notice to forbear suing the settlor, they had acquired a right to the execution of the trust, but Sir L. Shadwell, observing that the receipt of the circular was not admitted, and that, if received, yet the creditors had not refrained from suing, as they had proved against the Duke's estate, decided that the

(z) *Wilding v. Richards*, 1 Coll. 661.

(a) *Mackinnon v. Stewart*, 1 Sim. N. S. 76.

(b) *Cornthwaite v. Frith*, 4 De Gex & Sm. 552.

(c) *Walwyn v. Coutts*, 3 Sim. 14; 3 Mer. 707; *Smith v. Keating*, 6 Com. B. Re. 136; *Acton v. Woodgate*, 2 M. & K. 492; *Browne v. Cavendish*, 1 Jon. & Lat. 606.

(d) *Gibbs v. Glamis*, 11 Sim. 584; *Simmonds v. Palles*, 2 Jon. & Lat. 489.

(e) *Evans v. Bagwell*, 2 Con. & Laws. 612.

(f) *Wilding v. Richards*, 1 Coll. 655, see 659; and see *Kirwan v. Daniel*, 5 Hare. 493.

creditors had no equity to enforce the trust,<sup>(g)</sup> and the decree, on appeal to Lord Brougham, was affirmed.<sup>(h)</sup> The authority, however, of this case has, on several occasions, been questioned;<sup>(i)</sup> and Lord St. Leonards on one occasion observed he should be sorry to have it understood that a man may create a trust for creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power.<sup>(k)</sup> There can be little doubt that upon the general principles of equity the settlor, by giving notice to the trustees, and by subsequent conduct, may confer on the creditors a right which they did not originally possess.<sup>(l)</sup> [\*483] And indeed it has now been \*decided that if property be assigned to a trustee, and he takes possession of it, and communicates with certain of the creditors, who express their satisfaction, the trust is irrevocable.<sup>(m)</sup>

In one case, where property was vested in a trustee for creditors, and the trustee was a surety for some of the debts, it was held that, though the trust was revocable as to the general creditors, yet the trustee himself was not bound to reconvey the estate until the suretyship was satisfied.<sup>(n)</sup>

It does not clearly appear from the authorities what is the precise nature of a revocable trust of this kind. The instrument is sometimes called a *deed of agency*, and if so, the trust must be considered at an end at the death of the settlor, and the property, so far as it has not been applied, must be administered as part of the settlor's assets.<sup>(o)</sup> It is perfectly clear that the trust is not regarded as revocable only during the life of the settlor, so as to give a vested interest to the creditor after his death, for it has been held that the creditor has no more equity to enforce the trust after the settlor's death than in his lifetime.<sup>(p)</sup>

The courts at the present day consider the doctrine under which these deeds have been held revocable to have been carried far enough, and have expressed a disinclination to extend it.<sup>(q)</sup>

We now proceed to the *duties* of trustees for payment of debts, and upon this subject we shall consider, 1, What debts are to be paid; 2, In what order as regards priority; and 3, What interest is to be allowed.

(g) 3 Sim. 1.

(h) 2 Russ. & Myl. 451; and see *Cornthwaite v. Frith*, 4 De Gex & Sm. 552; *Stone v. Van Heythuysen*, Kay, 727.

(i) See *Acton v. Woodgate*, 2 M. & K. 495; *Kirwan v. Daniel*, 5 Hare, 499; *Simmonds v. Palles*, 2 Jon. & Lat. 495, 504.

(k) *Browne v. Cavendish*, 1 Jon. & Lat. 635; 7 Ir. Eq. Rep. 388.

(l) Perhaps the old case of *Langton v. Tracy*, 2 Ch. Rep. 30, was decided on this principle, for it appears that Tracy, the trustee, declared to the creditors that he would pay the debts, and that some of the debts were actually paid, under the deed. The creditors may also have been privies though not parties to the execution of the trust, for it is stated that the settlor executed the deed to avoid prosecution against him by his creditors.

(m) *Harland v. Binks*, 15 Q. B. Rep. 713; *Nicholson v. Tutin*, 2 Kay & Johns. 18.

(n) *Wilding v. Richards*, 1 Coll. 655.

(p) *Garrard v. Lauderdale*, 3 Sim. 1.

(q) *Wilding v. Richards*, 1 Coll. 659; *Kirwan v. Daniel*, 5 Hare, 499; *Simmonds v. Palles*, 2 Jon. & Lat. 495, 504; *Brown v. Cavendish*, 1 Jon. & Lat. 635; *Evans v. Bagwell*, 2 Con. & Laws. 616.



1. *What debts are within the scope of the trust.*

If the trust be created by *deed*, then, unless a contrary intention be expressed, the debts only at the date of the deed will [\*484] be intended; (r) but if the provision be contained in a will, the direction will include all debts at the testator's death; unless he specially restrict his meaning to the debts at the making of his will. (s)

If a settlor convey all his real and personal property upon trust to pay "all debts then owing by him, and which affect the estates thereby conveyed;" the trust, if the settlor have no *judgment* debts at the time, will be extended to *bond* debts, but not to *simple contract* debts. (t)

A direction for payment of debts will not *revive* a debt barred by the Statute of Limitations, (u) though the trustee or executor may have advertised for *all* creditors to come in and prove their debts. (v) But if the claim be not barred at the date of the deed or the death of the testator, the statute will not run afterwards; (w) for it is not to be inferred that a man abandons his debt because he does not enforce payment at law when he has a trustee to pay him. (x) Besides, unless delayed of necessity, the trustee ought to discharge the debt at once, and the universal rule is, that the *cestui que trust* ought not to suffer for the *laches* of the trustee. (y)

By the 40th section of the late Statute of Limitations (z) it is declared, that "no action, suit, or other proceeding shall be brought to recover any sum of money *charged upon or payable out of* any land at law or in equity, but within twenty years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless, in the mean time, some part thereof, or of the interest thereon, shall have been paid, or some acknowledgment of the right thereof shall have been given in writing, signed by the person by whom the same shall \*be payable, or his agent." Upon the construction of this clause it was held, that where a testatrix had [\*485] devised an estate to trustees upon trust to sell and pay debts, but no part of the produce of sale had been set apart for that purpose, the right of the creditor was not within the exception of the 25th section, but fell under the 40th section; but inasmuch as the debt had been acknowledged by the surviving trustee, that was sufficient to take the case out of the statute. (a) But the opinion of the vice-chancellor that the case was not within the 25th section cannot, it is conceived, be supported. The right

(r) *Purefoy v. Purefoy*, 1 Vern. 28.

(s) *Loddingon v. Kime*, 3 Lev. 433.

(t) *Douglas v. Allen*, 1 Con. & Laws. 367; 2 Drur. & War. 213.

(u) *Burke v. Jones*, 2 V. & B. 275, where all the cases are collected.

(v) *Jones v. Scott*, 1 R. & M. 255; 4 Cl. & Fin. 382; overruling *Andrews v. Brown*, Pr. Ch. 385.

(w) *Hughes v. Wynne*, 1 T. & R. 307; *Crallan v. Oulton*, 3 Beav. 1; *Hargreaves v. Mitchell*, 6 Mad. 326; *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107; and see *Morse v. Langham*, cited *Burke v. Jones*, 2 V. & B. 286.

(x) *Hughes v. Wynne*, 1 T. & R. 309, per Cur.

(y) See *Executors of Fergus v. Gore*, 1 Sch. & Lef. 110.

(z) 3 & 4 W. 4, c. 27.

(a) *Lord St. John v. Boughton*, 9 Sim. 219.

of the creditor would subsist until adverse possession had run against his trustee.(b)

The rule that the creation of a trust keeps alive a debt not barred at the testator's death does not apply to a trust declared of *personal estate* by will, for the personalty vests in the executor upon trust for the creditors by act of law, so that the words of the will are nugatory.(c)

The terms of the trust will extend to the repayment of a sum of money borrowed by an infant for the purchase of necessities.(d)

Shall a *mortgagee* who has a covenant for payment of his debt be allowed to prove and receive a dividend upon the whole amount of his debt *pari passu* with the other creditors, or shall he prove only for the excess of the debt beyond the value of the security, or what rule is to govern the case? In bankruptcy, the mortgagee proves only for the excess of the mortgage debt over the value of the security, so that he must first dispose of the estate, (with the concurrence of the trustees to pass the equity of redemption,) and then prove for the difference. But in the administration of assets by courts of equity, a mortgagee is allowed to prove for his whole debt without being put on terms as to his security.(e) The trust deed usually provides for the case of persons having [\*486] specific liens, and \*ingrafts the principle established in bankruptcy; but if there be no such clause, and if the deed provide that the creditor shall release his debt and all securities for the same, the mortgagee, by executing the deed, binds himself to the other creditors, notwithstanding any private arrangement with the debtor to the contrary, that he will not take advantage of his specific lien, but will bring it into the common stock and prove for his whole debt, and accept a dividend *pari passu* with the rest.(f) "It is established," said Lord Langdale, "by a series of decisions, that a creditor cannot ostensibly accept a composition and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for, or secure to himself, a peculiar and separate advantage which is not expressed upon the deed."(g) "The moment," observed Lord Lyndhurst, "a creditor releases his debt, which he does by executing a deed of this kind, there is, of course, an end of any lien he may have for it."(h) But though the word "release" be used in the deed, it will not necessarily operate as an absolute and unconditional release, if the whole contents of the instrument, when taken together, show that such was not the intention.(i)

If a trust be for payment of such creditors as shall come in within a year, it seems a creditor who delays beyond the year is not therefore pre-

(b) See *infra* as to the Statutes of Limitation.

(c) *Jones v. Scott*, 1 R. & M. 255; reversed, 4 Cl. & Fin. 382; *Freaker v. Crane-feldt*, 3 M. & C. 499; *Evans v. Tweedy*, 1 Beav. 55.

(d) *Marlow v. Pitfield*, 1 P. W. 558.

(e) See *Greenwood v. Taylor*, 1 R. & M. 185; *Mason v. Bogg*, 2 M. & C. 443; *Rome v. Young*, 4 Y. & C. 204; *Hanman v. Riley*, 9 Hare, App. xli.

(f) *Cullingworth v. Lloyd*, 2 Beav. 385; *Buck v. Shippam*, 1 Phil. 694; 14 Sim. 239.

(g) *Cullingworth v. Lloyd*, 2 Beav. 391.

(h) *Buck v. Shippam*, 1 Phil. 697.

(i) *Squire v. Ford*, 9 Hare, 47.

cluded from taking advantage of the trust, but the clause is regarded as directory only.<sup>(k)</sup>

But a creditor who repudiates the deed by his acts, as by suing the debtor contrary to the provisions of the deed, will not be allowed afterwards (more particularly after a long lapse of time) to retrace his steps and take the benefit of the deed; and though the trustee admit him to sign the deed, the other creditors will not be bound by the act of the trustee.<sup>(l)</sup>

A *discretion* is sometimes given to the trustees to admit or [\*487] \*exclude such creditors as they shall think proper. The court will endeavour, if possible, to withdraw the rights of the creditors from the caprice of the trustees;<sup>(m)</sup> but if the settlement clearly give such a discretionary power, and the trustees are willing to exercise it, and no fraud be found, the court cannot interfere to compel the admission of any particular creditor.<sup>(n)</sup>

If the trustees have a power of enlarging the time and advertise to that effect, but do not exercise the power, and so exclude a person who desired to come in, but could not do so before the day named in the deed, the creditor will be relieved in equity.<sup>(o)</sup>

If there be trustees for payment of debts and legacies, and subject thereto upon trust for A. for life with remainder over, and the court has taken an account of debts and legacies, and declared A. entitled to the possession, who is put in possession accordingly, it is not competent for the trustees afterwards to make an admission of some further debt, and to resume the possession in order to discharge it.<sup>(p)</sup>

## 2. *As to the order of payment.*

Where the trust is created by *will*, the direction generally is for payment of "debts and legacies." As regards the administration of assets, creditors take precedence of legatees; but here, as both take under the will, and the testator has made no distinction, it seems, upon strict principle, as was formerly held, that creditors and legatees ought to be paid *pari passu*.<sup>(q)</sup> However, there can be little doubt, that the testator, although he may not have explicitly declared it, meant the creditors to precede, and the courts accordingly (rather straining a point, that a man might not "sin in his grave") have now indisputably established that creditors shall have the priority.<sup>(r)</sup>

<sup>(k)</sup> Dunch v. Kent, 1 Vern. 260; and see Collins v. Reece, 1 Coll. 675; Jolly v. Norton, 3 Esp. 228; Raworth v. Parker, 2 Kay & Johns. 163; Spottiswoode v. Stockdale, Coop. 102; but see Emmet v. Dewhurst, 3 Mac. & Gor. 587.

<sup>(l)</sup> Field v. Donoughmore, 1 Dru. & War. 227; reversing the decision of Lord Plunkett, 2 Dru. & Walsh. 630.

<sup>(m)</sup> See Nunn v. Wilmshire, 8 T. R. 521.

<sup>(n)</sup> Wain v. Egmont, 3 M. & K. 445.

<sup>(o)</sup> Raworth v. Parker, 2 Kay & Johns. 163.

<sup>(p)</sup> Underwood v. Hatton, 5 Beav. 36.

<sup>(q)</sup> Hixon v. Wytham, 1 Ch. Ca. 248; Gosling v. Dorney, 1 Vern. 482; Anon. 2 Vern. 133; Powell's case, Nels. 202; Wolestoncroft v. Long, 1 Ch. Ca. 32; and see Walker v. Meager, 2 P. W. 552.

<sup>(r)</sup> Greaves v. Powell, 2 Vern. 248, 302, Raithby's ed.; Bradgate v. Ridlington, Mose. 56; 1 Eq. Ca. Ab. 141, pl. 3; Walker v. Meager, 2 P. W. 550; Martin v. Hooper, Rep. t. Hardwicke, by Ridgw. 209; Whitton v. Lloyd, 1 Ch. Ca. 275; Foly's case, 2 Freem. 49; Kidney v. Coussmaker, 12 Ves. 154, per Sir W. Grant;



[\*488] \*As amongst the creditors themselves, the court acts upon the well-known principle that "equality is equity," and, therefore, whether the trust be created by deed(s) or will,(t) the specialty debts in the absence of express directions to the contrary will have no advantage over simple contract debts, but all will be paid in rateable proportions; and, of course, the trustees will not be allowed to break in upon this rule by first discharging their own debts.(u)

It was formerly ruled, that where a testator charged his freehold estate with debts, and the estate subject to the charge descended to the heir, the specialty creditor had precedence, for it was argued he had his remedy at law against the heir independently of the will, and therefore ought not to be put on a level with those taking under the will.(v) The answer is, that the specialty creditor has no *lien* upon the estate, but can only recover the debt from the heir personally to the extent of the assets descended. If the estate be subject to the charge, the heir takes not beneficially but only as trustee, and then there are no legal assets in consideration of equity, and the bond creditor may be enjoined from pursuing his legal right; and on these grounds it has been decided that specialty debts are not entitled to a preference.(w)

It was also thought at one time, that if the estate charged with the debts was to be administered by the *executor*, the testator must have meant that the executor should, as in his executorial capacity, observe the *legal* priorities;(x) however, there was no reason, in fact, why the [\*489] characters of trustee and \*executor should not be united in the same person without confusion, and so it has since been determined.(xx) But if the trust be expressly to pay the settlor's debts "according to their priority, nature, and specialty," a bond-debt with interest is payable before a simple contract debt.(y)

### 3. *As to allowance of interest.*

Whether the trust be created by deed,(z) or will,(a) and though the

Peter v. Bruen, cited 2 P. W. 551; Lloyd v. Williams, 2 Atk. 111, per Lord Hardwicke.

(s) Wolestoncroft v. Long, 1 Ch. Ca. 32; Hamilton v. Houghton, 2 Bligh, 187, per Lord Eldon; Child v. Stephens, 1 Vern. 101.

(t) Wolestoncroft v. Long, 1 Ch. Ca. 32; Anon. 2 Ch. Ca. 54; &c.

(u) Anon. 2 Ch. Ca. 54.

(v) Fremoult v. Dedire, 1 P. W. 429; Young v. Dennet, 2 Dick. 452; Blatch v. Wilder, 1 Atk. 420; Allam v. Heber, Str. 1270; S. C. W. Black, 22; and see Plunket v. Penson, 2 Atk. 290.

(w) Shiphard v. Lutwidge, 8 Ves. 26; Pope v. Gwyn, cited ib. 28, note; Bailey v. Elms, 7 Ves. 319; Batson v. Lindegren, 2 B. C. C. 94; Hargrave v. Tindal, cited Newton v. Bennet, 1 B. C. C. 136, note.

(x) Girling v. Lee, 1 Vern. 63; Cutterback v. Smith, Pr. Ch. 127; Bickham v. Freeman, ib. 136; Masham v. Harding, Bunb. 339; Foly's case, 2 Freem. 49.

(xx) Prowse v. Abingdon, 1 Atk. 482; Newton v. Bennet, 1 B. C. C. 135; Silk v. Prime, ib. 138, note; S. C. 1 Dick. 384; Lewin v. Okeley, 2 Atk. 50; Barker v. Boucher, 1 B. C. C. 140, note.

(y) Passingham v. Selby, 2 Coll. 405.

(z) Hamilton v. Houghton, 2 Bligh, 169, see 186; Car v. Burlington, 1 P. W. 228, as corrected in Cox's ed.; Barwell v. Parker, 2 Ves. 364; Shirley v. Ferrers, 1 B. C. C. 41; and see Stewart v. Noble, Vern. & Scriv. 536; Creuze v. Hunter, 2 Ves. jun. 165; S. C. 4 B. C. C. 319.

(a) Lloyd v. Williams, 2 Atk. 108; Stewart v. Noble, Vern. & Scriv. 528; Dolman v. Pritman, 3 Ch. Re. 64; Nels. 136; Freem. 133; Bath v. Bradford, 2 Ves.

fund has been making interest, (b) the trustees will not be justified in paying interest upon *simple contract debts*; and *a fortiori*, this is the case where interest is expressly directed as to some particular debts. (c) Where the trust was *by deed*, but the creditors had not been made parties, Lord Eldon observed, "The mere direction to pay a debt does not infer either contract or trust to pay interest upon debts by simple contract. As to *contract*, the creditors did not execute the deed, and there was nothing to prevent their suing the debtor after the execution, and no *consideration* was given to the debtor by charging the land and discharging the person." (d) And Lord Hardwicke said (though under the altered state of the law the observation loses its force) it would be mischievous to hold that the trust should make the simple contract debts carry interest; for if the trust were to change the nature of the debts and burden the estate with interest, it would frighten people from doing justice to creditors. (dd) It was once suggested by Lord \*Abinger [\*490] that "if a man execute a trust of a term for the benefit of his creditors, the deed makes them mortgagees *if they execute it*, and so gives them a right of interest." (e) And it was held in some old authorities, that even in a *deed to which the creditors were not parties*, or in a trust created by *will* for payment of debts, the creditors were to be regarded as mortgagees and were entitled to interest; (f) but the doctrine in these cases has long since been overthrown, and it is apprehended that even the distinction taken by the chief baron cannot at the present day be supported. (g) Again, it was said by Lord Hardwicke that "if a man *by deed* in his life creates a trust for payment of his debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a *specialty*, it will make these, though simple contract debts, carry interest." (h) But this dictum also is not in conformity with the law as now established, and cannot be maintained. (i)

But where A. and B. assigned their *joint property* to C., D., and E. upon trust, in the first place to pay the *joint debts* at the expiration of a year from the date of the assignment, and then as to a moiety to pay the *separate debts* of A., and at the end of a year sufficient assets were realised to have discharged the joint debts, but the money, instead of being so applied, was invested in the funds and the interest accumulated, it was held, that as the fund applicable to the payment of the joint debts

588, per Lord Hardwicke; and see *Tait v. Northwick*, 4 Ves. 816. Bothomly v. Fairfax, 1 P. W. 334, note; *Maxwell v. Wettenhall*, 2 P. W. 26, ed. by Cox, are overruled.

(b) *Shirley v. Ferrers*, 1 B. C. C. 41; but see *Pearce v. Slocombe*, 3 Y. & C. 84.

(c) *Jenkins v. Perry*, 3 Y. & C. 178.

(d) *Hamilton v. Houghton*, 2 Bligh, 186.

(dd) See *Barwell v. Parker*, 2 Ves. 364; *Bath v. Bradford*, ib. 588.

(e) *Jenkins v. Perry*, 3 Y. & C. 183.

(f) *Maxwell v. Wettenhall*, 2 P. W. 27; *Car v. Burlington*, 1 P. W. 229.

(g) *Barwell v. Parker*, 2 Ves. 364. It must be borne in mind, however, that the 46th Order of August, 1841, gives simple contract creditors a right to interest from the date of the decree out of any surplus assets after paying all debts, and the interest of such as by law carry interest.

(h) *Barwell v. Parker*, 2 Ves. 364.

(i) *Stone v. Van Heythuysen*, Kay, 721; *Clowes v. Waters*, 16 Jur. 632.

had been making interest from the time the debts should have been paid, the joint creditors, though on simple contract, were entitled to interest at 4 per cent. before the separate creditors were paid their principal. The separate creditors would otherwise try to impede the general settlement, that, in the mean time, they might enjoy the interest from the joint creditors' fund.<sup>(k)</sup>

[\*491] \*Of course the creditors may stipulate for payment of interest, or the settlor, if so minded, may insert such a direction.<sup>(l)</sup> But a trust for payment of specialty and simple contract debts and *all interest thereof*, will not amount to such a direction, but the words will be taken to have reference to the debts carrying interest of their own nature.<sup>(m)</sup>

*Specialty* debts, though actually released by a creditor's deed, will carry interest up to the *time of payment*. It might be urged, indeed, that as regards specialty debts the amount of the debt is the principal and interest; and therefore in a trust for payment of debts, interest as well as principal must be taken into calculation to ascertain what the debt is at the date of the deed or the death of the testator; but that interest ought not to run beyond the date of the trust deed or the death of the testator, for that principal and interest together are then regarded as one sum, not as a debt but an *interest* of a *cestui que trust*. And some principle of this kind appears to have been acted upon in the case of *Car v. Burlington*,<sup>(n)</sup> where a person vested estates in trustees upon trust to pay all such debts as he should owe at his death, and the court directed the master to calculate interest on such of the debts as carried interest *up to the death of the settlor*; but the master was not to carry on any interest on any security beyond the settlor's decease, but in case there were assets to pay the simple contract debts as well as the specialty debts, the question of ulterior interest was reserved. At the present day, however, the rule is to consider the specialty debt as subsisting up to the time of payment, *i. e.* to calculate interest on *the principal* not only up to the date of the deed or the death of the testator, but up to the day of payment.<sup>(o)</sup>

Bond creditors, it must be observed, will not be entitled to receive more for principal and interest than the amount of the penalty.<sup>(p)</sup>

<sup>(k)</sup> *Pearce v. Slocombe*, 3 Y. & C. 84.

<sup>(l)</sup> See *Bath v. Bradford*, 2 Ves. 588; *Barwell v. Parker*, ib. 364; *Stewart v. Noble*, Vern. & Scriv. 536.

<sup>(m)</sup> *Tait v. Northwick*, 4 Ves. 816.

<sup>(n)</sup> 1 P. W. 228, as corrected in Cox's ed. from Reg. Lib.

<sup>(o)</sup> *Bateman v. Margerison*, 16 Beav. 477.

<sup>(p)</sup> *Hughes v. Wynne*, 1 M. & K. 20; *Anon.* 1 Salk. 154; *Clowes v. Waters*, 16 Jur. 632.



## \*CHAPTER XVIII.

[\*492]

## THE DUTIES OF TRUSTEES OF CHARITIES.

CHARITIES are either established by charter, as *eleemosynary corporations*, or are under the management of *individual trustees*.

Before entering upon the duties of trustees for charities, it may be proper to introduce a few preliminary remarks upon the subject of the court's *jurisdiction* over charities established by *charter*.

On the institution of such a charity a *visitatorial* jurisdiction arises of common right to the founder, whether the king or a private person, and his heirs, or to those whom the founder has substituted in the place of himself and his heirs; (q) and the office of visitor is *to hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed.* (r) The visitor must take as his guide the statutes originally propounded by the founder; (s) but so long as he does not exceed his proper province, his decision is final, and cannot be questioned by way of appeal. (t)

With this *visitatorial* power the Court of Chancery has nothing to do: it is only as respects the administration of the corporate *property* that equity assumes to itself any right of \*interference. "If," said Lord Commissioner Eyre, "the governors established for [\*493] the regulation of a charity are not those intrusted with the management of the revenue, the court has no jurisdiction: let the charity be ever so much abused, as far as respects this court the abuse is without a remedy; but if those established as governors have also the management of the revenue, the court does assume a jurisdiction of necessity so far as they are to be considered as trustees of that revenue." (u) "There are two sorts of authorities," said Lord Hardwicke, "one as to the management of the estate and revenue, the other as to the management and government of the house. In the latter the governors are absolute, and not controllable by the Court of Chancery; but so far as relates to the estates of the charity, they are subject and accountable to this court." (v)

Upon the ground of this distinction between the visitatorial power and

(q) *Eden v. Foster*, 2 P. W. 326, resolved; *Attorney-General v. Gaunt*, 3 Sw. 148.

(r) See *Philips v. Bury*, Skin. 478; *Attorney-General v. Crook*, 1 Keen, 126; *Attorney-General v. Archbishop of York*, 2 R. & M. 468; *In re Birmingham School*, Gilb. Eq. Rep. 180, 181.

(s) *Green v. Rutherford*, 1 Ves. 469, per Sir J. Strange; *id.* 472, per Lord Hardwicke.

(t) *St. John's College, Cambridge, v. Todington*, 1 Burr. 200, per Lord Mansfield; *Attorney-General v. Locke*, 3 Atk. 165, per Lord Hardwicke; *Attorney-General v. The Master of Catharine Hall, Cambridge*, Jac. 392, per Lord Eldon.

(u) *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 47. But note, Chief Baron Richards once observed, he had been of counsel in the Foundling Hospital case, and he remembered some of the first men of the bar were not satisfied with the decision. *In re Chertsey Market*, 6 Price, 272.

(v) *Attorney-General v. Locke*, 3 Atk. 165; and see upon this subject *Ex parte Berkhamstead Free School*, 2 V. & B. 138; *The Poor of Chelmsford v. Mildmay*, Duke, 83; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499; *Eden v. Foster*,

the management of the revenue, an information for the *removal of governors or other corporators*, as having been irregularly appointed, would be dismissed with costs; (w) but wherever the administration of the *property* by the governors can be shown to have a tendency to pervert the end of the institution, the court will immediately interpose, and put a stop to such wrongful application. (x)

[\*49†] \*An estate newly bestowed upon an old corporation is not to be regarded in the same light as property with which the charity was originally endowed. The visitatorial power is *forum domesticum*—the private jurisdiction of the founder; and the new gift will not be made subject to it, unless the will of the donor be either actually expressed to that effect, or is to be collected by necessary implication. (y) If a legal or equitable interest be given to a body corporate, and *no special purpose* be declared, the donor has plainly implied that the estate shall be under the general statutes and rules of the society, and be regulated in the same manner as the rest of their property: (z) but if a *particular and special trust* be annexed to the gift, *that* excludes the visitatorial power of the original founder; and the court, viewing the corporation in the light of an ordinary trustee, will determine all the same questions as would have fallen under its jurisdiction had the administration of the fund been intrusted to the hands of individuals.

Thus, in *Green v. Rutherford*, (a) an advowson was devised to St. John's College, Cambridge, upon trust, when the church should become void, to present "the senior divine then fellow of the College." A dispute arose as to the true interpretation of the words; and had the direction been contained in the statutes of the college, the construction would have fallen under the visitatorial province; but as the property was a new donation, it was held the question was determinable in the *forum* of the Court of Chancery. "A private person," it was said, "would have been compellable to execute the will, and, considered as a trust, it made no difference who were the trustees. Though here they were a collegiate body whose founder had given a visitor to superintend *his own bounty*, yet, as regarded one claiming under a *separate benefactor*, the court would look on them as trustees, and would compel them to execute the intent under the direction of the court. (b) The visitor, whose judg-

2 P. W. 326; *Attorney-General v. Dixie*, 13 Ves. 533, 539; *Attorney-General v. Corporation of Bedford*, 2 Ves. 505; 5 Sim. 578; *Attorney-General v. Browne's Hospital*, 17 Sim. 137; *Attorney-General v. Governors of Dedham Grammar School*, 3 Jur. N. S. 325.

(w) *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 498; *Whiston v. Dean & Chapter of Rochester*, 7 Hare, 532; *Attorney-General v. Dixie*, 13 Ves. 519; *Attorney-General v. Middleton*, 2 Ves. 327, see 330; *Attorney-General v. Dulwich College*, 4 Beav. 255; *Attorney-General v. Magdalen College, Oxford*, 10 Beav. 402; *Attorney-General v. Corporation of Bedford*, id. 505; *In re Bedford Charity*, 5 Sim. 578.

(x) See *Attorney-General v. St. Cross Hospital*, 17 Beav. 435; *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 48; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499.

(y) *Green v. Rutherford*, 1 Ves. 472, per Lord Hardwicke.

(z) Id. 473, *per eundem*; *Ex parte Inge*, 2 R. & M. 596, per Lord Brougham; *Attorney-General v. Clare Hall*, 3 Atk. 675, per Lord Hardwicke.

(a) 1 Ves. 462.

(b) 1 Ves. 468, 473.

ment must be founded on the statutes, could \*not execute the trusts of the will, for that would be departing from the statutes; [\*495] and the adhering to the statutes would be adding further circumstances to the trust than the testator prescribed, and making it the founder's will, and not the testator's." (c)

But even the *visitatorial* power may, under particular circumstances and in a special manner, be exercised by the lord chancellor; for the crown may be visitor by the terms of the foundation, and if the heir of the founder cannot be discovered, (d) or become lunatic, (e) the visitatorial power, rather than the corporation should not be visited at all, will result to the crown. In *civil* corporations the king is visitor through the Court of Queen's Bench; for corporate bodies which respect the public police of the country and the administration of justice, are necessarily better regulated under the superintendence of a court of law: but as regards *eleemosynary* corporations the king's visitatorial power has been committed to the lord chancellor, as in matters of charity the more appropriate supervisor. (f') And the mode of application to the lord chancellor in these cases is by petition to the Great Seal. (g)

We proceed to the consideration of the *duties* of trustees of charities.

It is of course imposed upon the trustees whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor; so long as those uses are capable of execution. (h) Thus if the gift be to find a preacher in Dale, it would be a breach of trust to provide one in Sale; or if it be to find a preacher, and the trustees apply it to the poor or to some other purpose; (i) [\*496] \*or if the trust be for the poor of O., and the trustees extend it to other parishes; (l) or if the trust be to repair a chapel, and the rents be mixed up with the poor-rate for parochial purposes; (m) or if a fund be raised for erecting an hospital, and it be diverted to lighting, paving, and cleansing the town. (n)

A chapel was granted to the trustees of a school for the use and benefit of the said school, and though the inhabitants of the hamlet had been long accustomed to attend divine service in the chapel, it was held that, as the chapel was for the exclusive benefit of the school, the trustees had

(c) 1 Ves. 469.

(d) Ex parte Wrangham, 2 Ves. jun. 609; Attorney-General v. Earl of Clarendon, 17 Ves. 498, per Sir W. Grant; Attorney-General v. Black, 11 Ves. 191; Case of Queen's College, Cambridge, Jac. 1.

(e) Attorney-General v. Dixie, 13 Ves. 519, see 533.

(f') King v. St. Catharine's Hall, 4 T. R. 233, see 244; and see Ex parte Wrangham, 2 Ves. jun. 619.

(g) See the cases cited in notes (d) and (c); and Ex parte Inge, 2 R. & M. 594; Re Queen's College, Cambridge, 5 Russ. 64; Re University College, Oxford, 2 Phil. 521.

(h) See Attorney-General v. Sherborne School, 18 Beav. 256.

(i) Duke, 116; Attorney-General v. Newbury Corporation, C. P. Coop. Cases, 1837-38, 72; Attorney-General v. Goldsmiths' Company, ib. 292; and see Wivellescom's case, Duke, 94.

(l) Attorney-General v. Brandreth, 1 Y. & C. Ch. Re. 200.

(m) Attorney-General v. Vivian, 1 Russ. 226, see 237.

(n) Attorney-General v. Kell, 2 Beav. 575.



no power to apply the revenues of the charity towards enlarging the chapel for the better accommodation of the inhabitants.<sup>(o)</sup>

The trustees for maintaining a chapel had pulled down the edifice, converted the burial-ground to profane purposes, carried the bell to the market-place, put the pews in the parish church, and employed the stones of the chapel for repairing a bridge. Sir T. Plumer said, "It was an enormous breach of trust, and such as could not have been expected in a christian country;" and directed an inquiry what emoluments had come to the hands of the trustees on account of the breach of trust, and what would be the expense of restoring the chapel to the state in which it stood at the time of its destruction.<sup>(p)</sup>

A fund in aid and relief of "poor citizens who often were grievously burdened by the imposts and taxes of the city," was held not to be applicable to the payment of rates and other expenses of the city that would otherwise have been raised by public levies and impositions, nor to be distributable to such of the poor as received parish relief, for that would be so much in aid of the rate-payers; but ought to have been administered for the exclusive benefit of the poor, and should therefore have been confined to such of the poor as were not supported by the parish.<sup>(q)</sup>

\*If land or money be given for maintaining "the worship of [\*497] God," and nothing more be said, the court will execute the trust in favour of the established form of religion. But if it be clearly expressed upon the deed or will that the purpose of the settlor is to promote the maintenance of dissenting doctrines, the court, provided such doctrines be not contrary to law, will execute the intention.<sup>(r)</sup> And where a fund is raised for the purpose of founding a chapel (or indeed any other charity,) and the contributors are so numerous as to preclude the possibility of their all concurring in any instrument declaring the trust, and such a declaration of trust is made by the persons in whom the property is vested at or about the time when the sums have been raised, that declaration may reasonably be taken *prima facie* as the true exposition of the minds of the contributors.<sup>(s)</sup>

Where an institution exists for the purpose of religious worship, and it cannot be discovered from the instrument declaring the trust what form or species of religious worship was in the intention of the settlors, the court will then inquire what has been the usage of the congregation; and if such usage do not contravene public policy will be guided by it as evidence of the intention in the administration of the trust. And by a recent act, if the instrument of trust do not define the religious doctrines, twenty-five years' usage immediately preceding any suit is made conclusive evidence thereof.<sup>(t)</sup> But if the purpose of the settlors appear clearly

(o) Attorney-General v. Earl of Mansfield, 2 Russ. 501.

(p) Ex parte Greenhouse, 1 Mad. 92; reversed on technical ground, 1 Bl. N. R. 17.

(q) Attorney-General v. Corporation of Exeter, 2 Russ. 45; S. C. 3 Russ. 395; and see Attorney-General v. Bovill, 1 Phil. 762; Attorney-General v. Blizard, 21 Beav. 233.

(r) Attorney-General v. Pearson, 3 Mer. 409, per Lord Eldon; see S. C. 7 Sim. 290.

(s) Attorney-General v. Clapham, 4 De Gex, M. & G. 626.

(t) 7 & 8 Vict. c. 45, s. 2.

upon the instrument, the court, in that case, though the usage of the congregation may have run in a different channel, cannot change the nature of the original institution: it is not competent for the majority of the congregation, or for the managers of the property, to say, "We have altered our opinions: the chapel in future shall be for the benefit of persons of the same persuasion as ourselves."<sup>(u)</sup>

\*If the deed of endowment neither provide for the succession of trustees nor the election of the minister, an inquiry will be [\*498] directed, who, according to the nature of the establishment, are entitled to propose trustees, and to elect the minister;<sup>(v)</sup> and if the election of the minister properly belong to the congregation, the majority is for that purpose the congregation.<sup>(w)</sup> The appointment of the minister cannot, in such a case, belong to the heir of the surviving trustee, who may not be of the same persuasion, but, it might happen, a Roman Catholic or Jew.<sup>(x)</sup>

A minister in possession of a meeting-house is tenant at will to the trustees, and his estate is determinable by demand of possession without any previous notice.<sup>(y)</sup> But this merely tries the legal right without affecting the question whether in equity the minister was properly deprived,<sup>(z)</sup> and if the minister be in possession, and preaching the doctrines that were intended by the founders, it is the practice of a court of equity to continue him until the case can be heard, whether he was duly elected or not (for the first point is to have the service performed) and the court will pay him his salary.<sup>(a)</sup>

It is the policy of the established church by giving the minister an estate for life in his office, to render him in some degree independent of the congregation; but if it be the general usage amongst any particular class of dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, though a court of equity might not struggle hard in support of such a plan, there is no principle upon which the court would not be bound to give it effect.<sup>(b)</sup>

To every corporation there belongs of common right the power of establishing *bye-laws* for the government of their own \*body; [\*499] but this privilege cannot authorize the enactment of any rules or regulations that would tend to pervert or destroy the directions of the original founder and the objects of the charity.<sup>(c)</sup> And so a clause in a deed investing the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to a meeting-

(u) S. C. 3 Mer. 400, per Lord Eldon; *Foley v. Wontner*, 2 Jac. & Walk. 247, *per eundem*; *Craigdallie v. Aikman*, 1 Dow's P. C. 1; *Milligan v. Mitchell*, 3 M. & C. 72; *Broom v. Summers*, 11 Sim. 353; *Attorney-General v. Murdoch*, 7 Hare, 445; 1 De Gex, M. & G. 86; *Attorney-General v. Munro*, 2 De Gex & Sm. 122.

(v) *Davis v. Jenkins*, 3 V. & B. 151, see 159; and see *Leslie v. Birnie*, 2 Russ. 114.

(w) *Davis v. Jenkins*, 3 V. & B. 155; and see *Leslie v. Birnie*, *ubi supra*.

(x) *Davis v. Jenkins*, 3 V. & B. 154.

(y) *Doe v. Jones*, 10 B. & Cr. 718; *Doe v. McKaeg*, 10 B. & Cr. 721; and see *Brown v. Dawson*, 12 Ad. & Ell. 624.

(z) See *Doe v. Jones*, 10 B. & Cr. 721.

(a) *Foley v. Wontner*, 2 Jac. & Walk. 247, per Lord Eldon.

(b) *Attorney-General v. Pearson*, 3 Mer. 402, 403, per Lord Eldon.

(c) *Eden v. Foster*, 2 P. W. 327, resolved.

house would not enable them to convert the meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended.(d)

The charity funds cannot be diverted into a *different* channel without the authority of an act of parliament; and this may now be obtained through the intervention of the charity commissioners, who are empowered to approve, provisionally, of a scheme varying from the original endowment and submit it to parliament.(e) Until the act referred to, trustees, before applying to the legislature, were in the habit of procuring the sanction of the Court of Chancery; for if they took such a step upon the mere suggestion of their own minds, and failed in obtaining the contemplated act, they were not allowed the costs and expenses incurred in the proceeding;(f) but if the application to parliament was attended with success, the trustees were then allowed their costs, though the sanction of the lord chancellor had not been previously obtained; for the court could not with propriety pronounce those measures to be imprudent which the legislature itself had enacted as prudent.(g)

But the management of the trust may contravene the *letter* of the founder's will, and yet, on a favourable construction, be conformable to the real intention.

It was the opinion of Lord Eldon(h) and Sir T. Plumer,(i) [\*500] \*that if the wish of the founder were to establish a *free grammar school*, the chancellor, though he felt perfectly convinced that a free grammar school, that is, a school for teaching the learned languages, could be of little or no use, would yet be bound to apply the revenue as the donor had directed, and could not substitute a school for teaching English and writing and arithmetic. "The duty of the court," said Lord Eldon, "is to enforce the trusts as they stand: the founder was the judge how far his institution was likely to be useful to the public."(k) But it has since been held by Lord Lyndhurst,(l) Sir John Leach,(m) Lord Langdale,(n) and Lord Cottenham,(o) that the court has jurisdiction to extend the application of the charity fund to purposes beyond the *literal* intention, and that *writing and arithmetic* may be well introduced into a scheme for the establishment or better regulation of a free grammar school. And this may of course be done in the case not of a *free grammar school* but of a *free school*.(p)

(d) Attorney-General v. Pearson, 3 Mer. 411, per Lord Eldon..

(e) 16 & 17 Vict. c. 137, ss. 54-60.

(f) Attorney-General v. Earl of Mansfield, 2 Russ. 519, per Lord Eldon.

(g) *Ib. per eundem*.

(h) Attorney-General v. Whiteley, 11 Ves. 241; Attorney-General v. Earl of Mansfield, 2 Russ. 501.

(i) Attorney-General v. Dean of Christchurch, Jac. 474.

(k) Attorney-General v. Earl of Mansfield, 2 Russ. 521.

(l) Attorney-General v. Haberdashers' Company, 3 Russ. 530.

(m) Attorney-General v. Dixie, 2 M. & K. 342; Attorney-General v. Gascoigne, id. 652.

(n) Attorney-General v. Caius College, 2 Keen, 150; Attorney-General v. Ladyman, C. P. Coop. Cases, 1837-38, 180.

(o) Attorney-General v. Stamford, 1 Phil. 745.

(p) Attorney-General v. Jackson, 2 Keen, 541.



Now by the 3 & 4 Vict. c. 77, s. 1, it is enacted that whenever any question may come under consideration, in any of her majesty's courts of equity, concerning the system of education to be established in any *grammar school*, or the right of admission into the same, it shall be lawful for the court to make such decrees or orders as to the said court shall seem expedient for extending the system of education to other useful branches of literature and science, in addition to or (subject to the provisions thereafter contained) in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation, or the existing statutes.

By the 13th section, the visitors of any school are enabled to require from the master a return of the state thereof, of the books used therein, and of such other particulars as they may think proper; and also, to order such examination of \*the scholars attending the same as may seem [\*501] expedient. And by the 14th, 15th and 16th sections, the court is empowered, upon proper occasions, to enlarge the existing, or to create new visitatorial powers, and to appoint, when necessary, a provisional visitor.

By the 17th section it is enacted that it shall be lawful for the Court of Chancery (upon application by petition under the 21st section,) to empower the person or persons having powers of visitation in respect of the discipline of any grammar school, or who shall be specially appointed to exercise the same, under the said act, and the governors, or either of them, after such inquiries, and by such mode of proceeding as the court may direct, to remove any master of any grammar school who has been negligent in the discharge of his duties, or who is unfit or incompetent to discharge them properly or efficiently, either from immoral conduct, incapacity, age, or from any other infirmity or cause whatsoever, and by a subsequent section, provision is made for the ejection of the master by a summary process from the premises in his occupation.

Where trustees were directed to apply the rents "towards the necessary *finding a master* and for the pains of such master," and the trustees applied part of the revenue towards *rebuilding and repairing* the school-room and school-house, it was held to be a good pursuance of the trust, because a school-room and house were necessary, and if these were not provided by the trustees, they must have been provided by the master himself, and so it was in effect applied for the pains of the master. (q)

So a trust "for the *relief of the poor*" has been construed to authorize an application of the funds to the building of a *schoolhouse*, and the *education of the poor* of the parish. (r)

So an estate had been given to trustees for the *repair* of a church and chapel of ease thereto belonging, and, the parish having taken down the chapel to erect a new one on a different site, it was determined that the trustees had not exceeded the \*line of their duty in expending [\*502] the accumulated rents upon the *rebuilding* of the chapel; but it was held the *rents* only, and not the *corpus* of the estate, could be so

(q) Attorney-General v. Mayor of Stamford, 2 Sw. 592.

(r) Wilkinson v. Malin, 2 Tyr. 544, see 570.

applied; and the court had great doubts whether any thing could be laid out upon the *fitting-up* of the chapel.(s)

And where the direction of the founder was that the master of a school should receive 50*l.* a year, and the usher 30*l.*, and the trustees had raised the salaries respectively to 80*l.* and 60*l.*, as the will did not contain any prohibition against increasing the salaries, and it could not be supposed that the trustees were not under any circumstances to alter the amount, the court refused to compel the trustees to refund the augmentations.(t)

And, *vice versa*, if a fund be given, not for purposes of individual benefit, but for the discharge of certain duties, as for the support of a schoolmaster, and the fund increase to such an extent as to yield more than a reasonable compensation for the duties to be performed, the court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose.(u)

Legacies had been left by several different testators (between the years 1545 and 1666) for the purpose of being lent out in sums varying from 5*l.* to 200*l.* without interest; and Sir J. Leach was of opinion, that, regard being had to the alteration in the value of money, it was not inconsistent with the intention of the testators to raise the loans to sums varying from 100*l.* to 500*l.*(v)

It need scarcely be remarked that a trustee would be guilty of a gross breach of trust, should he keep the charity fund in his hands, and not apply it, as it becomes payable, to the objects of the trust.(w)

[\*503] It is a general rule, that trustees of charities have no \*authority to make an absolute disposition of the charity estate: they could not, for instance, part with *lands* to a purchaser, and substitute instead the reservation of a *rent*.(x) And as the trustees may not alien absolutely, so they may not accomplish the same end indirectly by demising for long terms, as for 999 years;(y) or for terms of ordinary duration, with covenants for perpetual renewal;(z) or by granting reversionary terms.(a)

But there is no positive rule that in *no* instance shall an absolute disposition be made, for then the court itself could not authorize such an act—a jurisdiction which, it is acknowledged, has from time to time been exercised upon special cases made. “I do not doubt,” observed Sir J. Wigram, “the existence of this power in the court: the trustees have the power to sell at law, they can convey the legal estate, but it is only a court of equity that can resell the property, and if that court

(s) Attorney-General v. Foyster, 1 Anst. 116.

(t) Attorney-General v. Dean of Christchurch, 2 Russ. 321.

(u) Attorney-General v. Master of Brentford School, 1 M. & K. 376, see 394.

(v) Attorney-General v. Mercers' Company, 2 M. & K. 654; and see Attorney-General v. Holland, 2 Y. & C. 683; Morden College case, cited ib. 701, 702.

(w) Duke, 116.

(x) Attorney-General v. Kerr, 2 Beav. 420; Blackston v. Hemsworth Hospital, Duke, 49; Attorney-General v. Brettingham, 3 Beav. 91; and see Attorney-General v. Buller, Jac. 412; Attorney-General v. Magdalen College, 18 Beav. 223.

(y) Attorney-General v. Green, 6 Ves. 452; Attorney-General v. Pargeter, 6 Beav. 150.

(z) Lydiatt v. Foach, 2 Vern. 410; Attorney-General v. Brooke, 18 Ves. 326.

(a) See Attorney-General v. Kerr, 2 Beav. 420.

should sanction a sale it would be bound to protect the purchaser.”(b) The true principle is, that an absolute disposition is then only to be considered a breach of trust when the proceeding is inconsistent with a provident administration of the estate for the benefit of the charity.(c) And the transaction will be strongly assumed to be improvident as against a purchaser until he has established the contrary.(d) A house which had formerly produced a large income by being let in apartments had afterwards fallen into a state of dilapidation and become unproductive: the charity had no funds to rebuild, but the materials and site were of considerable value. The \*master having reported that it would be for the advantage of the charity to dispose of the house, Sir W. [\*504] Grant, on the authority of a precedent which was produced to him, directed a sale.(e)

Now under the provisions of the recent acts the commissioners of charities are empowered on application made to them to authorize the grant by charity trustees of building, repairing, improving, or other leases, and the working of mines, and the sale or exchange of any part of the charity property,(f) and the trustees are restricted from any sale, mortgage or beneficial leases, without the sanction of the commissioners,(g) and moneys arising from sales and exchanges may be laid out with the consent of the commissioners in the purchase of other lands without a license in mortmain.(h)

Where there are accumulations from a charity estate, the court, on application to it for directions, will not as a general rule sanction an investment on *land* contrary to the spirit of the mortmain act.(i) But there is nothing *illegal* in such an investment, if accompanied with the formalities required by the act, viz. an indenture sealed and delivered in the presence of two credible witnesses, and inrolled within six calendar months from the execution;(k) and therefore should a highly beneficial purchase offer itself, the trustees themselves would, it is conceived, run no risk in so investing the accumulations.(l) Indeed, the court itself has made such an order where the purchase of the land was not the main object, but incidental to a general scheme as for the enlargement of a school.(m)

Trustees of a charity may lend the trust fund upon a mortgage of real estate, though a legal condition is expressly reserved, and though after

(b) Attorney-General v. Newark, 1 Hare, 400.

(c) See Attorney-General v. Warren, 2 Sw. 302; S. C. Wils. 411; Attorney-General v. Hungerford, 8 Bl. 437; S. C. 2 Cl. & Fin. 357; Attorney-General v. Kerr, 2 Beav. 428; Attorney-General v. South Sea Company, 4 Beav. 453; Attorney-General v. Newark, 1 Hare, 395; Parke's Charity, 12 Sim. 329; Re Suir Island Female Charity School, 3 Jones & Lat. 171.

(d) Attorney-General v. Brettingham, 3 Beav. 91; Re Ashton Charity. 22 Beav. 288.

(e) Anon. case, cited Attorney-General v. Warren, 2 Sw. 300, 302.

(f) 16 & 17 Vict. c. 137, ss. 21, 24, 26; 18 & 19 Vict. c. 124, s. 32, 39.

(g) 18 & 19 Vict. c. 124, s. 29.

(h) 18 & 19 Vict. c. 124, s. 35.

(i) Attorney-General v. Wilson, 2 Keen, 680.

(k) But see Attorney-General v. Day, 1 Ves. 222.

(l) See Vaughan v. Farrer, 2 Ves. 188.

(m) Attorney-General v. Mansfield, 14 Sim. 601; Honnor's Trust, V. C. Kinderley, May 3, 1853.



default an equity of redemption arises by the rules of equity. The Statute of Mortmain <sup>\*(9 Geo. 2, c. 36,)</sup> which avoids conveyances [\*505] to a charity containing any reservation or condition for the benefit of the grantor, is held not to apply to such a case.<sup>(n)</sup> But of course care should be taken that the mortgage be by indenture attested by two witnesses, and inrolled. The court itself, its attention being directed to the question, has authorized the trustees of a charity to lend on mortgage.<sup>(o)</sup>

Governors of charities cannot grant leases to or in trust for one of themselves, for no trustee can be a tenant to himself, and the court will charge him with an occupation rack rent.<sup>(p)</sup> Where two trustee were expressly authorised by the will to grant a lease to themselves, or either of them, with the consent of the tenant for life, and one of them took a lease accordingly, which was fair and proper, but it was found in effect that the relative characters of trustee and lessee were inconsistent, and led to inconveniences, the court removed the trustee at the instance of the *cestuis que trust*, on the ground of the repugnant characters of trustee and tenant; and though the trustee offered to surrender the lease, the court held him to it, and dismissed him from the trust.<sup>(q)</sup> And trustees should be cautious how they grant leases to their own *relations*, for that circumstance is calculated to excite a suspicion, which, if confirmed by any other fact, it might require a strong case to remove.<sup>(r)</sup> So a lease should not contain any covenant for the private advantage of the trustees: where a corporation directed the insertion of a covenant that the lessee should grind at the corporation mill, in a suit for the establishment of the charity the corporation were, for this instance of misbehaviour, disallowed their costs.<sup>(s)</sup>

[\*506] Where trustees have a power given to them in general terms <sup>\*to grant leases,</sup> it is said they may take fines or reserve rents as, according to the circumstances of the case, may be most beneficial to the charity.<sup>(t)</sup> If the trust estate held on lease increase in value from the outlay of the *tenant*, the trustee is not called upon immediately to raise the tenant's rent, for such a practice would obviously prevent any improvement of the property.<sup>(u)</sup> Nor if the value of the estate increase from the rise of agricultural produce will the trustee be liable, because he neglects for a few months to raise the rent; but if he wilfully continues the old rent when clearly a much higher can be obtained, he may be held responsible.<sup>(v)</sup>

In granting leases of charity lands care must be taken that the lease

(n) Doe d. Graham v. Hawkins, 2 Q. B. Rep. 212.

(o) This was done by M. R. in Att.-Gen. v. Gibson; Ex parte Lushington; Re Lady Prior's Charity, July 21, 1853. The mortgage was for 50,000*l.* upon an estate in Northamptonshire.

(p) Attorney-General v. Dixie, 13 Ves. 519, see 534; Attorney-General v. Earl of Clarendon, 17 Ves. 491, see 500. (q) Passingham v. Sherborne, 9 Beav. 424.

(r) Ferraby v. Hobson, 2 Phill. 261, per Lord Cottenham; and see Ex parte Skinner, 2 Mer. 457.

(s) Attorney-General v. Mayor of Stamford, 2 Sw. 592, 593.

(t) Attorney-General v. Mayor of Stamford, 2 Sw. 592.

(u) Ferraby v. Hobson, 2 Phill. 258, per Lord Cottenham.

(v) See Ferraby v. Hobson, 2 Phill. 255.

be for an adequate consideration, and, if this be not observed, the court will interfere and order the lease to be cancelled, and with the lease will also cancel the covenants.(w)

The lease may be annulled on the mere ground of under value;(x) but it must be an under-value satisfactorily proved and considerable in amount: it is not enough to show that a little more might have been got for the estate, than has been actually obtained: still less is it sufficient to infer the under-letting from the value of the property at some subsequent period.(y)

Even where it was ordained at the creation of the trust, that no lease should be made for above twenty-one years, and *the rent should not be raised*, it was held the trustee would not be justified in granting leases from time to time at no more than the original reservation. Lord Cowper said "That the rent should not be raised was a constitution just and charitable for the encouragement of the tenant to improve the estate, and he ought to find a benefit by it; and the hospital \*also would find an advantage in having the rent well secured by an estate of [\*507] greater value, and consequently paid; but the rule or constitution was not to be followed according to the letter that no more rent was to be taken than what was at first reserved, but as the times altered and the price of provisions, &c., increased, so the rent ought to be raised in proportion."(z)

But, in considering the question of value it must be remembered that the case of a charity estate is one in which, of all others, the *security* of the rent is the first point to be regarded, and therefore the inadequacy of the amount reserved is less a badge of fraud in this than it would be in almost any other instance.(a) And Lord Eldon desired it might not be considered to be his opinion that a tenant who had got a lease of charity lands at too low a rate with reference to the actual value was therefore to be turned out, if it appeared he had himself acted fairly and honestly. The only ground for so dealing with him would be some *evidence* or *presumption* of collusion or corruption of motive: if, for instance the tenant happened to be a relation of the trustee, that was a circumstance to create suspicion.(b)

When leases are set aside for under-value and the court awards a *compensation* to the charity for the loss which has been sustained by the charity through the collusion of the trustees and the tenant, the burden will fall upon the trustees or the tenant according to the circumstances of the transaction.(c)

(w) *Attorney-General v. Morgan*, 2 Russ. 306.

(x) *East v. Ryal*, 2 P. W. 284; *Attorney-General v. Lord Gower*, 9 Mod. 224, see 229; *Attorney-General v. Magwood*, 18 Ves. 315; *Attorney-General v. Dixie*, 13 Ves. 519; *Poor of Yervel v. Sutton*, Duke, 43; *Eltham Parish v. Warreyn*, Duke, 67; *Wright v. Newport Pond School*, Duke, 46; *Rowe v. Almsmen of Tavistock*, Duke, 42; *Crouch v. Citizens of Worcester*, Duke, 33; *Attorney-General v. Foord*, 6 Beav. 288. (y) *Attorney-General v. Cross*, 3 Mer. 541, per Sir W. Grant.

(z) *Watson v. Hinsworth Hospital*, 2 Vern. 596; and see *Lydiatt v. Foach*, id. 410; *Attorney-General v. Master of Catharine Hall*, Cambridge, Jac. 381.

(a) *Ex parte Skinner*, 2 Mer. 457, per Lord Eldon.

(b) *Ex parte Skinner*, 3 Mer. 457.

(c) See *Duke*, 116; *Poor of Yervel v. Sutton*, id. 45; *Attorney-General v. Mayor*

A lease of charity lands may also be invalidated on the ground of the unreasonable extent of the term.

The duration of the lease should be such only as is consistent with the fair and provident management of the estate.<sup>(d)</sup> \*It would, [\*508] therefore, be a direct violation of duty to grant a lease for one thousand years,<sup>(e)</sup> not only on the ground before noticed that such a demise would in effect be an absolute alienation, but also on the principle that no private proprietor would choose to debar himself from profiting by the progressive improvement of the property. Sir Thomas Plumer observed, "It is impossible to deny that such a lease is a decisive breach of trust. The compensation which the trustees receive may be adequate at the date of the contract, but they are precluded for one thousand years from any advantage of increased value. It is true they are secured from *diminution*, and in some instances to guard against fluctuation may be as much the interest of one party as the other; but that would be an answer to all cases in which the trustees have made an alienation at a fixed rent. The progress of events and the depreciation of money have shown the improvidence of such agreements. At the same time," continued his honor, "it is just to say, that these principles seem not to have been acted upon at so early a period as 1670. There is no case produced in which mere improvidence, inferred solely from the extent of the term, was held sufficient to rescind the transaction. In many cases in Duke's collection the court acted on inadequacy of value, in none on mere extent of term.<sup>(f)</sup> Where the alienation appeared at the time to be a provident administration, the prospective possibility that it might become inadequate does not appear, at that period, to have had the effect which it does at present."<sup>(g)</sup>

*Husbandry or farm* leases should be granted for a term certain not exceeding *twenty-one years*.<sup>(h)</sup> But neither is this rule to be taken as [\*509] absolutely inflexible; but where the \*alienation is for any longer period, as for ninety-nine years, the court would put it upon those who are dealing *for* and *with* the charity estate to show the reasonableness of such a transaction, for *prima facie* it is unreasonable. There is no instance of a power in a marriage settlement to lease for ninety-nine years, except with reference to very particular circumstances: the ordinary husbandry lease is for twenty-one years.<sup>(i)</sup>

of Stamford, 2 Sw. 592, per Cur.; Attorney-General v. Dixie, 13 Ves. 540; Rowe v. Almsmen of Tavistock, Duke, 42.

(d) See Attorney-General v. Owen, 10 Ves. 560; Attorney-General v. Brooke, 18 Ves. 326; Attorney-General v. Griffith, 13 Ves. 575.

(e) Attorney-General v. Green, 6 Ves. 452; Attorney-General v. Cross, 3 Mer. 540; Attorney-General v. Dixie, 13 Ves. 531; Attorney-General v. Brooke, 18 Ves. 326.

(f) But see Poor of Yervel v. Sutton, Duke, 43, resolution 2; Rowe v. Almsmen of Tavistock, id. 42; Wright v. Newport Pond School, id. 46; Crouch v. Citizens of Worcester, id. 33.

(g) Attorney-General v. Warren, 2 Sw. 304.

(h) See Attorney-General v. Owen, 10 Ves. 560; Attorney-General v. Backhouse, 17 Ves. 291; Rowe v. Almsmen of Tavistock, Duke, 42; Wright v. Newport Pond School, id. 46; Poor of Yervel v. Sutton, id. 43; resolution 2; Attorney-General v. Pargeter, 6 Beav. 150.

(i) Attorney-General v. Owen, 10 Ves. 560, per Lord Eldon; and see Attorney-



In *Attorney-General v. Cross*(*k*) the trustees had been in the habit of granting leases for ninety-nine years, *determinable on lives* in consideration of fines and the reservation of a small rent, a mode of letting very general in the county where the lands were situate, and one which it was proved had been adopted by the founder himself. On a bill filed to set aside such a lease, Sir W. Grant said, "It is very difficult to lay down any abstract proposition as to the propriety or impropriety of leasing charity estates in the manner complained of. Such a mode of letting, generally objectionable, may, *under particular circumstances*, be the most beneficial that can be adopted. With respect to a charity, indeed, the reason against it is stronger than as to private estates, because the purposes of the charity may be suffered to languish during the intervals between the leases; but still even as to charity estates it is impossible to lay down any general rule. Though the expediency of letting charity estates in this manner may be more or less questionable, according to the nature of the charity and the circumstances and situation of the estate, I am not aware of any principle or authority on which it can be held that such a lease is on the very face of it a breach of trust. The legislature has, both in enabling and disabling statutes, considered leases for three lives as on a footing with leases for twenty-one years absolute. So have the founders of charities, who prohibited the letting on lease for more than three lives, \*or twenty-one years. Supposing, how-  
[\*510]  
ever, that where charity estates have been letten for twenty-one years it would be considered as improper to substitute a letting for lives, it does not follow that we can impute abuse to a mere adherence to the ancient and uniform mode of letting, especially when it is a mode usual in the district in which the estates are situate. In laying down prospective rules for the regulation of a charity, it may be very fit to consider which mode is best calculated to answer the particular purposes of such charity; but to set aside such a lease already existing it is not enough to say that the mode of letting is not the best that might be prescribed, because on such a point there may be a great difference of opinion among the most experienced: but you must show the mode is so positively bad, that no persons meaning fairly to discharge their trust would have resorted to it. This may be said of a lease for a long term of years absolute at a stationary rent, because no man of a reasonable degree of providence would so let his own estate; but many landowners do still let their estate upon leases for lives, and formerly the general usage in this county was to let in this manner." And upon these grounds his honor dismissed the bill, and allowed the trustees their costs out of the charity estate.

And in a later case, where charity lands had for two hundred years been let for lives upon a fine or foregift at a small reserved rent, Lord Langdale said there was no principle that a lease of a charitable estate for lives was, on the face of it, a breach of trust; and as there

*General v. Griffith*, 13 Ves. 575; *Attorney-General v. Backhouse*, 17 Ves. 291; *Attorney-General v. Brooke*, 18 Ves. 326; *Attorney-General v. Lord Hotham*, T. & R. 216; *Attorney-General v. Kerr*, 2 Beav. 421; *Attorney-General v. Hall*, 16 Beav. 388.

(*k*) 3 Mer. 524.

appeared no other ground of invalidating the leases, he refused to set them aside.<sup>(l)</sup>

*Building* leases should be for a term not exceeding sixty, or ninety, or ninety-nine years.<sup>(m)</sup> If granted for a longer period, it would be thrown upon the parties to show the reasonableness of the prolonged term from the particular circumstances of the case.

What has been said as to the proper duration of leases is of course [\*511] only applicable where the founder has not \*otherwise given directions, for in all cases the will of the settlor, where explicit, must be strictly followed; as if the terms of the endowment be that the charity estates shall be let only for twenty-one years, the trustees, though satisfied that leases of ninety-nine years would be more beneficial, could not make such a deviation from the directions of the trust without the sanction of the court. It was said on one occasion, with reference to such variations from the founder's intention, that the court itself could not give a good title to the lessee, but that it required the authority of an Act of Parliament.<sup>(n)</sup> It is plain, however, that there is a wide distinction between a deviation from the founder's intention as to the *objects* of the charity, and a deviation from the directions as to *management*, which were no doubt originally meant to be governed by circumstances.

When there has been no actual fraud, and the lessee or assignee of the lease has laid out money in the permanent improvement of the property, the court will direct an inquiry to what extent the charity estate has been benefited, and will allow the holder of the lease the amount of the benefit found.<sup>(o)</sup>

Now, by the Charitable Trusts Amendment Act, 1855,<sup>(p)</sup> s. 29, trustees of charities are disabled from granting any leases (except for a term not exceeding twenty-one years,) without the sanction of the Charity Commissioners.

[\*512]

## \*CHAPTER XIX.

### THE POWERS OF TRUSTEES.

THE powers of trustees are either *general* or *special*; the former, such as by construction of law are incident to the office of trustee; the latter, such as are communicated by the settlor himself by an express proviso in the instrument creating the trust.

(l) Attorney-General v. Crook, 1 Keen, 121, see 126.

(m) See Attorney-General v. Owen, 10 Ves. 560; Attorney-General v. Backhouse, 17 Ves. 291; Attorney-General v. Foord, 6 Beav. 290.

(n) Attorney-General v. Mayor of Rochester, 2 Sim. 34.

(o) Attorney-General v. Day, V. C. K. Bruce, March 9, 1847; and see Attorney-General v. Green, 6 Ves. 452; Attorney-General v. Kerr, 2 Beav. 420; Swan v. Swan, 8 Price, 518; Attorney-General v. Baliol College, 9 Mod. 411; Savage v. Taylor, Forr. 234; Shine v. Gough, 1 B. & B. 444.

(p) 18 & 19 Vic. c. 124.

## SECTION I.

## OF THE GENERAL POWERS OF TRUSTEES.

In a court of law the trustee, as the absolute proprietor, may of course exercise all such powers as the legal ownership confers; but in equity the *cestui que trust* is the absolute owner, and the question we have to consider in this place is, how far the trustee may deal with the estate without rendering himself responsible in the *forum* of a court of equity.

With reference to the *simple* trust, as the trustee is a mere passive depositary, he can neither take any part of the profits, nor, except in defence or protection of the estate, can exercise any dominion or control over the *corpus*.

In the *special* trust the authority of the trustee is equally limited, except so far as the execution of the trust itself may invest him with a proprietary power. The duties thus prescribed to him the trustee is bound strictly to pursue without swerving to the right hand or to the left; as if money be given to be laid out in a purchase of lands, he would not be justified in expending part on a purchase and applying the residue upon repairs and improvements.(q)

\*But, under particular circumstances, the trustee is held capable of exercising the discretionary powers of the *bona fide* pro- [\*513] prietor; for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand an immediate decision, while the sanction of the parties who are beneficially interested cannot be procured without great inconvenience, as where the *cestuis que trust* are a numerous class, or perhaps cannot be obtained at all, as where the *cestuis que trust* are under disability, or not yet in existence. The alternative of instituting a suit for the mere purpose of consulting the court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion, and perhaps in the mean time the opportunity might be lost. It is therefore evidently in furtherance of the *cestui's que trust* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power.(r)

It is a general rule of equity, that what is compellable by suit, or would have been ordered by the court, is equally valid if done by the trustee *without suit*, i. e., without the sanction of the court.(s) The difficulty with which the trustee has to struggle is the danger of assuming that the court, on application to it, would view the matter in the same light in which he regards it himself.

A trustee, clothed with a trust to manage real estates for the benefit of a person absolutely entitled, but incapable from infancy or otherwise

(q) *Bostock v. Blakeney*, 2 B. C. C. 653.

(r) See *Angell v. Dawson*, 3 Y. & C. 317.

(s) *Lee v. Brown*, 4 Ves. 369, per Cur.; *Earl of Bath v. Bradford*, 2 Ves. 590, per Lord Hardwicke; *Cook v. Parsons*, Pr. Ch. 185, per Cur.; *Inwood v. Twyne*, 2 Ed. 153, per Lord Northington; *Hutcheson v. Hammond*, 3 Br. C. C. 145, per Buller, J.; *Terry v. Terry*, Gilb. 11, per Lord Cowper; *Shaw v. Borrer*, 1 Keen, 576, per Lord Langdale.



to give directions, may make repairs. But he must not go beyond the necessity of the case, as by ornamental improvements, or the expense will not be allowed.<sup>(t)</sup> Where the legal estate is vested in trustees in trust for one person *for life*, with remainders over to others, it would [\*514] have \*been natural to suppose that the rights in equity as between the tenant for life and the remaindermen would be the same as those at law between a legal tenant for life and legal remaindermen. It is, however, now clearly settled, that whatever may be the legal liability of a legal tenant for life in respect of permissive waste,<sup>(u)</sup> the trustee cannot (where there is no special clause of management,) interfere with the possession of an equitable tenant for life who neglects to repair.<sup>(v)</sup> In other respects the rights in equity must, it is conceived, be governed by those at law. Thus a legal tenant for life may cut timber for the purpose of repairs,<sup>(w)</sup> though he may not cut timber to sell it and apply the produce,<sup>(x)</sup> nor to repay himself outlay in repairs;<sup>(y)</sup> and similarly the trustee may, it is conceived, as against the remainderman, cut timber for necessary repairs, if the tenant for life will consent to an application of income towards repairs in making use of the timber. The repairs by a tenant for life, however substantial and lasting, being his own voluntary act, and not arising from any obligation, he cannot claim any charge for them upon the inheritance,<sup>(z)</sup> nor will the court at his instance direct lasting improvements to be made;<sup>(a)</sup> and though it was said by the court in one case that the rule might not be absolutely without exception, as if there were a settled estate, and a fund directed to be laid out in a purchase to the same uses, it might be more beneficial to the remainderman that part of the trust fund should be applied to prevent buildings on the settled estates from going to destruction, than that the whole should be laid out in the purchase of other lands,<sup>(b)</sup> an extraordinary case would be requisite to create such exception.<sup>(c)</sup>

[\*515] \*Where an estate was devised to A. and his heirs upon trust to settle on B. for life, subject to impeachment of waste, remainder to C. for life, *sans* impeachment of waste, remainder to C.'s first and other sons in tail, and before any settlement was executed the trustee, with the concurrence of B. and C., cut down timber which showed symptoms of decay, Sir L. Shadwell said "he considered the timber to have been cut by the authority of the trustee who had a superintending control over the estate; that it was not a wrongful act; and that the effect of it must be the same as if it had been done with the sanction of the court."<sup>(d)</sup>

(t) *Bridge v. Brown*, 2 Y. & C. Ch. Ca. 181.

(u) *Powys v. Blagrave*, 4 De Gex, M. & G. 458, and cases there cited by Lord Granworth; *Harnett v. Maitland*, 16 M. & W. 257. The legal question must be considered still "*sub judice*." See *Re Skingley*, 3 Mac. & Gor. 221; and *Gregg v. Coates*, 2 Jur. N. S. 964; where the tenant for life was held liable under the particular words of the will in each case.

(v) *Powys v. Blagrave*, Kay, 495; 4 De Gex, M. & G. 448.

(w) Co. Lit. 54 b.

(x) Co. Lit. 53 b.

(y) *Gower v. Eyre*, Coop. 156; and see, *Duke of Marlborough v. St. John*, 5 De Gex & Sm. 181.

(z) *Hibbert v. Cooke*, 1 S. & S. 552; *Caldecott v. Brown*, 2 Hare, 144; and see *Bostock v. Blakeney*, 2 B. C. C. 653.

(a) *Nairn v. Marjoribanks*, 3 Russ. 582.

(b) *Caldecott v. Brown*, 2 Hare, 145, per Sir J. Wigram.

(c) *Dunne v. Dunne*, 3 Sm. & Gif. 22; see p. 23. (d) *Waldo v. Waldo*, 7 Sim. 261.

So trustees of a charity would, until the late charity acts, have been justified in aliening the estate where, under the same circumstances, the court on application would, from the necessity of the case, have made an order to that effect.<sup>(e)</sup>

So conservators of public works and similar *quasi trustees* are authorized to apply the funds under their control in opposing a bill in parliament, the effect of which if passed would be injurious to the interests confided to them. Thus by an act of parliament it was provided that the banks of the Ouse, in Norfolk, should be maintained by commissioners, with power to levy rates upon the adjacent landowners, which were to be applied "in making, doing, constructing, and executing all such works, acts, matters, and things as by such commissioners, should, from time to time, be deemed necessary, proper, or expedient, for putting the banks into, and maintaining the same in, a permanent state of stability." The Norfolk Estuary Company applied for an act to reclaim from the sea a tract of land near the mouth of the Ouse. The commissioners thereupon held a meeting, and the majority passed a resolution that proceedings should be taken for watching, and if necessary, for opposing the bill in parliament, and that a rate of 6*d.* an acre should be levied for defraying the expenses, and 150*l.* in hand was paid to the chairman for the like purpose. Three of the landowners, on behalf of themselves and the others, filed a bill against the \*commissioners, alleging a pretence by the defendants that the proposed scheme would be injurious [\*516] to the banks of the Ouse, but charging that, whether injurious or not, the funds ought not to be applied in pursuance of the resolution, and praying that the 150*l.* might be repaid, and an injunction against the application of any future funds in pursuance of the resolution. The defendants demurred, and Lord Cottenham, after referring to the pleadings, said, "I must assume that the works are likely to be injurious. Now it is clear that if actual injury was done, and proper measures had been taken by the commissioners to prevent it, they would be entitled to be allowed their expenses so incurred, for every trustee is entitled to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care. But if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect, but probable;" and the demurrer was allowed.<sup>(f)</sup>

On the other hand, *quasi trustees*, such as those before referred to, are not entitled to apply the funds of an existing undertaking in or towards the expense of obtaining other or larger parliamentary powers.<sup>(g)</sup>

A *trustee* would, it is conceived, under special circumstances, and in

(e) Attorney-General v. South Sea Company, 4 Beav. 458, per Lord Langdale: see ante.

(f) Bright v. North, 2 Phill. 216; and see The Queen v. Norfolk Commissioners of Sewers, 15 Q. B. R. 549.

(g) Attorney-General v. Andrews, 1 Mac. & Gor. 225; Attorney-General v. Guardians of Poor of Southampton, 17 Sim. 6; Attorney-General v. Corporation of Norwich, 16 Sim. 225; Stevens v. South Devon Railway Company, 13 Beav. 48; Vance v. East Lancashire Railway Company, 3 K. & J. 50.

due course of management, be justified in insuring the property ;(*h*) but where there is a tenant for life, he could not be advised to do so out of the income without the tenant for life's consent. And a *mortgagee* is not regarded as a trustee ; and if, in the absence of any stipulation on the subject, he effects an insurance, it is on his own account, and he cannot claim to be entitled to the premiums under just allowances. It is the same as if the lessor or lessee insured, in which case the other would have no claim to the benefit of the policy.(*i*)

[\*517] \*An executor may appropriate a legacy without the necessity of a suit, where the appropriation is such as the court itself would have directed.(*k*)

A trustee may expend sums of money for the protection and safety, or for the maintenance and support, of a *cestui que trust* who is incapable of taking care of himself, but the safer course is to apply to the court.(*l*)

If a legacy be left to an infant, and the court, upon application, would, from the inability of the parent to support his child, order *maintenance* out of the *interest*, the trustee, should he make advances for that purpose without suit, would be allowed them in his account.(*m*) In the case of *Andrews v. Partington*,(*n*) Lord Thurlow refused to indemnify the trustee : but the authority of that decision has been repeatedly denied, and may be considered as overruled.(*o*) And the maintenance of each year need not be confined to the interest of that year, but the trustee will be allowed in his accounts to set off the gross amount of the maintenance against the gross amount of the interest.(*p*)

Where the amount of the legacy is inconsiderable, as 100*l.*, the court would, in the absence of other means, direct maintenance to the child out of the *principal* itself :(*q*) the executor, therefore, who, under similar circumstances, but without the authority of the court, breaks in upon the capital, would not be liable, on the *cestui's que trust* coming of age, to account for the expenditure.(*r*) However, where the legacy was not [\*518] more than 300*l.*, Sir W. Grant determined that the trustee had \*exceeded his duty, and said his *impression* was, that the rule had been *never* to permit trustees of their own authority to break in upon the capital ;(*s*) but the case of *Barlow v. Grant*, which is clearly to the

(*h*) *Ex parte Andrews*, 2 Rose, 412.

(*i*) *Dobson v. Land*, 8 Hare, 216 ; and see *Ex parte Andrews*, 2 Rose, 410 ; *Phillips v. Eastwood*, L.L. & Goold. t. Sugden, 289.

(*k*) *Hutcheson v. Hammond*, 3 B. C. C. 128, see 145, 148 ; and see *Cooper v. Douglas*, 2 B. C. C. 231.

(*l*) *Duncombe v. Nelson*, 9 Beav. 211 ; and see *Chester v. Rolfe*, 4 De Gex, M. & G. 798, and cases there cited.

(*m*) *Sisson v. Shaw*, 9 Ves. 285.

(*n*) 3 B. C. C. 60.

(*o*) See *Sisson v. Shaw*, 9 Ves. 288 ; *Maberly v. Turton*, 14 Ves. 499 ; *Lee v. Brown*, 4 Ves. 369 ; *Ex parte Darlington*, 1 B. & B. 241 ; and see *Cotham v. West*, 1 Beav. 381.

(*p*) *Carmichael v. Wilson*, 3 Moll. 79.

(*q*) *Ex parte Green*, 1 J. & W. 253 ; *Ex parte Chambers*, 1 R. & M. 577 ; *Ex parte Swift*, ib. 575 ; *In re Mary England*, id. 499 ; *Harvey v. Harvey*, 2 P. W. 21 ; *Ex parte Hays*, 3 De Gex & Sm. 485 ; *Worthington v. McCraw*, 26 L. J., N. S. (Ch.) 286.

(*r*) *Barlow v. Grant*, 1 Vern. 255 ; *Carmichael v. Wilson*, 3 Moll. 79 ; *Bridge v. Brown*, 2 Y. & C. Ch. Ca. 181.

(*s*) *Walker v. Wetherell*, 6 Ves. 473.



contrary, must have escaped his honor's recollection. In *Swinnock v. Crisp*,<sup>(t)</sup> where the legacy was 250*l.* to be divided amongst three children, the executrix, who was the mother, was *not* allowed the sums which she had paid out of the principal: but the ground of the decision was the notion, since overruled, that the executrix, though she had married again, was under a legal obligation, as mother, to provide a maintenance for her children.<sup>(u)</sup> Where the legacy is considerable, as 1000*l.* or the like, as the court itself would not order the application of part of the principal, the trustee would not be justified in exceeding of his own authority the amount of the interest.<sup>(v)</sup>

A part of the capital may be sunk by a trustee without the direction of the court for the *advancement* of a child, where the same sums if expended for *maintenance* would not have been allowed.<sup>(w)</sup>

In *Smee v. Martin*<sup>(x)</sup> a testator gave 100*l.* to A. B., "not to be paid until he came of age, and in the meantime 5*l.* per annum to be allowed out of the testator's estate for his maintenance." The executrix, who was his mother, had expended in binding him apprentice, fitting him out for India, and other necessities, more than 100*l.* and the court decreed the payment of the legacy in full without any deduction for the disbursements. "The mother," it was said, "ought by nature to provide for the maintenance and education of her own son: besides, it appeared plainly the intention of the testator that the 100*l.* should not be touched until A. B. came of age, for there was a yearly allowance in the meantime of 5*l.*, and it was at her peril that she exceeded that." The case therefore does not militate against the general rule, but was determined upon \*the particular circumstances, that the executrix, as mother, [<sup>519</sup>] was herself liable for the maintenance of the child, (a position not tenable at the present day,) and that the expenditure of part of the capital was against the clear intention of the testator.

But a trustee cannot apply part of the principal towards the advancement of the child where the legacy is subject to a limitation over in favour of a stranger, for in such a case the court itself could not make an order to that effect.

Thus in *Lee v. Brown*,<sup>(y)</sup> where a testatrix gave 100*l.* to trustees upon trust to apply the produce to the maintenance and education of A. B., and when he should attain twenty-one to transfer to him the capital, but in case he died under that age the testatrix gave the legacy to his brother and sister equally, Lord Alvanley said, "It certainly was not competent under this trust to the executor, nor could he, *if he had applied*, have obtained permission from this court, to advance any part of the capital of the legacy in putting the child out in the world; for *if it had been such a case that the court would have authorized the act that was done*, I desire to be understood that it would be considered as properly done; for the principle is now established, that if an executor

(t) *Freem.* 78.

(u) *Billingsly v. Crichtet*, 1 B. C. C. 268.

(v) *Barlow v. Grant*, 1 Vern. 255, per Lord Guildford; *Davies v. Austen*, 1 Ves. jun. 247; S. C. 3 B. C. C. 178.

(w) *Swinnock v. Crisp*, *Freem.* 78; and see *Ex parte M'Key*, 1 B. & B. 405.

(x) *Bumb.* 136.

(y) 4 Ves. 362; *Worthington v. M'Craw*, *supra*, p. 517.

*does without application what the court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application.*"(z)

But where legacies were given to children payable at twenty-one or marriage, with a limitation over on the death of any child before attaining twenty-one or marriage, *not in favour of a stranger, but for the benefit of such of the children as should attain twenty-one or marry*, a trustee, who had paid a premium on the apprenticeship of a child, who died under twenty-one, was allowed it by the court.(a) The case turned upon the same principle as where a legacy is given to a class, all or some of whom must take the fund absolutely, when, as all have an equal [\*520] chance of survivorship, the individuals of the class will \*be ordered maintenance even before their shares in the fund have become actually vested.(b)

An executor has never been held responsible for paying a debt due and owing from the testator's estate, but the remedy for which had been barred by the Statutes of Limitation.(c)

A trustee, under circumstances, may release or compound a debt. Thus, where the tenant of part of the trust estate owed 225*l.* for arrears of rent, and afterwards became insolvent, and the trustee released the debt and gave a bonus of 20*l.* on condition that the tenant should give up the premises, which was done, it was argued that the trustee, before he made the release, should have consulted the *cestuis que trust in esse* for their consent; and, in case of their obstinacy, should have applied to the court for directions; and though it might be true that the tenant was at the time insolvent, yet thereafter he might have become solvent and able to pay the rent; and as to the gaining of possession, that was of no great value, as there was a proviso in the lease for the landlord's re-entry in case of non-payment of the rent; but Lord Chancellor Talbot said, "The tenant becoming insolvent, the testator's estate has not suffered by this release, in regard if the arrears of rent had not been released, the trustees could never have gotten them when the tenant was unable to pay them; and if the testator's estate has not suffered on account of the release, there is no reason it should gain thereby. The trustee seems to have done nothing but what was prudent. A vexatious tenant may put the landlord to great trouble and delay by a wrongful detainer of the possession, and by damaging the estate in the mean time, and may force the landlord to ejectment, writs of error, and bills in equity, by means of which he may lose not only his accruing rent, but his costs of suit. Neither will I make any difference between the 20*l.* and the release of the arrears, for both were but one entire consideration for the tenant's quitting the possession; and by the same reason that the trustee has

(z) 4 Ves. 369.

(a) *Franklin v. Green*, 2 Vern. 137. That the limitation over was for the benefit of the children is not mentioned in the report, but appears from Reg. Lib.

(b) See *Rop. Leg. ch. xx. s. 5*; *Greenwell v. Greenwell*, 5 Vesey, 194; *Cavendish v. Mercer*, cited *ib.*; *Brandon v. Aston*, 2 Y. & C. Ch. Ca. 30.

(c) *Stahlschmidt v. Lett*, 1 Sm. & Gif. 415.

been allowed the one, he ought to be allowed the \*other.(d) But if a trustee release or compound a debt without some sufficient [\*521] ground in justification of his conduct, he will clearly be answerable to the *cestui que trust* for the amount of the *devastavit*.(e)

The same principles may be applied to cases of constant occurrence in practice. Thus trustees of an equity of redemption of lands mortgaged for more than their value, may release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure suit, the costs of which, so far as incurred by themselves, will fall upon the trust estate.

Where trustees are *mortgagees* they are often requested to release part of the land from the security, in order to enable the mortgagor to deal with it for his own convenience. Where the value of the land is not excessive as compared with the debt, it would, of course, be a gross breach of trust to deteriorate the security. But suppose the value of the part to be left in mortgage to be at least double the amount of the debt, may the trustees release the residue? It is presumed that trustees can never justify the abandonment of any part of the security on the mere ground of consulting the convenience of the mortgagor. They must be prepared to show that the act was calculated under the circumstances to promote the interests of the *cestuis que trust*. If, for example, the mortgagor be ready to pay off the mortgage on a transfer of the security, unless the trustees will consent to release, and the existing mortgage, even when confined to the narrower parcels, is a highly beneficial one and the value still abundantly ample, it is conceived the trustees would not incur responsibility in acceding to the arrangement.

A trustee may reimburse himself a sum of money *bona fide* advanced by him for the benefit of the *cestui que trust*, or even for his own protection in the execution of his office.

Thus, a trustee of 1000*l.* South Sea stock had mortgaged it to the South Sea Company, at the request of the *cestui que trust* for 4000*l.*; some time after, the South Sea bubble burst and the 1000*l.* stock fell to a mere nominal value. An act \*having been passed by which it was provided that if any mortgagor to the company should pay [\*522] 10*l.* per cent. by such a day the debt should be extinguished, the trustee took upon himself to pay the 10*l.* per cent., the *cestui que trust*, who laboured under the impression that a mortgagor was at liberty by forfeiting his pledge to be quit of the debt, refusing to give his consent. The trustee filed a bill against the *cestui que trust* to recover the money which had been disbursed; and Lord Chancellor King, in deciding for the plaintiff, observed, "When money is borrowed, it ought to be repaid, and though a pledge was given for it, if that proves insufficient, the borrower ought to be liable. But if in the present case there was only a *hazard*, the trustee ought not to continue liable to such hazard: on the contrary, as it is a rule that the *cestui que trust* ought to save the trustee

(d) *Blue v. Marshall*, 3 P. W. 381; and see *Ratcliffe v. Winch*, 17 Beav. 216; *Forshaw v. Higginson*, 3 Jur. N. S. 476.

(e) *Jevon v. Bush*, 1 Vern. 342; *Gorge v. Chansey*, 1 Ch. Re. 125; *Wiles v. Gresham*, 5 De Gex, M. & G. 770.



harmless, so, within the reason of that rule, when the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, he ought to be repaid.”(f)

A trustee for payment of debts and legacies, and subject thereto upon trust for A. for life with remainders over, has no power, after the accounts have been taken by the court and A. declared entitled to the possession, to make an admission binding upon A. of any further debt, and to resume the possession for the purpose of discharging it.(g)

It has been held that a trustee of lands may grant a reasonable lease. Thus, a testator had devised an estate to two trustees in fee upon trust out of the yearly rents and profits to pay two annuities of 60*l.* and 10*l.* respectively, and subject thereto upon trust for certain persons successively for life, with remainder to their issue. The trustees granted a lease of the lands for the term of ten years, and Sir John Leach held [\*523] that they had not exceeded their authority.(h) But it \*must not be inferred from this case that a trustee is at liberty, except under peculiar circumstances, to grant other than a husbandry lease, which never exceeds twenty-one years;(i) and of course he cannot make even that demise where it is a simple trust, and the *cestui que trust* is in possession, except he do it with the *cestui's que trust* concurrence. And *prima facie* a trustee for sale would not be justified in granting a lease.(k)

A trustee has no power *mero motu*, in the absence of express authority, to vary the securities upon which the trust-fund stands invested, assuming them to be proper.(l) Indeed, where he makes the investment in the first instance himself, he ought, in all cases where the settlor has not warranted a different course, to invest in the 3 *per cent. consols*; and then, as that fund is considered by the court the most beneficial to the trust, he would hardly be justified in making a change not tending to ameliorate the estate. Should the trust authorize an investment upon real or government securities without any power of variation, and the trustee lend upon mortgage, of course he cannot prevent the mortgagor from paying off the money, and therefore he may sign a discharge for it, and may then invest it upon another mortgage, or in the funds.(m) Where, however, the trustee was directed to invest upon *security*, but *real security* was not mentioned, and he lent upon a mortgage, the court did not think it so clear that the trustee could sign a receipt when the money was paid off as to compel a purchaser to take a title which depended on that question.(n) The power of signing a receipt in such cases de-

(f) Balsh v. Hyham, 2 P. W. 453.

(g) Underwood v. Hatton, 5 Beav. 36.

(h) Naylor v. Arnit, 1 R. & M. 501; and see Bowes v. East Lond. Waterworks' Com., Jac. 324; Drohan v. Drohan, 1 B. & B. 185; Middleton v. Dodswell, 13 Ves. 268.

(i) See Attorney-General v. Owen, 10 Ves. 560.

(k) Evans v. Jackson, 8 Sim. 217.

(l) See Angell v. Dawson, 3 Y. & C. 316.

(m) Wood v. Harman, 5 Mad. 368; Locke v. Lomas, 5 De G. & Sm. 326.

(n) Hanson v. Beverley, Vend. & P. 848, 11th ed.

pend on the intention as collected from the instrument, and unless it contain authority to lend on a mortgage no power of signing a receipt when it is paid off is implied.

The powers assigned in the preceeding pages to trustees must be taken subject to the qualification, that if a suit has been instituted for the execution of the trust, *and a decree \*made*, the powers of the trustees are thenceforth so far paralyzed that the authority of the [\*524] court must sanction every subsequent proceeding.(o)

Thus the trustees cannot commence or defend any action or suit or interfere in any other legal proceeding without first consulting the court as to the propriety of so doing.(p) A trustee for sale cannot sell.(q) The committee of a lunatic cannot make repairs.(r) An executor cannot pay debts,(s) nor deal with the assets for the purpose of investment.(t)

A suit in which a bill merely has been filed is to be distinguished from one in which a decree has been made, for until a decree the plaintiff may dismiss his bill at any moment and should he do so, the progress of the trust may have been arrested for no purpose.(u) However, even in this case the trustees cannot be advised to act without first consulting the court, and if by acting independently of the court expenses be incurred which might have been avoided had the trustees applied to the court they may be made to bear them personally.(v)

## SECTION II.

### THE SPECIAL POWERS OF TRUSTEES.

Upon this branch of our subject we shall consider, First, The different kinds of powers; Secondly, The construction of powers; Thirdly, The effect of disclaimer, assignment of the estate, and survivorship among the trustees; and Fourthly, The control of the court over the exercise of powers.

#### I. Of the different kinds of powers.

In applying the doctrine of powers to the subject of trusts \*it may be useful to regard powers as either *legal* or *equitable*: the [\*525] former such as operate upon the legal estate, and so are matter of cognizance to courts of common law; the latter, such as affect the equitable interest only, and so fall exclusively under the notice of courts of equity. Thus, if lands be limited to the use of A. for life, remainder to B. and his heirs, and a power operating under the statute of uses be given to C., the execution of the power works a conveyance of the legal estate: but if lands be limited to the use of A. and his heirs upon trust for B. for

(o) *Mitchelson v. Piper*, 8 Sim. 64; *Shewen v. Vanderhorst*, 2 R. & M. 75; S. C. affirmed, 1 R. & M. 347.

(p) See *Jones v. Powell*, 4 Beav. 96.

(q) *Walker v. Smalwood*, Amb. 676; *Annesley v. Ashurst*, 3 P. W. 282.

(r) Anon. case, 10 Ves. 104.

(s) *Mitchelson v. Piper*, 8 Sim. 64; and see *Jackson v. Woolley*, 12 Sim. 13.

(t) *Widdowson v. Duck*, 3 Mer. 494.

(u) *Cafe v. Bent*, 3 Hare, 249; *Neeves v. Burrage*, 14 Q. B. R. 504.

(v) *Attorney-General v. Clack*, 1 Beav. 467; and see *Cafe v. Bent*, 3 Hare, 249.

life, remainder upon trust for C. and his heirs, and a power not operating under the statute of uses be given either to the trustee or to the *cestui que trust*, the execution of such a power will have no effect at law, but will merely serve to transfer the beneficial interest in equity, and may therefore be designated by the name of an equitable power.

An equitable, the same as a legal power, may be either annexed to the estate or be simply collateral; but whether it shall be taken as the one or the other will depend on the question, whether the donee of the power be possessed of the equitable, that is, of the *beneficial* interest, or not. Thus, where a testator devised to his *sister* and her heirs for ever, with a direction to settle the property on such of the descendants of the testator's mother as his *sister* should think fit, and, the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid, Lord Hardwicke said, "It is objected that a *feme covert* cannot execute a power, and that there are no words in the will authorising her to do so; but this is a power *without an interest*, and is improperly called a power, for, being a direction to a person who has the fee, it is rather a trust."<sup>(w)</sup> On the other hand, where the legal estate was devised to trustees upon trust for an infant *feme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving [\*526] the *feme covert* his heir at law, and \*she during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, "This is a power *coupled with an interest*, which is always considered different from naked powers. It was admitted that if this execution was to operate on the estate of the infant, it might not be good: now this is clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which would remain in herself, if undisposed of, and descend to her heir; so that this is directly a power over her own inheritance, which cannot be executed by an infant."<sup>(x)</sup>

Again, powers, in the sense in which the term is commonly used, may be distributed into *mere powers*, and *powers coupled with a trust*.<sup>(y)</sup> The former are powers in the proper sense of the word; that is, *not imperative*, but purely *discretionary*; powers which neither the trustee can be compelled to execute, nor, on failure of the trustee, can be executed vicariously by the court. The latter, on the other hand, are *not arbitrary*, but *imperative*, have all the nature and substance of a trust, and ought rather, as Lord Hardwicke observed, to be designated by the name of trusts.<sup>(z)</sup> "It is perfectly clear," said Lord Eldon, "that where there is

(w) *Godolphin v. Godolphin*, 1 Ves. 21.

(x) *Hearle v. Greenbank*, 1 Ves. 298, see 306; and see *Blithe's case*, Freem. 91; *Penne v. Peacock*, For. 43.

(y) See *Gower v. Mainwaring*, 2 Ves. 89; *Cole v. Wade*, 16 Ves. 43; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332.

(z) *Godolphin v. Godolphin*, 1 Ves. 23.



a *mere power*, and that power is not executed, the court cannot execute it. It is equally clear, that wherever a *trust* is created, and the execution of the trust fails by the death of the trustee or by accident, this court will execute the trust. But there are not only a *mere trust* and a *mere power*, but there is also known to this court a *power which the party to whom it is given is entrusted and required to execute*; and, with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place.(a)

Again, powers have been dealt with by the court as either of a *strict* or of a *directory* character: the former such as can only [\*527] arise under the exact circumstances prescribed by the settlement; the latter, such as being merely monitory, may be taken with a degree of latitude. Thus, where an advowson was vested in trustees upon trust to elect and present a fit person *within six months* from the incumbent's decease, it was considered the clause was *directory*, and that the trustees might equally elect and present, although that period had elapsed.(b) So where six trustees were empowered *when reduced to three* to substitute others, and all died but one, it was held competent to the sole survivor to fill up the number.(c) And where, in the case of twenty-five trustees, the direction was, that *when reduced to fifteen* the survivors should nominate, it was determined by the court that, although seventeen remained, the survivors were *at liberty* to exercise their power, but that, when reduced to only fifteen, they were *compellable* to do so.(d)

These were cases of charitable trusts, in which it seems a greater latitude of construction is allowed. But in another case, where the trusts were not charitable, estates were devised to trustees upon trust to sell "with all convenient speed, and within *five years*," and it was held that these words were *directory* only, and that the trustees could sell and make a good title, although the five years had expired.(e)

II. We proceed to consider the construction of powers. As the powers of trustees are regulated by the doctrines applicable to powers in general, we shall advert only to a few cases of most frequent occurrence.

If a power be given to "A. and B. and their heirs," it is perfectly clear that the words are not to be understood to this extent, that, as the limitation of an estate in such terms would so vest it in the grantees that they might convey it to a stranger, and the survivor devise it, the power is to be \*construed as intended in like manner to be [\*528] assignable and devisable.(f)

Upon the subject of such a power we have the following pointed

(a) *Brown v. Higgs*, 8 Ves. 570.

(b) *Attorney-General v. Scott*, 1 Ves. 413, see 415.

(c) *Attorney-General v. Floyer*, 2 Vern. 748; and see *Attorney-General v. Bishop of Lichfield*, 5 Ves. 825; *Attorney-General v. Cuming*, 2 Y. & C. Ch. Ca. 139; but see *Foley v. Wontner*, 2 Jac. & Walk. 245.

(d) *Doe v. Roe*, 1 Anst. 86.

(e) *Pearce v. Gardner*, 10 Hare. 287; and see *Cuff v. Hall*, 1 Jur. N. S. 973.

(f) *Cole v. Wade*, 16 Ves. 46, per Sir W. Grant.

remarks of Lord Chief Justice Wilmot: "It is asked," he said, "what must become of the power upon the death of one of the trustees. It must be considered as a tenancy in common. Had the words been 'their several and respective heirs,' it would have been clear; and in common parlance, and according to the common apprehension of mankind, when an estate is given to two men and their heirs, no one not illumined with the legal nature of joint-tenancy could ever conceive the estate was to go to the heirs of the survivor. It is equivalent to saying, *With consent of both while they live; but when one dies, that consent shall devolve upon his heir; the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power; I will supply the loss of one by his heir, and the loss of both by the heirs of both.*"(g)

In *Townsend v. Wilson*(h) a power of sale was given to *three trustees and their heirs*; and it was directed that the money to arise from the sale should be paid into the hands of the trustees, *or the survivors or survivor of them*, and the executors, administrator, or assigns of such survivor, and there was a power of appointment of new trustees, with a direction such appointment should take place as often as any one or more of the trustees should die, &c. One of the trustees died, and it was determined by the Court of Queen's Bench, that the survivors alone were incapable of exercising the power.

Lord Eldon expressed himself dissatisfied with this decision, and asked, "Did the Court of Queen's Bench consider that the two surviving trustees and *the heir of the deceased trustee* were to act together? for it was one thing to say that the survivors could not act *until another was appointed*; and a different thing to say, the *heir* of the deceased trustee [\*529] could act in the meantime."(i) No reasons were given by the \*court for their judgment, and it is difficult to collect on what grounds it proceeded.(k)

In *Hewett v. Hewett*,(l) a testator devised his estate to four persons to uses in strict settlement, with a power to the tenants for life, when in actual possession, to cut such trees as the four devisees to uses, or the survivors or survivor of them (omitting the words "and the heirs of the survivor") should direct; and all the trustees being dead, the question was whether the power was gone. Lord Henley held, that upon the construction of the will, the testator intended the power to be co-extensive with the life estates, and that the trustees were interposed, as supervisors only, to prevent destruction; and that the office of the trustees was not personal, but such as might be executed by the court. He, therefore, considered the power as subsisting, and referred it to the master to inquire what timber was fit to be cut. In this view of the case the court did not regard the authority to the trustees as a mere power, but as a trust.

It still remains to be decided how powers, in the strict sense, limited "to trustees and their heirs" are to be construed.

Though where a discretionary *legal power* is expressly limited to "A.

(g) *Mansell v. Vaughan*, Wilm. 50, 51.

(h) 1 B. & Ald. 608, 3 Mad. 261; and see *Cooke v. Crawford*, 13 Sim. 91.

(i) *Hall v. Dewes*, Jac. 193; and see *Jones v. Price*, 11 Sim. 557.

(k) Sugd. Pow. 490, 6th ed.

(l) 2 Eden, 332, Amb. 508.

and his *assigns*," the grantee or devisee of A., and even a claimant under him by operation of law as an heir or executor, may exercise the power; (*m*) yet in a *trust*, if an estate be vested in a trustee upon trust that he, his heirs, executors, administrators or *assigns* shall sell, *etc.*, the introduction of the word *assigns* will not authorise the trustee to assign the estate to a stranger, (*n*) nor will the stranger be capable of exercising the power. (*o*)

But in a *mortgage*, with a power of sale limited to the mortgagee, his heirs, executors, administrators and assigns, the intention is that the power should go along with and be annexed to the security: and, therefore, if the mortgage be assigned to a stranger, and the legal estate be conveyed to the stranger or to a trustee for him, the stranger alone or with the \*concurrence of the trustee, can give a good legal and equitable title; (*oo*) and even if a mortgage be made to A. and B. [\*530] to secure a joint advance, and the power of sale and signing receipts be limited to A. and B., *their heirs and assigns*, it has been held that as the power and the security were plainly meant to be coupled together, and the security enures to the benefit of the survivor, (the advance being a joint one,) the survivor may also sell. (*p*)

If a *power* indicating personal confidence be given to a "trustee and his *executors*," and the executor of the trustee die having appointed an executor, the latter executor, though by law the executor not only of his immediate testator but also of the trustee, will not, it has been thought, be so considered for the purposes of the power. (*q*) A matter of personal confidence is not extended beyond the express words and clear intention of the settlor; and in this case, the settlor may have meant the power to be exercised exclusively by the executors, whom the trustee should himself name, and not by a person who is executor of the trustee by operation of law only.

A power limited to "executors" or "sons in law" may be exercised by the survivors so long as the plural number remains; (*r*) and if a power be limited to "trustees" we may reasonably conclude it may be exercised by the surviving trustees. And a power given to "executors" will, if annexed to the executorship, be continued to the single survivor; (*s*) and so a power given to "trustees" will, as annexed to the office, be exercisable by the survivor. (*t*) But, of course, not by one of the trustees in the lifetime of the other who has not effectually dis-

(*m*) *How v. Whitfield*, 1 Vent. 338, 339; 1 Freem. 476.

(*n*) The case of *Hardwick v. Mynd*, 1 Anst. 109, cannot in this respect be supported.

(*o*) See pp. 266, 267, *supra*. (*oo*) *Saloway v. Strawbridge*, 1 Kay & Johns. 371.

(*p*) *Hind v. Poole*, 1 Kay & Johns. 383.

(*q*) See *Cole v. Wade*, 16 Ves. 44; *Stile v. Tomson*, Dyer, 210 a; Perk. sect. 552; and see 1 Sug. Pow. 145, 6th Ed.

(*r*) 1 Sug. Powers, 144, 6th Ed.

(*s*) 1 Sug. Powers, 144, 6th Ed. *Houell v. Barnes*, Cro. Car. 382; *Brassey v. Chalmers*, 4 De Gex, M. & G. 528, reversing the decision of the master of the rolls, 16 Beav. 231.

(*t*) *Lane v. Debenham*, 17 Jur. 1005.



claimed.<sup>(u)</sup> And if a power be communicated to "the trustees for the time being" of a will, it cannot be exercised by a single trustee.<sup>(v)</sup>

[\*531] \*A power to four trustees "and the survivors of them," cannot, it seems, be executed by the last survivor;<sup>(w)</sup> for though a power to trustees may, in general, be held to survive, an intention to the contrary may here be fairly inferred: the settlor may be supposed to have said, "I repose a confidence in any two of the trustees jointly, but in neither of them individually." But if a power be limited to four trustees "and the *survivor* of them," it may be argued, that on the death of one the power may still be exercised by the survivors; for there can be no valid reason why a person who trusted the four jointly, and each of them individually, should refuse to repose a confidence in the survivors for the time being.<sup>(x)</sup> However, it is a question of intention upon the construction of the instrument, and *à priori* reasoning cannot be relied upon without a decision.

In *Trower v. Knightley*<sup>(y)</sup> a testator devised an estate to trustees upon trust as to one moiety for A. for life, remainder to her children at twenty-one, and as to the other moiety for B. for life, remainder to her children at twenty-one, and gave the trustees a power of sale "during the continuance of the trust." A. died, and her children attained twenty-one, and the question was, whether the trustees could, under the power, sell the whole estate, the children of B. being infants. The vice-chancellor held, that if the children of A. could call for a present conveyance of their moiety it would have the effect of depriving B. and her children of the benefit of the power of sale, and also of the leasing power given to the trustees, for that an undivided moiety could not advantageously be sold or leased, and that the testator must have meant to continue the powers of ownership to the trustees until there were owners competent to deal with the whole estate.

But if a power be given to trustees to be exercised "during the continuance of the trust," it cannot be exercised after the time when the trust *ought* to have been completed, though, from \*the delay of [\*532] the trustees, it happens that the trust has not in fact been executed.<sup>(z)</sup>

III. Of the effect of *disclaimer*, *assignment*, and *survivorship* of the estate.

First. If a power be given to co-trustees, and one of them *disclaim*, the power may be exercised by the continuing trustee or trustees.

Jenkins observes, "If a testator devise that A. and B. shall sell, and near the end of the will he names them executors, if one refuses at

(u) *Lancashire v. Lancashire*, 2 Phill. 664.

(v) *Lancashire v. Lancashire*, 2 Phill. 576; 1 De G. & Sm. 288.

(w) *Hibbard v. Lambe*, Amb. 309. Note, further directions were declared necessary on the death of *either* of the surviving executors. See *Eaton v. Smith*, 2 Beav. 236.

(x) See *Crewe v. Dicken*, 4 Ves. 97; in which case it seems to have been assumed that the receipt of the survivors would have been a sufficient discharge.

(y) 6 Mad. 134.

(z) *Wood v. White*, 2 Keen, 664. It was determined on appeal that the trusts in this case were still in being, 4 M. & Cr. 460.

common law, (a) or dies, the other may sell, for *the power is annexed to the executorship*; (b) and in the instance of trustees, it may equally be argued that although given to persons by *name*, the power is annexed to the trusteeship.

And of this opinion apparently was Lord Loughborough in the case of *Crewe v. Dicken*; (c) for a power of signing receipts having been limited to three trustees by *name*, and one of them being dead, his lordship remarked, "If A. B. (one of the survivors,) had *renounced*," (that is, had *disclaimed* instead of constructively accepting the trust by the execution of a *conveyance*;) "the whole estate would have been in the continuing trustee exactly as if the two other trustees had died in the life of the testator;" and it is evident from the context that his lordship meant to extend the observation to the power of signing receipts.

In *Hawkins v. Kemp*, (d) a purchaser at first objected that the accepting trustees could not exercise the power, or not without the appointment of a new trustee in the place of the trustee who had disclaimed, but the point was afterwards abandoned by the purchaser's counsel as untenable.

\*And *Adams v. Taunton* (e) is a direct decision by Sir J. Leach to the same effect. A testator had devised his estates to A. and B. upon trust to sell and apply the proceeds amongst his children, and declared that the receipts of the said A. and B. should be sufficient discharges. A. renounced, and Sir J. Leach, after having taken time to consult the authorities, said, "It being now settled that a devise to A., B., and C., upon trust, is a good devise to such of the three as accept the trust, it follows by necessary construction that by the receipts of the trustees is to be intended the receipt of those who accept the trust." (f)

If the power be not given to the trustees by name, but to the "trustees" or "executors;" it is *clear, à fortiori*, that if one disclaim the acting trustees or executors may exercise the power. (g)

Secondly. As to the effect of *assignment* of the estate, it is certain that the power is not appendant to the estate, so as to follow along with it in every transfer by the party, or devolution by course of law. (h) But

(a) That is, independently of 21 H. 8. c. 4, which, upon a refusal by one executor, authorized a sale by the co-executor.

(b) Jenk. 44.

(c) 4 Ves. 97.

(d) 3 East. 410. "I have always understood, said the late V. C. of England, ever since the point was decided in *Hawkins v. Kemp*, or rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for: that where two or more persons are appointed trustees, and all of them, except one, renounce, the trust may be executed by that one." *Cooke v. Crawford*, 13 Sim. 96.

(e) 5 Mad. 435; and see *Bayly v. Cumming*, 10 Ir. Eq. Re. 410; *Cooke v. Crawford*, 13 Sim. 96; *Sands v. Negee*, append. No. viii. S. C. 8 Sim. 130.

(f) From his honour's words, "the receipts of the trustees," it might be thought the power had been given, not to A. and B. by name, but to "the trustees;" the R. L. has been consulted, and it appears, as stated in the report, that the power was given to "the said A. and B."

(g) *Warrington v. Evans*, 1 S. & S. 165; *Boyce v. Corbally*, Rep. t. Plunket, 102; and see *Clarke v. Parker*, 19 Ves. 1.

(h) *Cole v. Wade*, 16 Ves. 47, per Sir W. Grant; *Crewe v. Dicken*, 4 Ves. 97; MARCH, 1858.—29

where the estate is duly transferred to persons regularly appointed trustees under a power in the settlement creating the trust, the transferees, of course, take the estate and the office together, and can exercise the powers. Where the settlement contains no such power, it seems that the appointment of new trustees by the court will not communicate special discretionary or arbitrary powers,<sup>(i)</sup> unless they be limited to the trustees for the time being,<sup>(k)</sup> or be otherwise in fair construction annexed to the office.<sup>(l)</sup>

[\*534] \*We have seen that if one trustee *disclaim* in the strict sense of the word, the power will not be extinguished, but will survive to the co-trustee; but, according to the old doctrine, if a trustee, instead of *disclaiming* had *released* the estate, that was a virtual acceptance of the trust, and then the conveyance of the retiring trustee did not pass the power into the hands of the continuing trustee;<sup>(m)</sup> but at the present day it seems a release with the intention of disclaimer would have all the operation of a formal and actual disclaimer.<sup>(n)</sup>

Though an assignment of the estate will not carry the power to the assignee, it does not follow that the power will remain in the assignor; for where it was the settlor's intention that the estate and power should be coupled together, the trustee, by severing the union through the alienation of the estate, ceases to be the person intended to execute the power. Thus, if an estate be limited to A. and his heirs upon a trust to be executed by A. and his heirs, and A., in his lifetime, conveys away the estate, or devises it by his will, A., the alienor or his heir, cannot now execute the power.<sup>(o)</sup> The heir, indeed, is no heir *quatenus* this estate; for it was not allowed to descend, but was devised away from the person who would have been heir. But compare the subsequent discussion, at page 567, upon the question how far a trustee becomes such before the transfer to him of the trust estate.

Upon a similar principle, in *Cole v. Wade*,<sup>(p)</sup> where the power was given to the trustees, and the *heirs, executors, and administrators* of the survivor, it was held, that on the death of the survivor the power was extinguished. The circumstances were these: A testator gave the residue of his real and personal estate to Ruddle and Wade (whom he appointed his executors,) their executors, administrators, and assigns, and directed *his said trustees and executors*, after making certain payments thereout, to convey and dispose of the said residue of his real and personal estate unto and amongst such of his relations and kindred in

Re Burt's Estate, 1 Drewry, 319; *Wilson v. Bennett*, 5 De Gex & Sm. 475. The case of *Hardwick v. Mynd*, 1 Anst. 109, is an anomaly.

(i) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Fordyce v. Bridges*, 2 Phill. 497; *Newman v. Warner*, 1 Sim. N. S. 457; and see *Cole v. Wade*, 16 Ves. 44, 47; *Hibbard v. Lambe*, Amb. 309.

(k) *Bartley v. Bartley*, 3 Drew. 384; *Brassey v. Chalmers*, 4 De Gex, M. & G. 528.

(l) *Byam v. Byam*, 19 Beav. 66.

(m) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Crewe v. Dicken*, 4 Ves. 97.

(n) *Supra*, p. 233.

(o) *Wilson v. Bennett*, 5 De Gex & Sm. 475; and see *Re Burt's Estate*, 1 Drew. 319.

(p) 16 Ves. 27.



such proportions, manner, and form, as *his said executors* should think proper, his intention being that everything relating to that disposition should be entirely \*in the discretion of *the said trustees and* [\*535] *executors, and the heirs, executors, and administrators of the survivor of them*; and the testator directed *his said trustees and executors and the survivor of them, and the heirs, executors, and administrators of the survivor of them* to mortgage or sell the said residue, or such part thereof as they in their discretion should think proper; the testator meaning to leave it in the discretion of *his said trustees and executors* to convey unto his relations the said residue in such manner and form as *his said trustees* should think proper; and, lastly, he directed that *the said Ruddle and Wade, or the survivor of them, or the heirs, executors, or administrators of such survivor*, should make the division within fifteen years from the testator's decease. Wade, the survivor, devised and bequeathed the real and personal estate of the testator to William and Edward Bray, their heirs, executors, administrators, and assigns, upon the trusts of the will, and named them his executors for that specific purpose only, appointing his wife and another person executors as to his own estates. The question was agitated, whether William and Edward Bray could exercise the power of distribution among the relations. Sir W. Grant said, "The original trustees and executors were the same persons; all the real and personal estate was vested equally in them; but the heirs and executors of the surviving trustee might be different persons: yet all the directions about the distribution of the residue proceed upon the supposition that the same persons are to select the objects and settle the proportions in which they are to take; but if the real estate is to go to one, and the personal estate to another, the testator has left it entirely uncertain how the power is to be executed. Whether the Messrs. Bray can in any sense be the executors of Wade, with whose own property they are not to intermeddle, it is not material to determine." His honor, therefore, decided, that the power had become extinguished.

But, of course, the estate and the power, though originally intended to be in the same hands, may be vested in different persons with the sanction of the court, where the intentions of the settlor cannot otherwise be conveniently effected. Thus a testator gave a sum of money to be invested in the funds in the names of the head of a college at Oxford, the junior bailiff \*of the city, and the elder churchwarden of a [\*536] parish, the dividends to be applied to certain purposes as the trustees should approve. The bailiff and churchwarden being *annual* officers, the investment as directed by the will would have been accompanied with frequent transfers of the stock: the court therefore ordered that the money should be invested in the names of two new trustees jointly with the head of the college, but that the objects of the charity should be nominated and approved in the manner pointed out by the will.(q)

Thirdly. As to *survivorship*. The survivorship of the estate carries

(q) Ex parte Blackburue, 1 J. & W. 297: and see Hibbard v. Lamb. Amb. 309.

with it the survivorship of such powers as are annexed to the trust. If a mere power be given to A., B., and C., and one of them die, it is perfectly clear that the power cannot be exercised by the survivors; but if trustees have an *equitable* power annexed to the trust, as if an estate be vested in three trustees upon trust to sell, then as the power is coupled with an interest, and the interest survives, the power also survives.<sup>(r)</sup>

The principle that trust powers survive with the estate appears to be as old as the time of Lord Coke, for he observes, "If a man *deviseth land to his executors to be sold*, and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the *estate*, so the *trust* shall survive; and so note the diversity between a *bare trust* and a *trust coupled with an interest*."<sup>(s)</sup> At the present day a *trust*, that is, a *power imperative*, whether a bare power, or a power coupled with an interest, would equally be carried into execution in the *forum* of a court of equity; for the maxim now is, The trust or power imperative is the estate. But in the time of Lord Coke had a bare power been devised to A. and B. to sell an estate, as for payment of debts, the authority was one which A. and B. during their joint lives were compellable by *subpoena* in chancery to execute for the benefit of the creditors; but if [\*537] \*A. happened to die before the sale had been carried into effect, the trust was extinguished, and the heir, who had always retained a right to the intermediate rents and profits, was then seized of the absolute and indefeasible inheritance. But in case the testator had *devised the estate* to A. and B. to sell for payment of debts, then, as the trust was not a mere power, but a power coupled with an interest, it received a more liberal construction, and as upon the death of A. the whole estate passed by survivorship to B., the power, being annexed to the estate was considered as intended to survive with it.<sup>(1)</sup>

(r) Lane v. Debenham, 17 Jur. 1005; and see Gouldsb. 2, pl. 4; Peyton v. Bury, 2 P. W. 628; Mansell v. Vaughan, Wilm. 49; Eyre v. Countess of Shaftesbury, 2 P. W. 108, 121, 124; Butler v. Bray, Dyer, 189 b; Byam v. Byam, 19 Beav. 58; Jenk. 44; Co. Lit. 112 b, 113 a; Flanders v. Clarke, 1 Ves. 9; Potter v. Chapman, Amb. 100.

(s) Co. Lit. 113 a; and see ib. 181 b.

(1) In examining the cases of powers before the Statute of Uses, the following points may be usefully noticed. 1. A person seized of the legal estate of lands could not, before the Statute of Wills, have devised them directly, and therefore he could not have gained his object indirectly by means of a power: had a testator devised that A. and B. should sell his estate, the authority was void. 2. But a *use* was devisable, and therefore, if *cestui que use* had devised the lands to a stranger, though the legal estate did not pass (the statute of Richard the Third, which made mention of feoffments and grants, not extending to wills,) the devisee might still have sued his *subpoena* in chancery, and have compelled the feoffees to execute a conveyance of the estate. 3. If *cestui que use* had devised that A. and B. should sell, and A. and B. in pursuance of the authority had made a feoffment or grant, this assurance seems to have operated retrospectively as the assurance of the testator, and so, falling within the words of the statute of Richard, served to pass even the legal estate. 4. And *cestui que use* might have devised such an authority even to his feoffees, and the power would have been construed in the same manner as if it had been devised to a stranger: thus where a man enfeoffed A. and B. to his own use, and afterwards devised that the said A. and B. should sell the estate and apply the proceeds, &c., and A. and B. on the decease of the testator, enfeoffed C. and D. to the like uses, it was ruled that A. and B. might still sell under

A distinction may perhaps be thought to exist between cases where the language of the power is indefinite, as to the \*persons by whom it is to be exercised; for example, where an estate is [\*538] vested in trustees and their heirs in trust, *to sell*, &c., and those cases where the power is limited to persons by name, as upon trust, that "the said A. and B." or that "the said trustees," (which is equivalent to naming them,) shall sell; but the courts have never relied upon any distinction of the kind, and it seems to be now decided that even where the trust is reposed in the trustees by name, the survivor, who takes the estate with a duty annexed to it, can execute the trust.(t)

But powers that are purely arbitrary, and independent of the trust, and not intended in furtherance of the trust, must, it is conceived, be construed strictly, and be governed by the rules applicable to ordinary powers. If, for instance, the trustees by name have a power of revoking the limitations, and shifting the property into a different channel, this discretion is evidently meant to be personal, and not to be annexed to the estate.

#### IV. Of the control of the court over the exercise of powers.

Where a power is given to trustees to do, or not do, a particular thing at their discretion, the court has no jurisdiction to control the trustees in the exercise of that discretion, provided their conduct be *bona fide*, and their determination is not influenced by improper motives.(u)

Thus, in *Pink v. De Thuisey*,(v) a testatrix gave 1000*l.* to A. upon a condition precedent, but "left her executor *at liberty* to give the said sum if he found the thing proper" though the condition should not have been performed. A. died without having fulfilled the condition or received the money, and his \*personal representative filed a bill against the executor of the testatrix to compel payment of the [\*539] legacy. A. in his lifetime had applied for the money, but the executor

(t) *Lane v. Debenham*, V. C. Wood, 17 Jur. 1005.

(u) *Thomas v. Dering*, 1 Keen, 729; *Pink v. De Thuisey*, 2 Mad. 157; *French v. Davidson*, 3 Mad. 396; *Sillibourne v. Newport*, 1 Kay & Johns. 602; *Walker v. Walker*, 5 Mad. 424; *Banks v. Le Despencer*, 11 Sim. 527, per Sir L. Shadwell; *Attorney-General v. Governors of Harrow School*, 2 Ves. 551; *Cowley v. Hartsonge*, 1 Dow. 378, per Lord Eldon; *Potter v. Chapman*, Amb. 99, per Lord Hardwicke; *Carr v. Bedford*, 2 Ch. Re. 146; *Wain v. Earl of Egmont*, 3 M. & K. 445; *Livesey v. Harding*, Taml. 460; *Collins v. Vining*, C. P. Coop. Rep. 1837-38, 472; *Kekewich v. Marker*, 3 Mac. & Gor. 326, per Lord Truro; *Lee v. Young*, 2 Y. & C. Ch. Ca. 532.

(v) 2 Mad. 157.

the power, although they had parted with the legal fee. 5. Until the sale was effected, the feoffees were trustees for the testator's heir, and were bound to account to him for the accruing rents and profits; and if the power, which, whether given to a stranger or to the feoffees, was construed as a naked authority, became extinguished by any means, as by the death of the donees of the power, the heir was as absolutely entitled to the use in fee, as if no will had been made. 6. So long as the power subsisted, the person who would suffer by the extinguishment of the power might have compelled the donees, by filing a bill in chancery, to execute the power. 7. But if the proceeds of the sale were to be distributed *in pios usus*, as no one could plead a personal loss by the non-execution of the power, there was no one to sue a *subpoena*, and the donees of the power were left to the arbitrary exercise of their own discretion. See case temp. H. 7, Treat. of Powers, Appendix, No. 1.



had not thought it right to comply with the request. Sir T. Plumer, in dismissing the bill, observed, "The executor says *he did not think proper to advance the legacy*: is the court to decide upon the propriety of the executor's withholding the legacy? That would be assuming an authority confided by the will to the discretion of the executor: it would be to *make a will for the testatrix, instead of expounding it.*"

Again, where a testator directed that so long as the produce of certain estates should be consigned to the house of "D. and Son," in which the testator held a moiety of the emoluments, his executors, "unless circumstances should render it unnecessary, inexpedient, and impracticable," should pay out of the income of his residuary property, an annuity of 600*l.* to Messrs. French, and the executors declined to pay the annuity, Sir J. Leach said, "The executors are to exercise the authority, unless circumstances shall render it unnecessary, inexpedient, and impracticable, by which must be meant shall *in their opinion* render it unnecessary, inexpedient, and impracticable. If they had distinctly stated in their answer that they had not made the payment because, using their best discretion upon the subject, they had come to a conclusion that circumstances had rendered the payment unnecessary, inexpedient, and impracticable, a court of equity could not have controlled their judgment, unless it appeared that they had acted *mala fide*. But their answer states many mixed motives for their refusal to pay the annuity, and it is plain that they have never simply addressed themselves to the sound exercise of that discretion which the testator has been pleased to place in them;" and the court declared in the words of the will, that the annuity was to be paid so long as the consignments were continued, unless in the judgment of the executors, circumstances should render it unnecessary, inexpedient, and impracticable.<sup>(w)</sup>

[\*540] In another case a testator devised an estate to three trustees \*upon trust, for A. for life, and in case the conduct and behaviour of A. should, for not less a time than the space of seven years, at the least, from the testator's decease, be and continue to the entire satisfaction and approbation of the trustees, agreeing and signifying their unanimous approbation of such conduct, then the said testator gave the said estate to A. in fee; and at the expiration of seven years from the testator's decease, A. filed a bill against the trustees praying that they might signify their approbation of his conduct, and convey the estate to him in fee, and one of the trustees stated by his answer, that he had not such confidence in the conduct and discretion of the plaintiff as to induce him to think that it would be proper or conformable with the intention of the testator, to give the plaintiff absolute control over the estate. Sir John Leach held, that where the discretion of trustees was to be exercised upon matter of opinion and judgment, as to which well-intentioned persons might differ, the court could not substitute the master for the trustees; and the court directed an inquiry, whether the conduct of the plaintiff *had* for seven years from the testator's death been to the entire satisfaction and approbation of the trustees; and whether they *had* agreed and signified their unanimous approbation.<sup>(x)</sup>

(w) French v. Davidson, 3 Mad. 396.

(x) Walker v. Walker, 5 Mad. 424.

So, where the trustees of a settlement had a power of sale at the request and by the direction of the tenant for life, and A., the tenant for life, entered into a contract for the sale of the estate to B., and the trustees refused to concur in the sale, and the purchaser filed a bill for specific performance against the tenant for life and the trustees, the court observed, "The contract having been entered into, A. was himself bound to perform it if he could, but he could not perform it without the concurrence of the trustees, and the trustees did not concur."(*y*) "With respect to the point which has been raised whether A. can now be called upon to request or direct the trustees to convey, I think that he ought not to be called upon to do so, unless it shall appear that the trustees when \*requested or directed ought to comply with the request; and [541] without at present determining this point, the strong inclination of my opinion is, that the power of sale does give a discretion to the trustees, in relation to all the matters comprised in the terms of the power, and that this court has no power or jurisdiction to interfere with the discretion so vested in the trustees."(*z*) And on a subsequent day the master of the rolls observed, "I have before stated that I considered the contract binding upon A. but not upon the trustees, and it appears to me, upon the true construction of the settlement under which the trustees hold the estate, that they have a discretion which would entitle them to refuse to concur in a sale requested by A., and that in the absence of any imputation upon them, this court ought not to interfere with that discretion."(*a*)

Again, where estates were vested in trustees upon trust to sell, and pay the debts of the settlor, and the trustees were authorized to treat with the creditors for the amount of their debts, and to deliver to them debentures, and it was declared that no creditor should be entitled to any benefit under the deed until such debenture was given; on a question whether the court could take upon itself to ascertain the debts, the master of the rolls observed, "If the trustees were authorised by this deed to refuse debentures at their discretion to any lawful creditors, it is plain that this court could never take upon itself the exercise of such a discretion, nor grant power to the master to ascertain the parties entitled to the benefit of this deed. The creditors must first submit their claims to the investigation and allowance of the trustees, and if the trustees refuse to enter into that investigation, the creditors will then be justified in an application to the court."(*b*)

In another case, a power was given to trustees with the consent of the tenant for life to invest the trust moneys in purchase of freehold or copyhold estates, or leasehold for a term of not less than 60 years: the tenant for life was desirous of having the fund invested in a certain leasehold property, but one of the trustees, for reasons which he stated, refused, and the \*court held, without examining into the weight of the reasons assigned, that as the trustee had not acted from corrupt [542] motives, he was not to be controlled.(*c*)

(*y*) *Thomas v. Dering*, 1 Keen, 741.

(*z*) *Ib.* 743.

(*a*) *Ib.* 744.

(*b*) *Wain v. Egmont*, 3 Myl. & Keen, 445; and see *Drever v. Mawdsley*, 16 Sim. 511.

(*c*) *Lee v. Young*, 2 Y. & C. Ch. Ca. 532.

But where the trustees were "authorized and *required*," with the consent and *direction* of the tenant for life, to invest in leaseholds, the clause was held to be imperative upon the tenant for life's demand, and the trustees were not allowed to say that the leaseholds would impose personal liabilities upon themselves, for by being parties to the settlement they had engaged to do it.(d)

So, where a thing is to be done, but the *mode* of doing it is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not control their discretion.

Thus, if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself to regulate the maintenance, but will leave it in the hands of the trustees.(e)

Again, where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose in such *manner* as the executors or trustees may think fit, the executors or trustees, if willing to execute the trust, will not, on a bill being filed for carrying the trusts into execution, be deprived of their discretionary power, but may propose a scheme before the master for the approbation of the court.(f)

So where the *objects* of the charity are from time to time to be at the discretion of the trustees, as if annual sums be made distributable either to private individuals or public institutions, as the trustees may think fit, the court will not even order a scheme to be proposed, but will leave the trustees to the free exercise of their power with liberty for all parties to apply.(g)

[\*543] \*So where trustees had a power of selecting a lad for education from certain parishes, and if there were no suitable candidate, then from any other parish, and the trustees upon consideration rejected the candidate from the specified parish, and selected a lad from another parish; it was held that the court could not control the discretion. The trustees had assigned no reasons for their choice, but that the court said was not necessary, and in many cases would not be proper.(h)

But though the trustees invested with a discretionary power are not bound to assign their reasons for the way in which they exercise it; yet, if they do state their reasons, and it thereby appears that the trustees were labouring under an error, the court will set aside the conclusion to which they come upon false premises.(i)

Of course there is sufficient ground for the interference of the court, wherever the exercise of the discretion by the trustees is infected with

(d) *Beauclerk v. Ashburnham*, 8 Beav. 322; *Cadogan v. Earl of Essex*, 2 Drewry, 227.

(e) *Livesey v. Harding*, Taml. 460; *Collins v. Vining*, C. P. Coop. Rep. 1837-38, 472.

(f) *Brunsdon v. Woolledge*, Amb. 507; *Bennett v. Honeywood*, id. 708; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Supple v. Lowson*, Amb. 729; &c.

(g) *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 M. & K. 59; and see *Powerscourt v. Powerscourt*, 1 Moll. 616.

(h) *Re Beloved Wilkes's Charity*, 3 Mac. & Gor. 440.

(i) *Re Beloved Wilkes's Charity*, 3 Mac. & Gor. 448; *King v. Archbishop of Canterbury*, 15 East, 117.



fraud,<sup>(k)</sup> or misbehaviour,<sup>(l)</sup> or they decline to undertake the duty of exercising the discretion;<sup>(m)</sup> or generally where the discretion is *mischievously and ruinously* exercised, as if a trustee be authorized to lay out money upon government, *or* real, *or* personal security, and the trust-fund is outstanding upon any *hazardous* security.<sup>(n)</sup> And where the trustees of a *charity* were empowered to lease for three lives or thirty-one years, the court expressed an opinion that the discretion might be controlled, if it appeared for the benefit of the charity that such a power should not be acted upon.<sup>(o)</sup>

Where proceedings had been taken for controlling the \*discretion of the trustees, Lord Hardwicke said, "though he could not [544] contradict the intent of the donor, which was to leave it in the discretion of the trustees, yet he would not dismiss the information, but would still *keep a hand over them*."<sup>(p)</sup>

And generally where a suit has been instituted for the administration of the trust, *and a decree has been made*, that attracts the court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the court; as if a trustee have a power of appointment of new trustees, he is not excluded from the right of nominating the person, but the court must give its sanction to the choice.<sup>(q)</sup> But if a decree has not been made, then, as the plaintiff may dismiss his bill at any moment, the trustee must not assume that a decree will be made, but must proceed with the due execution of the trust.<sup>(r)</sup> He cannot be advised, however, to act without first consulting the court. It was held in one case, that the trustees had not exceeded their duty by appointing new trustees after the filing of the bill, as no extra costs had been thereby occasioned;<sup>(s)</sup> but in another case it was said that the trustees ought, under the difficulties in which they were placed, to have consulted the court, and as instead of so doing, they had acted independently and made an appointment which, though they entered into evidence, they could not justify, and great extra costs had arisen out of their conduct, the trustees were made to pay personally the extra costs which had been occasioned.<sup>(t)</sup>

(k) *Ib.* 552, per Lord Hardwicke; *Potter v. Chapman*, Amb. 99, *per eundem*; *Richardson v. Chapman*, 7 B. P. C. 318; *French v. Davidson*, 3 Mad. 402, per Sir J. Leach.

(l) *Maddison v. Andrew*, 1 Ves. 59, per Lord Hardwicke; *Attorney-General v. Glegg*, Amb. 585, *per eundem*; *Willis v. Childe*, 13 Beav. 117; and see *Re Wilkes's Charity* 3 Mac. & Gord. 440; and see *Byam v. Byam*, 19 Beav. 65.

(m) *Gude v. Worthington*, 3 De Gex & Sm. 389. This was apparently the ground on which the case was decided, but the refusal of the trustees to act does not sufficiently appear on the report. And see *Mortimer v. Watts*, 14 Beav. 622.

(n) *De Manneville v. Crompton*, 1 V. & B. 359; and see *Lee v. Young*, 2 Y. & C. Ch. Ca. 532.

(o) *Ex parte Berkhamstead Free School*, 2 V. & B. 138.

(p) *Attorney-General v. Governors of Harrow School*, 2 Ves. 551.

(q) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; — *v. Roberts*, 1 J. & W. 251; *Middleton v. Reay*, 7 Hare, 106; *Kennedy v. Turnley*, 6 Ir. Eq. Rep. 399.

(r) See *Williams on Executors*, 891, 4th Edn.

(s) *Cafe v. Bent*, 3 Hare, 245.

(t) *Attorney-General v. Clack*, 1 Beav. 467.

[\*545]

## \*CHAPTER XX.

## OF ALLOWANCES TO TRUSTEES.

Now that we have discussed the *duties* of trustees, and the extent of their *powers*, we may next enter upon a subject very closely interwoven with the execution of the office, viz: First, The allowances to trustees for their time and trouble; and Secondly, The allowances to trustees for actual expenses.

## SECTION I.

## ALLOWANCES FOR TIME AND TROUBLE.

It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time; one reason given is, that on these pretences, if admitted, the trust estate might be loaded, and rendered of little value, besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another. And there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not.<sup>(a)</sup> But the true ground is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty; [\*546] and, as a matter of prudence, the \*court will not allow a trustee or executor to place himself in such a situation.<sup>(b)</sup>

And the rule applies not only to trustees in the strict and proper sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators,<sup>(c)</sup> mortgagees,<sup>(d)</sup> receivers,<sup>(e)</sup> committees of lunatics' estates,<sup>(f)</sup> &c.

But trustees for absentees of estates in the West Indies are allowed a commission for their personal care in the management and improvement of the property. However, if, instead of remaining upon the island, they commit the management to the hands of agents, the court will reject the claim; for it would be a strange construction that one allowed a commission on account of the proprietor's absence should insist upon

(a) Robinson v. Pett; 3 P. W. 251, per Lord Talbot; Gould v. Fleetwood, cited ib. note (A); How v. Godfrey, Rep. t. Finch, 361; Brocksopp v. Barnes, 5 Mad. 90; Ayliffe v. Murray, 2 Atk. 58; In re Ormsby, 1 B. & B. 189, per Lord Mannors; Charity Corp. v. Sutton, 2 Atk. 406, per Lord Hardwicke; Bonithon v. Hockmore, 1 Vern. 316, &c.

(b) New v. Jones, Exch. Aug. 9, 1833, cited 9th Jarm. Prec. 338, per Lord Lyndhurst; and see Burton v. Wookey, 6 Mad. 368.

(c) Scattergood v. Harrison, Mos. 128; How v. Godfrey, Rep. t. Finch, 361; Sheriff v. Axe, 4 Russ. 33.

(d) Bonithon v. Hockmore, 1 Vern. 316; Langstaffe v. Fenwick, 10 Ves. 405; French v. Baron, 2 Atk. 120; Carew v. Johnston, 2 Sch. & Lef. 301; Arnold v. Garner, 2 Phil. 231; Mathison v. Clarke, 3 Drewry, 3.

(e) In re Ormsby, 1 B. & B. 189.

(f) Anon. case, 10 Ves. 103; Re Walker, 2 Phill. 630; Re Westbrooke, ib. 631.

his reward when he had been absent himself. *(g)* But a manager, though he forfeits his *commission* during the period of his absence, will be repaid the sums actually disbursed by him for the care of the estate by others, provided the payments he has made be in themselves reasonable and proper. *(h)*

The rate of commission in Jamaica has been regulated by several acts of assembly: it was originally 10*l.* per cent. upon the receipts, then 8*l.* per cent., and since 6*l.* per cent. *(i)* But the intention of the legislature was only that the rate should not exceed 6*l.* per cent., not that under particular circumstances it might not be a great deal less. *(k)*

Mortgagees in possession of estates situate in Jamaica are by the act referred to expressly prohibited from charging any commission, except what they may have themselves paid by way of commission to a factor, *(l)* and even irrespectively of \*statutory prohibition, mortgagees in possession of West Indian property are under the same disability [\*547] of charging commission as if the property were situate in this country. *(m)*

An executor who has been appointed in the East Indies and administers in that country, and then returns to England, will, if called upon in a court of equity to render an account, be allowed a commission of five per cent. upon the receipts *or* payments according to the practice of the Indian courts. The appointment of an executor in the East Indies is considered the appointment of an agent for the management of the estate. Without such an allowance, where a person died in India deprived of the presence of his relations, the effects of the testator might often not be collected at all. Besides, the executors in England could scarcely procure a person to undertake the office at any cheaper rate. *(n)* If an Indian executor after collecting part of the assets comes over to this country he will be allowed a commission on those assets only that were collected by himself in India, and not on the assets subsequently collected by his agents and transmitted to this country, for the courts here allow the commission because the Indian courts allow it, and the Indian courts allow it on the ground of residence in India. *(o)*

An executor in India will only be allowed the commission where the testator himself has not left him a legacy for his trouble; *(p)* but if the

*(g)* Chambers v. Goldwin, 5 Ves. 834; 9 Ves. 254, see 273.

*(h)* Forrest v. Elwes, 2 Mer. 68.

*(i)* Chambers v. Goldwin, 9 Ves. 267.

*(k)* See S. C. id. 257.

*(l)* See S. C. 5 Ves. 837; 9 Ves. 268.

*(m)* Leith v. Irvine, 1 M. & K. 277.

*(n)* Chetham v. Lord Audley, 4 Ves. 72; Matthews v. Bagshaw, 14 Beav. 123.

To the latter case is appended the following note:—

“The custom of allowing a commission to executors and administrators in the presidency of Bengal has been abolished by Act No. VII., of 1849, of the governor-general in council. By that act an administrator-general has been appointed in place of the ecclesiastical registrar, with a reduced commission of 3 per cent. on moneys distributed or invested in manner therein provided.

“By Act No. II. of 1850, the provisions of the above act, with certain restrictions, are extended to the presidencies of Madras and Bombay, but the rate of commission to the public administrator is there to remain 5 per cent. until altered to 3 per cent. by the governor and council in each of these presidencies.”

*(o)* Campbell v. Campbell, 13 Sim. 168; and see 2 Y. & C. Ch. Ca. 607.

*(p)* Freeman v. Fairlie, 3 Mer. 24.



amount of the legacy be an inadequate compensation for the duties of the office, it seems the executor, so as he signify his resolution in proper time, [\*548] may renounce \*the intended legacy, and take advantage of the commission.(q)

A person who has carried on a business with another man's money, and so is *constructively* a trustee, will, if compelled to account for the profits, be sometimes allowed a compensation for his skill and exertions in the management of the concern.

Thus, Brown and De Tastet were partners, and Brown died, and De Tastet carried on the business with Brown's money. A bill was filed by Brown's representative against De Tastet for an account, and Lord Eldon said, "It could not be denied, that if the business was such that on the death of the party other persons were concerned in aiding it by the application of their skill, their services, and their property, a great deal would be included under the head of just allowances, which, till the master had thoroughly investigated the case, the court could not determine;" and it was ordered, that upon the reference to the master, De Tastet should be at liberty to submit any claims to just allowances for his management of the business, the master to certify upon what grounds he made the allowances should the plaintiff require it, or upon what grounds he refused to make the allowances if required by the defendant.(r)

To this principle must be referred the early case of *Brown v. Litton*, before Lord Harcourt.(s) The captain of a ship, who had 800 dollars on board which he intended to invest in trade, died upon the voyage, and the mate, who succeeded to the command of the vessel, took the 800 dollars, and traded with them, and made great improvements. The executrix of the captain filed a bill for an account, and Lord Keeper Harcourt said, "The defendant was like a trustee, and was clearly liable to account for the profits. It resembled the case of two joint traders, where one died, and the survivor carried on the business, when the survivor should account for the profits he made to the representative of the deceased partner." And the court observed, that "this country being an [\*549] island, all imaginable \*encouragement ought to be given to trade; and it was a comfort to a man to know that if he should die on the passage, the improvement of his effects should be for the advantage of his family; but that, to recompense the defendant for his care in trading with the money, the master should settle a proper salary for the pains and trouble he had been at in the management thereof."

But a person will not be allowed to charge any thing for his management of a trade or business, where he has been clothed in *express* terms with a character of a trustee or executor.(t)

A *solicitor* or *attorney* who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for

(q) See *Freeman v. Fairlie*, 3 Mer. 28.

(r) *Brown v. De Tastet*, Jac. 284; and see Sir Samuel Romilly's argument in *Crawshay v. Collins*, 15 Ves. 225.

(s) 1 P. W. 140; S. C. 10 Mod. 20.

(t) *Stocken v. Dawson*, 6 Beav. 371; *Burden v. Burden*, 1 V. & B. 170; *Brock-sopp v. Barnes*, 5 Mad. 90. See *Marshall v. Holloway*, 2 Sw. 432.

his actual disbursements;(u) nor can the charge be made by the firm of which the trustee is a partner.(v) "The principle," observed Lord Lyndhurst, "applies as strongly to the case of an attorney as to that of any other person. If an attorney who is an executor performs business that is necessary to be transacted, he is not entitled to be repaid for those duties; for it would be placing his interest at variance with the duties he has to discharge. It is said, the bill may be taxed, and this would be a sufficient check; but I am of opinion that that would not be a sufficient check: the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee in addition to the check of the taxing officer. There may be cases where a trustee placed in the situation of a solicitor might, if he were allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do if he were to derive no emolument from them himself, and if he were to employ another person. If a trustee, \*who is [ \*550] a solicitor, acts as a solicitor, he is not entitled to charge for his labour, but only for his costs out of pocket."(w)

But a solicitor in the country defending a suit in chancery as executor through a town agent, will be allowed such proportion of the agent's bill in respect of the defence as such agent is, on his own account, entitled to receive.(x) And in one case it was held that the rule so stringently enforced in the administration of a trust out of court, did not apply to the case of several co-trustees, who, not by any act of their own, but at the will of another, were made *defendants* to a suit, and that in such a case if one of the trustees was a solicitor, and acted for himself and his co-trustees, he ought to be allowed the full costs, unless it could be shown that they had been, to any extent, increased through his own conduct.(y) But this exception stands by itself, and is not likely to be followed; and accordingly, where a solicitor, a single trustee, *defended* himself by his partner, the claim to professional profits was disallowed.(z)

If a *cestui que trust* settle accounts with a trustee, a solicitor, and execute a general release, and the accounts contain items of charges for professional services, the *cestui que trust*, if he had no legal advice, and was not expressly informed that professional services might have been disallowed, may open the accounts as regards the objectionable items;(a) but if the *cestui que trust* had independent legal assistance, he is bound by the release.(b)

The doctrine against professional charges by a trustee, a solicitor, is so

(u) *New v. Jones*, Excheq. Aug. 2, 1833, 9 Jarm. Prec. 338; *Moore v. Frowd*, 3 M. & C. 46; *Fraser v. Palmer*, 4 Y. & C. 515; *In re Sherwood*, 3 Beav. 338; *York v. Brown*, 1 Coll. 260; *Bainbrigge v. Blair*, 8 Beav. 588; *Stanes v. Parker*, 9 Beav. 385; *Broughton v. Broughton*, 5 De Gex. Mac. & Gor. 160; *Todd v. Wilson*, 9 Beav. 486; *Gomley v. Wood*, 3 Jones & Lat. 678.

(v) *Collins v. Carey*, 2 Beav. 128.

(w) *New v. Jones*, 9 Jarm. Prec. 338.

(x) *Burge v. Brutton*, 2 Hare, 373.

(y) *Cradoek v. Piper*, 1 Mac. & Gord. 664, S. C. 1 Hall & T. 617.

(z) *Lyon v. Baker*, 5 De Gex & Sm. 622; and see *Lincoln v. Windsor*, 9 Hare, 158; *Broughton v. Broughton*, 5 De Gex, Mac & Gor. 160; 2 Sm. & Gif. 422.

(a) *Todd v. Wilson*, 9 Beav. 486.

(b) *Stanes v. Parker*, 9 Beav. 385; *Re Wyche*, 11 Beav. 209.

rigidly applied, that where a security has been given for payment of such professional charges, it may be set aside, even as against a purchaser for a valuable consideration, if he had notice.(c)

The rule against allowances to trustees is merely a general one in the absence of express directions to the contrary; for there is no objection, [\*551] if the settlor himself choose to \*compensate the trustee for his services, either by the gift of a sum in gross, or by the allowance of a salary.(d)

Thus, in *Webb v. The Earl of Shaftesbury*,(e) an estate was devised to Arrowsmith and his heirs upon trust to settle and manage, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards', bailiffs', and gamekeepers' salaries, and all other expenses, and the commission thereafter mentioned, and subject thereunto upon certain trusts; and the testator directed that the trustee should retain for his trouble a commission of 5*l.* per cent. on the gross rental of the estates. The trustee claimed to be reimbursed all his expenses over and above his commission; and Lord Eldon said, "he felt a strong inclination to hold that this commission of 5*l.* per cent. was the whole the trustee was to have, but the will did not say so, and upon the will he must give him the other allowances."

And if a testator give an executor a salary for his trouble, the allowance will not cease on the institution of a suit; for though the management be thenceforward under the direction of the court, the executor is still called upon to assist the court in the administration with his care and vigilance.(f)

Where the settlor has directed a remuneration, but has not declared his mind as to the *amount*, it will be referred to the master to settle the *quantum meruit* according to the circumstances of the case.(g)

The trustee may also *contract* for an allowance with his *cestui que trust*; but bargains of this kind are very suspicious, and are watched by the court with an eye of extreme jealousy.

Two persons had been made executors and trustees, and one of them refused to act unless the *cestui que trust* would give them, besides their legacies, some consideration for their trouble. This the *cestui que trust* refused for some time to do, but at last consented to give 100*l.* to one, and 200*l.* to the other. Lord Hardwicke said, "With regard to the question, whether upon general grounds a trustee may make an agree- [\*552] ment with his *cestui que trust* for an extraordinary allowance \*over and above what he is allowed by the terms of the trust, I think there may be cases where the court would establish such agreements; but at the same time time would be extremely cautious and wary in doing it. In general the court looks upon trusts as honorary, and a burden upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason, too,

(c) *Gomley v. Wood*, 3 Jones & Lat. 678.

(d) *Robinson v. Pett*, 3 P. W. 250, per Sir J. Jekyll; *Willis v. Kibble*, 1 Beav. 559.

(e) 7 Ves. 480.

(f) *Baker v. Martin*, 8 Sim. 25.

(g) *Ellison v. Airey*, 1 Ves. 111, see 115; and see *Willis v. Kibble*, 1 Beav. 559.



against allowing any thing beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*; and therefore this court has always held a strict hand over trustees in this particular. If a trustee comes in a fair and open manner, and tells the *cestui que trust* that he will not act in such a troublesome and burdensome office unless the *cestui que trust* will give him a further compensation, and it is contracted for between them, I will not say this court will set it aside, though there is no instance where they have confirmed such a bargain. I consider the present case in this light:—Two trustees are making an ill use of an authority they had under the will to extort a reward from the *cestui que trust*. If they had told him, ‘Give us a further reward, or we will renounce,’ they had acted fairly, and something might be said in favour of the contract; but the personal estate was vested in them before probate, and could not be got out of them without an actual renunciation. The real estate was likewise vested in them, and could not be taken out of them but by an actual assignment; and, sensible of these difficulties upon the *cestui que trust*, the trustees and executors, in order to force him into their terms, would not act. Consider the ill consequences of such a case. Suppose it should be necessary that a will should be immediately proved, as in the case of a widow and children; shall a trustee, in whom the testator reposed a trust and confidence, and depended upon his honour and kindness, insist upon such hard terms as to have an unreasonable reward before he will either prove the will or act in the trust?” And the trustees were refused the advantage of their bargain.<sup>(h)</sup>

Where a trust was created by deed, and it was doubtful whether, as the instrument directed the payment of “all costs, \*charges, [\*553] and expenses which the trustees might sustain, expend, or be put unto, the same to be reckoned as between attorney and client,” the trustees, who were solicitors, had not stipulated for the allowance of their professional charges, besides their expenses out of pocket, Lord Cottenham said, “The parties may by contract make a rule for themselves, and agree that a trustee, being a solicitor, shall have some benefit beyond that which, without such contract, the law would have allowed; but in such a case the agreement must be distinct, and in its terms explain to the client the effect of the arrangement, and the more particularly when the solicitor for the client, becoming himself a trustee, has no interest personal to himself adverse to that of the client. It is not easy to conceive how, consistently with the established rules respecting contracts between solicitors and their clients, a solicitor could maintain such a contract made with his client for his own benefit, the client having no other professional adviser, and in the absence of all evidence, and of any probability that he was aware of his rights, or of the rule of law, or of the effect of the contract.”<sup>(i)</sup> And his lordship disallowed the claim.

Even where the contract is not void *ab initio*, the conditions of it must be fulfilled to the letter, or the trustee is not entitled to his reward.

(h) *Ayliffe v. Murray*, 2 Atk. 58.

(i) *Moore v. Frowd*, 3 M. & C. 46, see 48.

An executor, who had no legacy, and where the execution of the trust was likely to be attended with trouble, agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship. He died before the execution of the trust was completed, and his executors brought a bill to be allowed those 100 guineas out of the trust money in their hands; but the court said all bargains of this kind ought to be discouraged, as tending to eat up the trust, and here the executor had died before he had finished the affairs of the trust; and so the plaintiff's demand was disallowed.<sup>(k)</sup>

A trustee dealing, not with the *cestui que trust*, but with the *court*, is of course at liberty, before accepting the trust, to stipulate for a reasonable remuneration.<sup>(l)</sup>

[\*554] \*In *Marshall v. Holloway*,<sup>(m)</sup> Croft, one of three trustees, had declined to prove the will or enter upon the trusteeship, but had executed no disclaimer of the estate, and, as the person best acquainted with the testator's affairs, had been employed by his co-trustees in the capacity of agent. The co-trustees filed a bill for the administration of the trust, and prayed, *inter alia*, that in case the court should be of opinion that Croft ought to be discharged from the trust, then he might convey the trust estates, and be allowed a compensation for his time and trouble in the management of the testator's affairs. Lord Eldon decreed, that, "it being alleged by the co-trustees that the nature and circumstances of the testator's estate required the application of a great proportion of time, and that they could not undertake to continue in the trust without the aid and assistance of Croft, who was better acquainted therewith than any other person, and that it would be for the benefit of the estate that Croft should continue a trustee, and it being alleged by Croft that due attention to the affairs of the testator would require so much of his time and attention as would be greatly prejudicial to his other pursuits, and therefore he would not have undertaken to act therein, but under the assurance that an application would be made to the court to authorize the allowance of a reasonable compensation for his labour and time, and that he could not continue to act therein without such reasonable allowance being made to him, it should therefore be referred to the master, to settle a reasonable allowance to be made to Croft for his time, pains, and trouble for the time past; and if the master should be of opinion that Croft should be continued a trustee, then to settle a reasonable allowance to be made to Croft for his services in the time to come."

But if a trustee omit to contract with the court before entering upon his duties, he will have great difficulty in obtaining compensation afterwards, and we may add that in no case will the court remunerate a trustee for his trouble by permitting him to make *professional charges* where the settlor has not so directed, but will compensate him for his trouble if at all by a regular and fixed salary.<sup>(n)</sup> Lord Langdale commenting

(k) *Gould v. Fleetwood*, cited *Robinson v. Pett*, 3 P. W. 251, note (A.)

(l) *Brocksope v. Barnes*, 5 Mad. 90, per Sir J. Leach; see *Morison v. Morison*, 4 M. & C. 215.

(m) 2 Sw. 432.

(n) *Bainbridge v. Blair*, 8 Beav. 588.

\*upon *Marshall v. Holloway*, observed, the trustee and solicitor in that case was not allowed to charge his bill of costs, or to charge for each particular item of business done, but an inquiry was directed whether it would be proper, under the peculiar circumstances, to give him some remuneration or compensation for his loss of time and trouble. I may therefore safely say that this court would not, even in a case when it thought a deviation from the general rule advisable and proper, make that deviation by allowing a gentleman acting as solicitor for himself as trustee to make the usual professional charges against the trust fund. To do so would be to place a party having a duty conflicting with his interest in the position of having to make out his own bill against himself, leaving any error which might occur to be settled and set right at some future occasion. Assuming that all that was done here was highly beneficial, and that a great benefit was acquired to the estate by the exertion of the trustee, was he not bound to do his utmost for the benefit of his trust? In every case a trustee might say I have had a great deal of trouble in these matters, and have spent a considerable portion of my time and trouble. Is that the rule? I am not aware of the existence of any such rule, nor has any authority been produced which tends in the least to show that this is the way in which trustees who have strictly performed their duty, and thereby procured a benefit to the estate, are to be dealt with. It is very different from the case where a trust being in the course of execution, and many things remain to be done which can be done beneficially only by a particular trustee, who cannot from his situation do it without grievous personal loss, and that party comes to the court and states that he is in a situation and is willing to do these things, but that he cannot consistently with his own interest proceed with such duties, and gratuitously devote his time for the benefit of the trust. In such a case it is competent for the court, considering what is beneficial to the *cestui que trust*, and is calculated to promote their interest, to take the matter into consideration, and to give proper remuneration to that person who alone by his own exertion can produce that benefit.(o)

\*During the continuance of the usury laws a mortgagee could not, as a general rule, have bargained for a compensation exceeding, together with the actual interest, the legal rate, for an agreement of this kind would have tended to usury.(p) But after a long struggle certain special exceptions were established in favour of mortgagees (*not in possession*) of West Indian estates.(q)

As a trustee will not be permitted to charge for his personal care and loss of time, it is but just he should be allowed on proper occasions to call in the assistance of *agents* at the expense of the estate.

Thus a trustee or a mortgagee may, if the case require it, appoint a collector of rents.(r)

(o) *Bainbrigge v. Blair*, 8 Beav. 595, 596.

(p) See *Chambers v. Goldwin*, 9 Ves. 271.

(q) See the history of the struggle detailed in Lord Brougham's judgment in *Leith v. Irvine*, 2 M. & K. 277.

(r) *Davis v. Dendy*, 3 Mad. 170; *Stewart v. Hoare*, 2 B. C. C. 663; and see



And as a man is not bound to be his own bailiff, if a trustee or mortgagee employ a skilful person in that capacity, the salary must be allowed; (s) at least the court will grant that indulgence where the estate is at such a distance from the mortgagee's residence, that he must have appointed a bailiff, had the estate been his own. (t)

An executor employed a person who had been his clerk to transact some business for him relative to the testator's affairs, and the master insisted it was the executor's own duty, and refused to allow the expense. But Lord Hardwicke said, "he was clear, that if an executor paid an attorney for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed," and ordered a reference to the master to tax the items of the bill. (u)

If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and attention, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by the employment of an \*accountant, he is entitled to charge the trust estate [\*557] with it under the head of expenses. (v)

The executor of a trader had employed an agent to collect debts at a commission of 5 per cent. The master had reduced the commission to 2½ per cent.; and, the executor upon that ground taking an exception to the report, Sir J. Leach said, "Executors, generally speaking, are not allowed to employ an agent to perform those duties which by accepting the office of executors they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them the expenses they have incurred in the employment of agents: I have some doubt whether in this case the master ought to have made any allowance, but with the allowance of 2½ per cent. the executor must be content." (w)

## SECTION II.

### ALLOWANCES TO TRUSTEES FOR EXPENSES.

Though a trustee is allowed nothing for his *trouble*, he is allowed every thing for his *expenses out of pocket*. (x) "It flows," said Lord Eldon, "from the nature of the office, whether expressed in the instrument or

Wilkinson v. Wilkinson, 2 S. & S. 237; Re Westbrooke, 2 Phill. 631; Nicholson v. Tutin, 3 K. & J. 159.

(s) Bonithon v. Hockmore, 1 Vern. 316; Chambers v. Goldwin, 9 Ves. 272, per Lord Eldon.

(t) Godfrey v. Watson, 3 Atk. 518, per Lord Hardwicke.

(u) Macnamara v. Jones, 2 Dick. 587.

(v) New v. Jones, Exch., Aug. 9, 1833, cited 9 Jarm. Prec. 338; Henderson v. Milver, 3 Mad. 275.

(w) Weiss v. Dill, 3 M. & K. 26; and see Giles v. Dyson, 1 Stark. N. P. C. 32; Hopkinson v. Roe, 1 Beav. 180; Day v. Croft, 2 Beav. 488.

(x) How v. Godfrey, Rep. t. Finch, 361; In re Ormsby, 1 B. & B. 190, per Lord Manners; Hide v. Haywood, 2 Atk. 126; Caffrey v. Darby, 6 Ves. 497, per Sir W. Grant; Godfrey v. Watson, 3 Atk. 518, per Lord Hardwicke; Feoffees of Heriot's Hosp. v. Ross, 12 Cl. & Fin. 512, 515, per Lord Cottenham.

not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust.”(y)

Thus a trustee will be entitled to be reimbursed his travelling expenses,(z) unless they be improperly incurred.(a)

\*So a trustee may give fees to counsel, and shall have allowance thereof.(b) [\*558]

And if a trustee be sued concerning the trust, and have his costs paid him as between party and party, and the *cestui que trust* afterwards file a bill for an account, the trustee will be allowed his necessary costs in the former suit, and will not be concluded by the amount of the taxation ;(c) but of course a trustee will have no claim to reimbursement out of the trust fund, where the legal proceedings were occasioned by his own negligence in the first instance ;(d) or were improperly instituted by him ;(e) and a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solicitor, for the bill, as between trustee and *cestui que trust*, though not submitted to a regular taxation (which is between solicitor and client,) will be moderated by the court by a deduction of such charges as may appear irregular and excessive ;(f) and the trustee will not be allowed interest on the costs, though at the time he paid them he had no trust moneys in his hands.(g)

Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for expenses. A testator bequeathed to his acting trustees for the time being the yearly sum of five guineas apiece for the care and trouble they might have in the execution of the trust. The testator's estates consisted in part of about fifty houses in London, thirty-four of which were let to weekly tenants. The trustees employed a person to collect the rents, and Sir John Leach said, “The annuity was given to them as a recompense for the care and trouble which would attend the due execution of the office ; and if it was consistent with the due execution of the office to \*employ a collector, they were entitled to the annuity. A provident owner might well employ [\*559] a collector in such a case, and the labour of such a collection could not be imposed on the trustee.”(h)

(y) *Worrall v. Harford*, 8 Ves. 8 ; and see *Dawson v. Clarke*, 18 Ves. 254 ; *Attorney-General v. Mayor of Norwich*, 2 M. & C. 424.

(z) *Ex parte Lovegrove*, 3 D. & C. 763 ; and see *Ex parte Elsee*, 1 Mont. 1 ; *Ex parte Bray*, 1 Rose, 144. These were cases of assignees who, by 6 G. 4, c. 16, s. 106, (the Bankrupt Act then in force,) were to have “all just allowances,” but trustees are equally entitled to all just allowances *virtute officii*.

(a) *Malcolm v. O'Callaghan*, 3 M. & C. 52 ; and see *Bridge v. Brown*, 2 Y. & C. Ch. Ca. 181.

(b) *Cary*, 14.

(c) *Amand v. Bradburne*, 2 Ch. Ca. 138 ; *Ramsden v. Langley*, 2 Vern. 536 ; and see *Fearns v. Young*, 10 Ves. 184.

(d) *Caffrey v. Darby*, 6 Ves. 497.

(e) *Peers v. Ceeley*, 15 Beav. 209.

(f) *Johnson v. Telford*, 3 Russ. 477. As to the right of the *cestui que trust* to obtain a taxation as against the solicitor, see *Re Dickson*, 3 Jur. N. S. 29, and cases there cited.

(g) *Gordon v. Trail*, 8 Price, 416.

(h) *Wilkinson v. Wilkinson*, 2 S. & S. 237 ; and see *Webb v. Earl of Shaftesbury*, 7 Ves. 480 ; *Fountaine v. Pellet*, 1 Vesey. jun. 337.

A regular account of the expenses should invariably be kept; but where this has not been done the court has ordered a reasonable allowance to be made in the gross, at the same time taking care that the remissness and negligence of the trustee in not having kept any account should not meet with any encouragement. Thus in *Hethersell v. Hales*(*i*) the trustee put in a general claim for 2500*l.*, apparently an average estimate of the expenses he had incurred in the trust. "The court," says the reporter, "took some time to deliberate what was fit to be allowed in a matter of this nature; and having considered that the trustee was a friend to the family, and undertook the trust at their great importunity, and that he had incurred the charge of surveying the whole estate, selling and letting the same, looking after tenants, adjusting their accounts, calling in their rents, returning moneys to creditors, and treating with them and stating their debts, and procuring and agreeing with purchasers, and for law charges, and for keeping servants and horses, and employing others in journeys to London and elsewhere, and his care there lying from home a long time, the court was of opinion that the trustee might well deserve the whole 2500*l.*, yet would not allow but 2000*l.*, which the trustee was to have."

As it is a rule that the *cestui que trust* ought to save the trustee harmless from all damages relating to the trust, so within the reason of the rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss, or from a plain and great hazard of it, the trustee ought to be repaid.(*k*)

[\*560] \*The expenses incurred by a trustee in the execution of his office are treated by the court as a charge or *lien* upon the estate, and the *cestui que trust* or his assign cannot compel a conveyance in equity without a previous satisfaction of all the trustee's demands.(*l*)

In *Trott v. Dawson*(*m*) Lord Macclesfield said, "Dawson, the assignee of Archdale, cannot be in a better case than Archdale under whom he claims. Wherefore, as Archdale would not have had the assistance of a court of equity without paying for the charge and trouble which Trott had been at in relation to the trust, so, by parity of reason, the defendant Dawson, as claiming under Archdale, must do the same thing which it was incumbent upon Archdale to have done."

The decision in this case was reversed in the house of lords; and hence the inference has been drawn that a trustee gives credit for the expenses, not to the *estate*, but to the *person* of the *cestui que trust*, and that the assign is not liable for the trustee's expenses incurred in the time of the assignor. The case is reported much more at length in *Brown*,(*n*) and the circumstances were briefly these:—An eighth of the proprietorship of the province of Carolina had been conveyed in 1684 to

(*i*) 2 Ch. Rep. 158.

(*k*) *Balsh v. Hyham*, 2 P. W. 455, per Lord King; and see *Attorney-General v. Mayor of Norwich*, 2 M. & C. 424; *Attorney-General v. Pearson*, 2 Coll. 581; *Quarrell v. Beckford*, 1 Mad. 282; *Sandon v. Hooper*, 6 Beav. 246; *Bright v. North*, 2 Phill. 216.

(*l*) See *Ex parte James*, 1 D. & C. 272; *Hill v. Magan*, 2 Moll. 460.

(*m*) 1 P. W. 780.

(*n*) 7 B. P. C. 266.



Amy in trust for four persons. The whole equitable interest had become subsequently vested in John Archdale, who settled it upon Dawson and his wife. Dawson filed a bill against the co-heirs of Amy for a conveyance; and the question between the parties was, whether the expenses incurred by Amy ought or not to be first paid and satisfied. On a reference to the master it was found that Amy had been active in the trust from 1684 to 1697, and during that time had expended various sums of money; that the proprietors of the province had ordered Amy one grant of 12,000 acres; had created him landgrave, with a further grant of 48,000 acres; and had also presented him with one of the eight proprietorships, which had fallen in by the death of a proprietor without heirs. It was entered on the books of the proprietors in 1698, that the grants \*had been made to Amy for his services generally, and particularly for his faithful discharge of the trust; that Amy [\*561] had agreed to convey the estate on request to W. J., who was to succeed him in the office, and by whom subsequently the trust was exclusively managed. It did not appear that the first two grants had even been perfected, or had become beneficial; but the grant of the proprietorship had been accepted and acted upon. It was under these circumstances that Lord Macclesfield directed a conveyance of the estate, subject to the payment of Amy's expenses; but on appeal to the house of lords the decree below was reversed. The question therefore appears to have been, not whether Amy's expenses, due from the assignor, were to be regarded as a lien upon the estate, but whether the grants made to Amy had not been accepted by him as a full compensation.

But although the trustees themselves are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them as solicitors, surveyors, &c., have no such lien. And the law is so settled, notwithstanding an express declaration by the settlor that the trustee shall *in the first place pay the expenses of the trust*, and though the trustees themselves be charged to be insolvent. In every deed is *implied* a direction to pay the costs and expenses, and *expressio eorum quæ tacite insunt nihil operatur*. It would be a mischievous principle to hold, that every person with whom the trustees had incurred a just and fair demand might sue the trustees, and come for an account of the whole administration.<sup>(o)</sup> And, *vice versa*, the agents of the trustees are accountable to their employers only, the trustees, and not to the *cestuis que trust*.<sup>(p)</sup> But under the special provisions of the Solicitors Act<sup>(q)</sup> the *cestuis que trust* may at the discretion of the court obtain an order to tax the bill of the solicitor employed by the trustees,<sup>(r)</sup> and generally the *cestuis que trust* may proceed against the agents where they have not confined themselves to the duties of agents, but by accepting a [\*562]

(o) Worrall v. Harford, 8 Ves. 4, see 8; Hall v. Laver, 1 Hare, 571; Feoffees of Heriot's Hospital v. Ross, 12 Cl. & Fin. 507; Francis v. Francis, 5 De Gex, Mac. & Gor. 108.

(p) Myler v. Fitzpatrick, 6 Mad. 360, per Sir J. Leach; and see Langford v. Mahony; 2 Conn. & Laws. 317; Lockwood v. Abdy, 14 Sim. 441; Keane v. Roberts, 4 Mad. 350.

(q) 6 & 7 Vict. cap. 73, s. 39.

(r) As to the circumstances under which the court will direct taxation at the instance of a *cestui que trust* see Re Dickson, 3 Jur. N. S. and cases there referred to.

delegation of the whole trust,(s) or by fraudulently mixing themselves up with a breach of trust,(t) have themselves become trustees by construction of law.

If a person be trustee of different estates for the *same cestui que trust*, under the same investment, and he incur expenses on account of one estate from which he has no funds, it is presumed that he may apply to their discharge any money which may have come to his hands from any other of the estates. But he would not be justified in mixing up any claims under one instrument of trust with those under another.(u)

If the trust estate fail, it seems the trustee may then file a bill against the *cestui que trust* on whose *behalf* and at whose *request* he acted, to recover from him personally the amount of the money expended.(v)

In a late case it was held that a trustee who, in that character, has incurred a legal liability, may call upon the *cestui que trust* in equity to indemnify the trustee against the liability, even before an actual loss has accrued. Mr. Gillan mortgaged a hundred shares in the Western District Banking Company to Mr. Phene, to secure 1000*l.* The shares were transferred in the books of the company into the name of Mr. Phene. The 1000*l.* was afterwards paid off, and Mr. Gillan required Mr. Phene to re-transfer the shares; but before this could be done a creditor of the company recovered judgment against the public officer of the company, and notice was given to Mr. Phene that unless he paid 3*l.* 10*s.* per share by a day named, execution would be levied upon him for the full amount of the judgment. Upon that Mr. Phene filed a bill [\*563] against Mr. Gillan, praying the reimbursement of certain \*expenses, and an indemnity against the liability. The court observed, "The effect of the payment of the debt, combined with the subsequent transactions was, in my opinion, to make the plaintiff a mere trustee for the defendant, and I cannot doubt but that a trustee, circumstanced as the plaintiff was, has a right to be indemnified by his *cestui que trust*, against all liabilities which he may properly have incurred in that character. His liability in this court is that of his *cestui que trust*. I might take the analogous case of a trustee of leasehold property under covenants for the benefit of a *cestui que trust*. It is quite clear, I apprehend, that if such trustee were obliged to pay money for the benefit of his *cestui que trust*, he would have a right of indemnity over. It was contended, on behalf of the defendant, that in the case of a trustee and *cestui que trust*, the trustee cannot proceed in this court until he has been actually damaged, although, if he had paid anything, he might have come to be indemnified. I do not accede to that proposition. If it was a *subsisting* liability, the trustee is not bound to be out of funds for a moment. In this case a judgment was recovered against a public officer of the company. *Prima facie*, the plaintiff is liable as a share-

(s) Myler v. Fitzpatrick, 6 Mad. 360; and see Pollard v. Downes, 1 Eq. Ca. Ab. 6.

(t) See Fyler v. Fyler, 3 Beav. 550; Alleyne v. Darcy, 4 Ir. Ch. Re. 199; Portlock v. Gardner, 1 Hare, 606; and Ex parte Woodin, 3 Mont. D. & D. 399; Attorney-General v. Corporation of Leicester, 7 Beav. 176; Pannell v. Hurley, 2 Coll. 241; Bodenham v. Hoskyns, 2 De Gex, Mac. & Gor. 903.

(u) Price v. Loaden, 21 Beav. 508.

(v) Balsh v. Hyham, 2 P. W. 453.

holder, and *prima facie* he has a right to be indemnified in the way suggested."<sup>(w)</sup>

It will be observed that the claim to reimbursement from the *cestui que trust* has been admitted, where the trustee has acted at the request or on behalf of the *cestui que trust*, he being competent; but in the absence of such request, or of an implied assent, or where the *cestuis que trust* are under disability as infants, the trustee can have no right against the *cestuis que trust* on the ground of any *personal* obligation,<sup>(x)</sup> though the trustee would have the fullest lien upon the trust fund, and no benefit from it would be allowed to the *cestui que trust* until the trustees were properly indemnified. But \*of course the trustee cannot claim this indemnity in respect of an advance that was not [\*564] properly made in the execution of the trustee's duty.

Questions occasionally arise respecting the proper fund for payment of expenses. In one case<sup>(y)</sup> Sir John Leach decided that a provision made in a will for payment of debts and funeral and testamentary expenses out of a particular fund, did not make that fund primarily liable for costs. But in a subsequent case Lord Langdale, master of the rolls, appears to have arrived at a different conclusion.<sup>(z)</sup> Again, a trust in a will of real and personal estate to pay out of the personal estate the expenses of probate and "the execution of the trusts of the will," does not authorize the trustee to apply the fund in payment of any other expenses than what would be payable by the *executors* in that character, and therefore does not authorize the application of the personal estate in payment of the expenses incurred in the execution of trusts declared of the testator's *real* estate.<sup>(a)</sup>

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## \*CHAPTER XXI.

[\*565]

### HOW A TRUSTEE MAY OBTAIN HIS DISCHARGE FROM THE OFFICE.

WE shall conclude the subject of the office of trustee by considering in what manner he may divest himself of that character.

The only modes by which he can accomplish this object are the following: First—He may have the universal consent of all the parties interested; or, Secondly—He may retire by virtue of a special power contained in the instrument creating the trust; or, Thirdly—He may obtain his release by application to the court.

I. As no *cestui que trust* who concurs in a breach of duty by the trustee can afterwards call him to account for the mischievous consequences

(w) *Phene v. Gillan*, 5 Hare, 3, pp. 9, 13.

(x) Thus in *Collinson v. Lister*, 20 Beav. 368, where the advances were not proper the M. R. said, "No assets exists out of which the executor could seek for payment, and, of course, it could not be contended that the plaintiffs (who were the *cestuis que trust*,) were liable to repay the advances."

(y) *Brown v. Groombridge*, 4 Mad. 495.

(z) *Wilson v. Heaton*, 11 Beav. 492.

(a) *Lord Brougham v. Lord Poulett*, 19 Beav. 119.



of the act, it follows, that where *all* the *cestuis que trust* lend their joint sanction to the trustee's dismissal, they are precluded from ever visiting him with damages on the ground of delegation of his office.(a)

But the trustee must first satisfy himself that *all* the *cestuis que trust* are parties, for even in the case of a numerous body of creditors the consent of the majority is no estoppel as against the rest.(b)

And the *cestuis que trust* who join must of course be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent. But a *feme covert* is considered to be *sui juris* as to her separate estate where there is no restraint against anticipation.(c)

[\*566] \*If the parties interested in the trust fund be not all in existence, as where the limitation of the property is to children unborn, it is clear, that as the trustee cannot have the sanction of all the parties interested, he cannot with safety be discharged from the trust.

II. A trustee may retire by virtue of a special power contained in the original instrument.

The person who creates the trust may mould it in whatever form he pleases, and may therefore provide, that on the occurrence of certain events and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted.

The form of power most commonly in use is, that in case any trustee shall happen to die, or be abroad for twelve calendar months, or be *desirous of being discharged from*, or refuse, decline, or become incapable to act in the trusts, it shall be lawful for the *cestui que trust* to whom the power may be given, or, as the proviso is frequently worded, for the surviving or continuing trustee, or the executors or administrators of the survivor, by deed or writing, to nominate some other person to be a trustee; and the power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named.

As it has been made a question how far a trustee appointed by the court can exercise the discretionary powers of the original trustees, it would be proper to extend the common form by adding, that the powers of the settlement shall be exercised by "every trustee, whether appointed under the present power, or by the Court of Chancery, or other competent authority." It has also been found useful in practice, where the power of appointment is given to the trustee, to limit it to "the surviving, or continuing, or other trustee."(d)

[\*567] \*The words commonly inserted, which expressly confer all powers on the new trustees before the estate has actually been conveyed, show that a doubt has been felt by the profession, whether in the absence of these words the powers could be exercised until after conveyance, and the late vice-chancellor of England, in a case where the words referred to did not occur, but there was simply a power of nomi-

(a) *Wilkinson v. Parry*, 4 Russ. 276, per Sir J. Leach.

(b) See *supra*, 464, note (n).

(c) See *infra*, c. 25, s. 3.

(d) See *Lord Camoys v. Best*, 19 Beav. 414.

nation and no direction for a conveyance, expressed his opinion to be that the person to be appointed was not invested with the character of trustee until he had both been nominated to the office by the donee of the power, and the trust property had also been duly conveyed or assigned.<sup>(e)</sup> "The settlor meant," observed the vice-chancellor, "that the person to be nominated should be a trustee just as the others were. If he be nominated and no conveyance executed, and all the others die, how is he to execute any trust, for he has no estate."<sup>(f)</sup>

However in a more recent case before the present master of the rolls,<sup>(g)</sup> A. and B. were appointed trustees of a settlement, and after a lapse of eighteen years A. disclaimed, and B. was desirous of retiring, and the donee of the power nominated C. in the place of A., and D. in the place of B., and B. professed to assign the trust fund (consisting of a share of 3000*l.* in the hands of trustees of another settlement) to C. and D. who filed their bill without their *cestuis que trust* to have the trust fund paid to them. It was objected against the validity of the appointment that A. had acted, and that consequently B. could not alone pass the trust fund, and that therefore the appointment of trustees was incomplete. The master of the rolls, however, held that, whether A. had acted or not, C. and D. were duly appointed, and entitled to call for payment of the trust fund. His honor said in his judgment, "I am of opinion that the appointment of new trustees, and the conveyance of the trust property to them constitute two distinct and separate matters, and that the second, the transfer, can only take place where the first or the appointment is complete. Were it is not so, in some cases, probably in all, no valid appointment of \*new trustees could finally be made." And his [\*568] honor subsequently pointed out various difficulties which would arise from holding that transfer of the trust fund was necessary to perfect the appointment. The particular facts of the case at the rolls suggest the observation that the subject-matter settled was a mere *equitable* interest in a fund, incapable of assignment strictly so to speak; but unquestionably the doctrine of the late vice-chancellor of England must be considered as shaken; and the views of the master of the rolls seem to derive some support from the practice of the court allowing persons nominated trustees to present petitions for a transfer of the trust fund, or a conveyance or vesting order of the trust estate.<sup>(h)</sup> Looking to the *decision* only of the master of the rolls, it may be regarded as still an open question, whether a newly appointed trustee ought not, before proceeding to exercise a power of sale of real estate (the case before the vice-chancellor of England,) to procure a conveyance to himself, but according to the *views* of the master of the rolls this would clearly be unnecessary.

Should the trust estate consist of *money in the funds*, or other property transferable in the books of any company, then by one and the same deed the donee of the power may nominate the new trustee, and the old and new trustee may execute a declaration of trust of the stock or other

<sup>(e)</sup> Warburton v. Sandys, 14 Sim. 622.

<sup>(f)</sup> *Ib.* 631.

<sup>(g)</sup> Noble v. Meymott, 14 Beav. 471.

<sup>(h)</sup> *In re Law*, 4 Beav. 509; see *In re Odell*, Hayes Ir. Exch. Rep. 257.

property intended to be transferred, and after the execution of the trust the stock may be transferred into their joint names accordingly.<sup>(i)</sup> If the trust estate consist of *chattels real*, or other *chattels personal* not transferable in the books of any company, the parties cannot effectuate their object but at the trouble and expense of two deeds. By the first, the old trustee will assign the chattel interest to A., and then A., by indorsement, will reassign it to the old and new trustee as joint tenants.<sup>(k)</sup> If the trust estate be of a *freehold* nature, and by the terms of the instrument of trust the whole legal estate is to be vested in the trustees, there [\*569] needs, in general, no other \*machinery than a simple conveyance under the Statute of Uses; for the old trustee may release the lands to the joint use of himself and the new trustee, and the statute will operate to transfer the possession.<sup>(l)</sup> But in *settlements which invest the trustees with powers*, the established form of the proviso has introduced the necessity of resorting to the use of two deeds. The language of the clause is, that "the trust estate shall be conveyed in such manner that the same may be vested in the old and new trustee to the uses, trusts, intents, and purposes of the settlement." Now, the meaning obviously is, that, as by the settlement an estate to preserve contingent remainders, or, it may be, some other interest, was limited to the trustees who are armed with the powers, should either of the trustees die, &c., and a new trustee be appointed, such estate *pur autre vie*, or other interest, should be transferred to the old and new trustee jointly. But the practitioner, *ex majori cautela* has attached to the words the possible, however improbable construction, that on the appointment of a new trustee the whole settlement should be re-opened, and that the fee-simple should *ab integro* be conveyed to the old and new trustee to all the same uses, &c., as were declared by the original deed. For accomplishing this object it is necessary that two instruments should be prepared. By the first,<sup>(m)</sup> the new trustee will be nominated by the donee of the power, the old uses of the settlement will be absolutely revoked (the proviso, it is said, implying an authority for that purpose,) and the use will be appointed to A. and his heirs, and the estate and interest vested in the old trustee will be assured unto and to the use of A. and his heirs, by way of conveyance. When this has been effected by one deed, and A. has become seised, or is supposed to have become seised, of the inheritance in fee-simple, he may then, by lease and release, which may be indorsed on the former release,<sup>(n)</sup> reconvey the premises to the old and new trustee to the uses, trusts, &c., of the settlement, in the same manner as if the new trustee had been originally appointed. Thus, if the real intention was, [\*570] that on the appointment of a new trustee a \*seisin to serve the uses should be vested in the old and new trustee jointly, then a power of revocation was implied, and the direction has been complied with. If the settlor had no such intention, then there was no implied power of

(i) See Appendix No. IV.

(k) See Appendix No. VII. If the person to assign is not to be one of the trustees, as where the assignment is by an executor or administrator of a surviving trustee, of course only one deed is necessary.

(l) See Append. No. VI.

(m) See Appendix No. VII.

(n) See Appendix No. VIII.



revocation, and the affected exercise of it is a nullity, and the conveyance *by* the old trustee, and the reconveyance *to* the old and new trustee has served only to pass the actual and vested interest.

It must of course be carefully ascertained by the trustee that the circumstances under which he retires from the trust are precisely those which the settlor contemplated in the terms of the proviso; for if the case be not warranted by the power, the trustee who resigns will be made responsible for all the mischievous consequences, just as if he had delegated the office.

It is somewhat surprising, considering the frequency of this power, how few questions until lately arose upon its construction.

In *Sharp v. Sharp*,<sup>(o)</sup> heard in the Court of Queen's Bench the terms in which the power was expressed were as follows:—"In case *either* of the trustees the said A. and B. shall happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in, the trusts, it shall be lawful for the *survivors or survivor* of the trustees *so acting* in the trusts, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee." Neither of the trustees being willing to act in the trust, they executed a *conveyance* to two other persons intended to be new trustees; and the question was raised, whether the power of appointment had, under the circumstances, been effectually exercised, and it was determined in the negative. Lord Tenterden said, "By the word 'survivor' I understand merely the trustee 'continuing to act;' for it seems to have been throughout the intention of the testator, that, in case of the death or incapacity or refusal of some one of the trustees, the remaining trustee who had been named by him, and who had been the object of his confidence, should have the power of associating with himself some other person in the execution \*of the trust: but it would be giving a much larger construction [\*571] to these words than they fairly import if we were to say, that the trustees, in the event of the whole class declining to act, might nominate such other persons as they might think fit to perform their duties." Mr. Justice Bayley observed, "The word 'either' is not uselessly introduced: it is in effect a proviso that if *either* of the trustees named in the will should refuse to act, still that the testator should have the benefit of the judgment of the other, who would act in concurrence with such other individual as he might nominate. The testator may have had good reason for confining the power to the care of one trustee, for he may have had special confidence in the trustees named by himself, and so long as *either* of those persons acted in the trust he might think his property safe. But if we were to read these words as if they were 'both or either,' the case would be different. If both the persons should decline to act, the testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a court of equity. And I apprehend that under the words of this power the testator meant by the word 'acting' to designate those who had taken upon themselves to perform some of the

(o) 2 B. & A. 405; *Pearce v. Pearce*, 22 Brev. 248.

trusts mentioned in the will, and that he did not contemplate one who *in limine* refused to act. And it seems to me, that a person who does so refuse cannot be considered as acting in any of the trusts. Then the word 'survivor' must mean the 'continuing' trustee, as contradistinguished both from those who might refuse to act and those who might be desirous to discontinue acting."

In this case *both* the trustees disclaimed; and it was decided that, under such circumstances, they had no power to appoint others. But supposing *one* trustee *disclaims*, may not the continuing trustee appoint another, or do the words of the power, "if any trustee shall refuse or decline" apply, not to the case of a *disclaimer*, but only to a *refusal after having acted*? Although the point decided in *Sharp v. Sharp* was as stated above, yet from the language of the judges it appears, that, had only one trustee disclaimed, the other might have exercised the [\*572] power; and such it is presumed is clearly the \*rule when there is nothing to narrow the meaning of the words "refusing or declining." There generally follows in the power a direction that the estate "vested in the trustee so refusing or declining" shall be transferred to the new trustee; and hence it has been argued, that as no estate vests in a disclaiming trustee, the power did not contemplate such a case. However, there seems to be but little weight in the argument; for when it is said that the words "if any trustee shall refuse or decline" apply to disclaimer, it is not meant that they do not also apply to a subsequent refusal. At all events, therefore, the direction for the transfer of the estate is not nugatory.(p)

It has sometimes been doubted whether the words "refusing" or "declining" do not refer exclusively to disclaimer, and have no application to the case of a trustee refusing after having accepted the trust to act any longer in it. This proposition is also untenable, as it excludes the application of the power to the very case which was mainly contemplated.(pp)

In a late case a testator appointed three trustees with the usual power of appointment of new trustees, and two trustees having died in the testator's lifetime, the late vice-chancellor of England adverting to the question whether the surviving trustee could appoint new trustees, observed that "it was very questionable at the least whether the survivor could appoint, for it seemed to be clear that the case which the testator contemplated was that of a vacancy in the trusteeship occasioned by death, refusing to act, &c., which was capable of being supplied by a continuing or acting trustee which was not the case that had happened,(q) and his honour in a subsequent case decided to that effect;(r) but this was a narrow construction of the power, and it has since been ruled that a trustee who has survived the testator may appoint new trustees in the place of those who pre-deceased the testator.(s)

(p) See *In re Roche*, 1 Conn. & Laws. 306; *Walsh v. Gladstone*, 14 Sim. 2; *Mitchell v. Nixon*, 1 Ir. Eq. Rep. 155; *Crook v. Ingoldsby*, 2 Ir. Eq. Rep. 375.

(pp) See *Re Armstrong's Settlement*, 5 Weekly Rep. 448, and *Re Woodgate's Settlement*, *ib.*, in reference to the question there adverted to.

(q) *Walsh v. Gladstone*, 14 Sim. 2.

(r) *Winter v. Rudge*, 15 Sim. 596.

(s) *Re Hadley*, 5 De Cex & Sm. 67; and see *Noble v. Meymott*, 14 Beav. 477.

\*In *Morris v. Preston* <sup>(t)</sup> the proviso was, that "in case of the death of any or either of the two trustees during the lives of the husband and wife or the life of the survivor, the husband and wife or the survivor should, *with the consent of the surviving co-trustee or co-trustees*, nominate and appoint a new trustee or trustees, and that upon such nomination or appointment the *surviving co-trustee* should convey and assign the trust estates in such manner as that the *surviving trustee and trustees*, and such person or persons so to be nominated and appointed, should be jointly interested in the said trusts in the same manner as such *surviving trustee* and the person so dying would have been in case he were living." Both the trustees died, and the wife, who survived her husband, executed an appointment of two new trustees in the place of the deceased trustees. A purchaser took the objection, that, as the proviso clearly contemplated the case of *one* trustee surviving, an appointment of new trustees after the decease of *both* the original trustees was not warranted by the power. The purchaser abandoned the objection at the hearing without argument—a circumstance much to be regretted, as a judgment from Lord Eldon would have thrown great light upon the subject. However, the case as it stands, has been said by the lord chancellor of Ireland to be of great authority, viz., in favour of the validity of the appointment. <sup>(u)</sup>

In another case, where two trustees had been appointed by the settlement, and the power was, that "if either of the trustees should die, or reside beyond seas, or become incapable or *unfit to act* in the trusts, it should be lawful for the tenants for life, *together with the surviving or continuing or acting trustee for the time being*, to nominate a new trustee, and that the trust estate should thereupon be vested in the newly appointed trustee, jointly with the surviving or continuing trustee," upon the trusts of the settlement; and one trustee died and the other became bankrupt; on the suggestion by counsel that there was no surviving or continuing trustee, and therefore the power was gone, the lord chancellor of Ireland observed, "That happens in many cases without the power being \*affected. The construction is not so straitlaced as all that." <sup>(v)</sup> [\*574]

It was ruled in the same case, that a trustee who became bankrupt was "unfit" within the words of the power. But if the power be worded "in case the trustee shall become *incapable to act*," without the addition of the words "or unfit," a bankrupt trustee is not within the description, for by "incapable" is meant personal incapacity and not pecuniary embarrassment. <sup>(w)</sup> If a power of appointing new trustees be given to a surviving trustee, and he goes abroad for permanent residence, he may be removed from the office as not in a situation to discharge the duties properly, but if not removed he may execute the power of appointing a new trustee, though, of course, he must do so in this as in every other case, with impartiality as regards the interests of the *cestuis que trust*. <sup>(x)</sup>

(t) 7 Ves. 547.

(u) In re Roche, 1 Conn. & Laws. 308.

(v) In re Roche, 1 Conn. & Laws. 306; 2 Drur. & War. 287.

(w) Re Watts's Settlement, 9 Hare, 106; Turner v. Maule, 15 Jur. 761.

(x) O'Reilly v. Alderson, 8 Hare, 101.



The court held in one case that a trustee who went to reside permanently abroad, came within the description of a trustee "*incapable to act*,"(y) but this seems scarcely in harmony with correct principle, residence abroad being rather a question of unfitness than incapacity, and it cannot be reconciled with another decision.(z)

If there be two trustees of a settlement, and both be anxious to retire from the trust at one and the same time, they would not be justified in putting the property under the control of a single trustee appointed in their joint places.(a)

And, *vice versa*, a single trustee should he wish to retire, cannot, unless expressly authorized by the power, appoint more than a single trustee in his place; for though, in the substitution of more trustees than one, he would be chargeable rather with too much than too little caution, yet, he ought not to clog the estate with any unnecessary machinery. The idea of the settlor may have been, that by increasing the number of the trustees the vigilance of each, individually, would be diminished. [\*575] "A great number," observed Lord \*Mansfield, in a case where justices had appointed five overseers instead of four, "may not do business better than a smaller, and it would be attended with more expense."(b)

In a late case, a testator appointed two trustees, and directed "that if the trustees thereby appointed or to be appointed, as thereafter mentioned, should die, &c., it should be lawful for the surviving or continuing trustee or trustees for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, &c., and thereupon the trust estates should be vested in the new trustee or trustees, jointly with the surviving or continuing trustee or trustees, or solely, as occasion should require." The surviving trustee appointed two trustees in the room of the deceased trustee, and the vice-chancellor expressed his opinion that such a case was immediately contemplated by the proviso.(c)

In another case, where the proviso was in the common form, and on the death of all three trustees, the donee of the power appointed four new trustees, the court held that such appointment could not be supported. One of the four trustees so appointed declined to act, but this circumstance did not vary the legal question.(d)

Where however the court itself is appointing new trustees it does not at the present day, though doubts appear to have been formerly felt on the point,(e) consider itself bound to fill up only the precise number mentioned in the instrument of trust. It has appointed three trustees where the testator originally appointed two only,(f) two where the

(y) *Mennard v. Welford*, 1 Sm. & Gif. 426.

(z) *Withington v. Withington*, 16 Sim. 104.

(a) *Hulme v. Hulme*, 2 M. & K. 682.

(b) *Rex v. Lexdale*, 1 Burr. 448.

(c) *D'Almaine v. Anderson*, V. C. Feb. 1, 1841, MS.

(d) *Ex parte Davis*, 2 Y. & C. Ch. Ca. 468; S. C. 3 Mont. D. & De G. 304.

(e) *Devey v. Peace*, Taml. 78.

(f) *Birch v. Cropper*, 2 De Gex & Sm. 255.

testator originally appointed one,(g) four where he originally appointed three.(h)

In another case, there were originally two trustees only, and the settlement declared that "in case the said A. B. and C. D. or any of them or any new trustee or trustees to be appointed under that provision, in their or either of their places should depart this life, &c., it should be lawful (in the event therein \*mentioned) for the acting trustee *or trustees for the time being*, or the last acting trustee or the [\*576] executors or administrators of the last acting trustee to nominate any person or *persons* to supply the place of the trustee *or trustees* respectively so dying, &c., and that immediately after such appointment the trust estate, &c., should be conveyed, assigned, and transferred, so and in such manner as the same might vest in such new trustee *or trustees jointly*, with the surviving or continuing trustee or trustees, or solely as the case might require, and in his, her or their executors, administrators, or assigns, upon the trusts thereinbefore mentioned, and that every new trustee should have and might exercise the same powers and privileges whatsoever as if he had been appointed a trustee by those presents, and as if his name had been inserted in those presents instead of the name of the trustee or trustees, in or to whose place such new trustee or trustees respectively should come or succeed;" and a power of reimbursement was given "to any one or more of the trustees," and also "to allow to his and their co-trustee *or co-trustees*," the expenses which he or they might incur; and the two trustees retired, and *three* trustees were appointed in their place, and Vice-Chancellor Knight Bruce observed, "Generally, it is true that there ought to be an adherence to the original number of trustees where new trustees are substituted. This is conformable to the presumed intention of the parties, where nothing to the contrary appears, though in the abstract it may be difficult to suggest much inconvenience from appointing three trustees to act in the place of two who are dead. If, however, the instrument is so worded as to authorize an appointment of three trustees to succeed two, of course such an intention appearing must have effect given to it," and his honor, considering that the instrument contained expressions which could not be interpreted consistently with the notion that two trustees only could be substituted, held the appointment to be valid.(i)

In general the new trustees should be persons amenable to the jurisdiction of the court, but where the personal property of a lady was settled on her marriage with a foreigner, whose \*domicile was in America at the time of the marriage, the subsequent appointment [\*577] of three Americans to be trustees was decided to be justifiable.(k) But though the parties who have a power of appointment may exercise it in this way, the court in substituting trustees by its own jurisdiction has refused to appoint new trustees who are out of the jurisdiction.(l)

Should one of two trustees be desirous of retiring, of course he cannot do so without the substitution of another in his place.(m) and the power

(g) *Plenty v. West*, 16 Beav. 356.

(h) *Ib.*

(i) *Meinertzhagen v. Davis*, 1 Coll. 335.

(k) *Ib.*

(l) *Guibert's Trust*, 16 Jur. 852.

(m) *Adams v. Paynter*, 1 Coll. 532.

of appointment of new trustees would not authorize the appointment of the continuing trustee as *sole* administrator of the trust;(n) for this would, in effect, amount to a relinquishment of the trust without the appointment of any successor.(o)

A surviving trustee cannot be advised, (though it has been sometimes done,) to vest the trust estate in himself, and a new trustee appointed in the place of *one of several deceased trustees*, but should refuse to part with the property unless the original number of trustees be restored. Still less could the representative of the last surviving trustee be advised to vest the property in a single new trustee nominated in the place of one only of the deceased trustees. And where a settlement appoints three trustees for sale, with a power of appointment of new trustees in the usual form, and two die, and the survivor retires in favour of a single new trustee appointed in his place, it is conceived that as the original settlement constituted three trustees to execute the trust, the donee of the power ought not to have executed the power partially, but to have restored the original number, and in such a case a purchaser would object to the title on a sale by the new trustee.(p) The strongest ground for supporting the sale would be, that probably many titles depend on the validity of such an execution of the power, and in a similar case where forty-three years had elapsed since the exercise of the power, the appointment was supported.(q)

[\*578] \*If A. and B. be trustees, and A. dies, and then B. retires and appoints C. a trustee in his *own* place, and afterwards the donee of the power for the time being appoints C. and D. in the place of A. and B. the two new trustees are properly appointed and can sign receipts; for either the original appointment of C. was good, and the subsequent appointment of D. filled up the number, or the original appointment of C. was invalid, and then the appointment of both C. and D. by the donee of the power was effectual.(r)

It sometimes happens where the power of appointment of new trustees is limited to the "*surviving or continuing trustee*," that one trustee *dies*, and then the other wishing to retire proposes to appoint two new trustees at the same time in the place of himself and the deceased trustee. But the practice of the profession is understood to be not to consider such an appointment valid within the words of the power. The *surviving* trustee ought first to appoint a person in the room of the deceased trustee, and then the person so substituted may, as the *continuing* trustee, appoint a new trustee in the place of the trustee desirous of retiring.

So if there be two trustees, and a power of appointing new trustees be given to "*the surviving or continuing trustees or trustee*," they cannot both *retire* at the same time, but there must be two separate appointments.(s)

(n) *Wilkinson v. Parry*, 4 Russ. 272.

(o) *Attorney-General v. Pearson*, 3 Mer. 412, per Lord Eldon.

(p) See *Earl of Lonsdale v. Beckett*, 4 De Gex & Sm. 73.

(q) *Re Pool Bathurst's Estate*, 2 Sm. & Gif. 169; and see *In re Fagg's Trust*, 19 L. J. 175; *Nicholson v. Smith*, 3 Jur. N. S. 313.

(r) *Miller v. Priddon*, 1 De Gex, Mac. & Gor. 335.

(s) *Stones v. Rowton*, 17 Beav. 303; *Nicholson v. Smith*, 26 L. J. N. S. (Ch.) 312; 3 Jur. N. S. 313.



But where four trustees were appointed originally, and the power was to the surviving or continuing or *other* trustee to appoint, it was held that the survivor of the four trustees who desired himself to be discharged, could, by force of the words "other trustee" appoint four new trustees in the place of himself and the three others.<sup>(t)</sup>

Where persons are nominated as trustees in a will, and a power of appointing new trustees is given to the "acting" trustees, should all the trustees disclaim, the power of appointment is gone, and the *hiatus* in the trust can only be filled up by the court. It has, occasionally, been suggested that the trustees, instead of disclaiming, should accept the trust to the \*extent of exercising the power only, and should, [\*579] by virtue of it, appoint new trustees; but it is conceived that trustees who availed themselves of the office for the purpose only of introducing other parties into the trust would be rather "refusing" than "acting" trustees, and the exercise of the power, under such circumstances, would be fraudulent and nugatory, and might involve the outgoing trustees in serious liabilities.

On a change of trustees it is not uncommonly proposed to appoint one of the *cestuis que trust* to that office, but such an arrangement is evidently irregular, as each *cestui que trust* has a right to insist that the administration of the property should be confided to the care of some third person whose interest would not tend to bias him from the line of his duty. Should a bill be filed for the removal of the *cestui que trust*, and the substitution of some indifferent person as trustee, the costs would probably be thrown upon the parties who had improperly filled up the trust.<sup>(u)</sup> But it is presumed that this rule affects the parties to the trust only, and that if a *cestui que trust* who has been appointed trustee sell real estate under a power of sale, he may sign a receipt, and that the purchaser is not bound to look to the proper exercise of the discretion in such a case. *Cestuis que trust* are not absolutely *incapacitated* from being trustees, as the court under special circumstances appoints a *cestui que trust* a trustee.<sup>(v)</sup> The question is merely one of relative fitness. *A fortiori*, the circumstance of near relationship to the *cestui que trust* creates no absolute disqualification for the office of trustee, though the present master of the rolls objects to appoint relatives to be trustees.<sup>(w)</sup>

Where estates of a different description, or held under a different title, or limited upon different trusts, have been vested in the same trustees by the settlor, and there is a single power of appointment of new trustees in the usual form, it is conceived there is no authority for afterwards dividing the trust by the appointment of one set of new trustees to execute the trusts of \*the one estate, and a distinct set of new trustees to [\*580] execute the trusts of the other.<sup>(x)</sup>

The proviso is sometimes of such a directory character as to authorize the appointment of new trustees upon one event, without the intention of confining the exercise of the power to the occurrence of that event exclu-

(t) Lord Camoys v. Best, 19 Beav. 414.

(u) See *Passingham v. Sherborne*, 9 Beav. 424.

(v) *Ex parte Clutton*, 17 Jur. 988.

(w) *Wilding v. Bolder*, 21 Beav. 222.

(x) See *Cole v. Wade*, 16 Ves. 27; *In re Anderson*, 1 Lloyd & Goold. 27.

sively. Thus, where six trustees were empowered, *when reduced to three*, to fill up the number, and all died but one, it was held competent to the survivor to execute the appointment.(y) So, where the original number of trustees was twenty-five, and they were directed, *when reduced to fifteen*, to proceed to nominate others, it was determined that, when seventeen remained, the survivors *might* elect, but when reduced to only fifteen they were *compellable* to elect.(z) It should be observed that these were cases of charitable trusts, in which a degree of latitude is allowed.

If a tenant for life has a power of appointing new trustees and sells his life interest, it seems the power is gone, for it is unreasonable that he should nominate a trustee to the prejudice of the person to whom he has aliened the beneficial interest. If he has only *mortgaged* his life interest he may not be able to appoint a trustee behind the back of the mortgagee, but there can be no objection to such an exercise of the power, if it be done with the consent of the mortgagee.

Advantage cannot be taken of the power for the purposes of fraud; and therefore if a trustee refuse, when solicited to commit a breach of duty himself, but declare his willingness to resign in favour of some other person less scrupulous, the court, acting upon the principle of *qui facit per alium facit per se*, would hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted.(a) And upon principle it would seem that a bond of indemnity given to the retiring trustee would be a very doubtful security against the consequences of the act; [\*581] for the bond itself if found \*to have been infected with fraud could afford no just ground of action.(b) However, in a recent case, it was held by the Court of Exchequer that the common law courts have no such cognisance of breaches of trust as to treat a bond of indemnity against an act amounting in equity to a breach of trust as necessarily containing anything *illegal*.(c)

If a new trustee be irregularly appointed, the old trustees may exercise the powers given to them by the instrument of trust, notwithstanding the mere ineffectual attempt.(d) But if a trustee retire upon the appointment of a new trustee, and from want of the proper formalities being observed the appointment be not legal, the old trustee cannot lie by for a long interval and then exercise a power by mere concurrence in a deed, without having *bona fide* exercised his own judgment and discretion. In *Lancashire v. Lancashire*(e) A. and B. were trustees of a will, and in 1831, A. professed to appoint C. in the place of B., but the appointment was invalid. In 1842, a deed of settlement was prepared, by which, after reciting a doubt whether B. had been discharged, and that in order to

(y) *Attorney-General v. Floyer*, 2 Vern. 748; and see *Attorney-General v. Bishop of Lichfield*, 5 Ves. 825; but see *Foley v. Wontner*, 2 Jac. & Walk. 245.

(z) *Doe v. Roe*, 1 Anst. 86.

(a) *Norton v. Pritchard*, Reg. Lib. B. 1844, 771; *Sugden v. Crossland*, 3 Sm. & Gif. 192.

(b) See *Shep. Touch.* 132, 371.

(c) *Warwick v. Richardson*, 10 Mees. & Wels. 284.

(d) *Warburton v. Sandys*, 14 Sim. 622; *Miller v. Priddon*, 1 De Gex, Mac. & Gor. 335.

(e) 2 Phill. 657; 1 De G. & Sm. 288.

obviate such doubt, B. had concurred in the propriety of the settlement; A., B., and C., in pursuance of a power contained in the will, conveyed the trust estate upon certain trusts within the purview of the power. B., who since 1831 had taken no part in the trust, at first refused to execute the deed, but afterwards complied upon an indemnity. Lord Cottenham held that the concurrence of B. in the deed was not, under the circumstances, an execution of the power, for B. had withdrawn from the trust in fact, and C. had not been duly substituted; and that the mere formal execution of a deed by B. with an indemnity, was not such an exercise of discretion as the will had contemplated. We may observe, that if B., on ascertaining that the substitution of C. was nugatory, had actively resumed his duties, and *bona fide* exercised the power, his lordship's decision would no doubt have been different.

If the administration of the trust be in the hands of the \*court, the donee of the power cannot exercise it without having first [\*582] obtained the court's approbation of the person proposed.(f) However, if the old trustees do appoint without the leave of the court, the act is not to be considered as altogether void in itself, but it puts the burden upon them of proving, and that by the strictest evidence, that what was done was perfectly right; and also saddles them with the costs of that proof. If the act was not proper, of course the appointment cannot stand.(g)

On the appointment of a new trustee under a power, the costs fall properly on the corpus of the trust estate, for the benefit enures not only to the tenant for life, but to all the *cestuis que trust*. This rule may be deduced from the practice of the court, for on the appointment of new trustees by the court, the costs are always thrown upon the estate. Where there is no available fund the costs are often paid by the tenant for life.

III. The trustee may, as a general rule, although the contrary appears to have been at one time supposed,(h) get himself discharged from the office by the substitution of a new trustee in his place on application to the court. A power of appointment of new trustees is very frequently omitted in settlements, and were there no means by which a trustee could ever denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task.

Where no new trustee can be found willing to act, the trustee's right to be discharged must depend upon the circumstances of the case. "It is a mistake," observed Lord St. Leonards, "to suppose that a trustee who is *entitled to be discharged* is bound to show to the court that another person is ready to accept the office; the court will at once refer it to the \*master to appoint a new trustee. But if no one can be [\*583]

(f) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Attorney-General v. Clack*, 1 Beav. 467; *Peatfield v. Benn*, 17 Beav. 522; *Middleton v. Reay*, 7 Hare, 106; *Kennedy v. Turnley*, 6 Ir. Eq. Rep. 399; *Palmer's Settlement*, cor. Vice-Chancellor Kindersley, April 18, 1857, costs of appointing new trustees ordered to be paid out of the corpus.

(g) *Attorney-General v. Clack*, 1 Beav. 473, per Lord Langdale; and see *Cafe v. Bent*, 3 Hare, 249.

(h) *Hamilton v. Fry*, 2 Moll. 458.



found who will accept the trust, the court may find itself obliged to keep the old trustee before the court, but will take care to protect him in the meantime.”(i) This was said in a case where the trustee, from the conduct of the *cestui que trust*, could claim to be discharged, but if a trustee wish to retire from mere caprice, it is not clear that the court can or will discharge him, unless another trustee can be found in his place.(k) It is certain that the court cannot divest him of the estate before some one can be found to take it, and even as to the office it is not unreasonable, that if a man once engages to undertake it, he shall not afterwards retire from it without any reason, and so leave the estate without a trustee. But every trustee may, of course, escape from the liabilities of the office by submitting the administration of the trusts to the jurisdiction of the court.(l)

The application to the court to be discharged from the trust should in general be made by bill or claim, in order to give the court an opportunity of examining into the merits of the case;(m) but if a suit be already pending, the trustee may then solicit his dismissal by petition or motion.(n) It was formerly not the custom of the court to look through the proceedings, but a reference was ordered to the master.(o) Under the present practice the court, except in cases of special difficulty, usually appoints a trustee without a reference to chambers.

The costs where the trustee retires from caprice or without sufficient reason must be borne by himself;(p) but where he retires from necessity, or on good and sufficient ground, they will be thrown upon the trust estate.(q)

\*“If,” said Lord Langdale, “a trustee undertakes the performance of a trust, he is not entitled, as against the estate he has undertaken to protect, to exercise a mere caprice, and without any assignable reason say that he will no longer continue a trustee. On the other hand, if the trustee finds the trust-estate involved in intricate and complicated questions, which were not and could not have been in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the court to be relieved; and the court will judge whether the circumstances were such as to make it fair for him to decline acting longer upon his own responsibility;”(r) and to the same effect, the present master of the rolls observed, “It is quite clear that any circumstances arising in the administration of the trust, which have altered the nature of his duties, justify

(i) *Courtenay v. Courtenay*, 3 Jones & Lat. 533, per Lord St. Leonards; and see *Forshaw v. Higginson*, 20 Beav. 487.

(k) *Ardill v. Savage*, 1 Ir. Eq. Rep. 79.

(l) See *Forshaw v. Higginson*, 20 Beav. 485.

(m) See *Ex parte Anderson*, 5 Ves. 243; *In re Fitzgerald, Lloyd & Gould*, 22; *In re Anderson*, Id. 29.

(n) — *v. Osborne*, 6 Ves. 455; — *v. Roberts*, 1 J. & W. 251.

(o) — *v. Osborne*, *ubi supra*.

(p) *Howard v. Rhodes*, 1 Keen, 581; *Porter v. Watts*, 16 Jur. 757; *Hamilton v. Fry*, 2 Moll. 458.

(q) *Greenwood v. Wakeford*, 1 Beav. 581; *Forshaw v. Higginson*, 20 Beav. 486; *Courtenay v. Courtenay*, 3 Jones & Lat. 529; *Gardiner v. Downes*, 22 Beav. 395.

(r) *Greenwood v. Wakeford*, 1 Beav. 581.

a trustee in leaving it, and entitle him to receive his costs; but the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually.”<sup>(s)</sup>

A distinction was taken by Lord Langdale between the case where the same person who accepted the trust comes to be relieved from it, in whom it would be caprice to relinquish the trust without any sufficient reason, and the case where, on that person's death, the trust devolves on his representative by operation of law, and that representative applies to the court.<sup>(t)</sup>

In a case, where the settlement contained a power of appointment of new trustees, and the tenant for life having incumbered his life-estate with annuities and other charges, the original trustees were desirous of relieving themselves from the difficulties of their situation by retiring from the trust, and the tenant for life who was the donee of the power could not find any person to undertake the trust, the costs of the suit which the trustees had instituted for their discharge were thrown exclusively upon the fund of the *tenant for life*.<sup>(u)</sup>

## \*CHAPTER XXII.

[\*585]

IN WHAT THE ESTATE OF THE CESTUI QUE TRUST PRIMARILY CONSISTS.

HAVING concluded the subject of the estate and office of the trustee, it follows next that we investigate the nature and properties of the estate of the *cestui que trust*; and in the present chapter we shall inquire in what the estate of the *cestui que trust* primarily consists, 1. In the simple trust; and 2. In the special trust.

### SECTION I.

OF THE CESTUI'S QUE TRUST ESTATE IN THE SIMPLE TRUST.

In the *simple* trust the equitable ownership is compounded of the pernancy of the profits and the disposition of the estate—the *jus habendi* and *jus disponendi*.<sup>(v)</sup>

1. The equitable owner is entitled to the pernancy of the profits.

Thus in a trust of lands the *cestui que trust* may compel the trustee to put him in possession of the estate;<sup>(w)</sup> and if the *cestui que trust* be ejected from the possession by the trustee, the *cestui que trust* may

<sup>(s)</sup> Forshaw v. Higginson, 20 Beav. 486.

<sup>(t)</sup> 1 Beav. 582; and see Aldridge v. Westbrooke, 4 Beav. 212.

<sup>(u)</sup> Coventry v. Coventry, 1 Keen, 758.

<sup>(v)</sup> Smith v. Wheeler, 1 Mod. 17, per Pemberton J.

<sup>(w)</sup> Brown v. How, Barn. 354; Attorney-General v. Lord Gore, Id. 150. per Lord Hardwicke.

compel the trustee to account not only for the rents actually received, but for the amount reserved, and which but for accidental deficiencies ought to have been paid.(x) At the same time it must be borne in mind that the possession of the *cestui que trust* is regarded at law as the [\*586] \*possession of the trustee, to whom he is tenant at will, and in whom the legal seisin still continues.(y) But the tenancy of the *cestui que trust* is not determined until the trustee has demanded possession.(z)

The rule which gives the *cestui que trust* the possession is only applicable to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions.

Thus, in *Blake v. Bunbury*,(a) a testator devised all his real estate to trustees in fee, upon trust to convey the same for a term of 500 years (the trusts of which were to raise certain annuities and sums in gross,) and subject thereto to the use of A. for life with remainders over. A. filed a bill, praying to be let into possession. At the hearing of the cause a general account was directed of the testator's estates and of the charges upon them, and the plaintiff further desired that he might be let into immediate possession; but Lord Thurlow said, "It is impossible for me to let him into possession till I have the accounts before me, and even till the trusts are executed, unless, as he now offers, he pays into court a sum sufficient to answer all the purposes of the trust. The court, perhaps, has let tenant for life into possession, where it has seen that the best way of performing the trusts would be by letting him into possession, as where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year; but till the account is taken I do not know but the purposes of the trust may take up the whole and if I was to do it now, perhaps I should only have to resume the estate." The accounts were afterwards taken, and the plaintiff was let into possession on giving security to the amount of 10,000*l.* to abide the order of the court as to the annuities and other incumbrances.(b)

[\*587] \*In the case of *Tidd v. Lister* (c) a testator devised and bequeathed all his real and personal estate to trustees upon trust to pay his funeral expenses and debts, to keep the buildings upon the estate insured against fire, to satisfy the premiums upon two policies of insurance on the lives of his two sons, to allow his said sons an annuity of sixty guineas each, and subject thereto upon trust for his daughter for life, with remainders over; and the personal estate having sufficed to discharge the funeral expenses, debts, and annuities, the daughter, who was then a *feme covert*, filed a bill praying to be let into possession upon

(x) *Kaye v. Powel*, 1 Ves. Jun. 408.

(y) *Parker v. Carter*, 4 Hare, 400; *Garrard v. Tuck*, 8 Com. Bench Re. 231; *Melling v. Leak*, 1 Jur. N. S. 759.

(z) *Doe v. Phillips*, 10 Q. B. Rep. 130.

(a) 1 Ves. jun. 194. See the case more fully stated, *Ib.* 514, 4 B. C. C. 21.

(b) S. C. 4 B. C. C. 28.

(c) 5 Mad. 429.



securing the amount of the premiums of the policies : but Sir J. Leach said, "It is perfectly plain from the continuing nature of this trust, that the testator intended the actual possession of the trust property should remain with the trustees ; and it did appear to me a singular proposition, that if a testator, who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, it should be a principle in a court of equity to disappoint that intention. and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own interest to the fair right of those who are to take in remainder. Independently of the purpose of management of the property, a testator may be considered in the case of a female *cestui que trust* for life as having a further view to her personal protection in the case of her marriage. There may be cases in which it may be plain from the *expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees. There may be cases in which it may be plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which this court would deliver the possession of the property to the *cestui que trust* for life although the testator's \*intention appeared to be that it should remain with the trustees ; as, [\*588] where the personal occupation of the trust property was beneficial to the *cestui que trust*, there the court, by taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator." And his honor refused the application.

In *Jenkins v. Milford*(d) A. granted certain annuities to B. with powers of distress and entry, and demised an estate for 200 years to C. upon trust, to permit A. to receive the rents until the annuities should be in arrear forty days, and, when in arrear for that period, out of the rents, issues, and profits, or by demising, assigning, or otherwise disposing of the term, or by bringing actions against the tenants, or by such other means as should seem meet, to raise the arrears of the annuities, and to pay the surplus, if any, to the grantor. The annuities fell in arrear, and the trustee gave notice to the tenants to pay the rents to himself, and appointed a receiver, to whom the rents were afterwards paid. A. discharged the arrears of the annuities, and then applied to the trustee to deliver up the possession, which was refused. The point was submitted to the judgment of the court, and Lord Eldon said, "If you look to the powers of *distress and entry*, you will not find in either of them that any thing is said respecting the grantor's being permitted to *receive the rents*, or what is to be done with the surplus. The first trust of the *term* is to permit the grantor to *receive the rents*, but that is different from a trust allowing him to continue in *possession*. Under this

(d) 1 J. & W. 629.

deed, though the trustee has the legal estate, he has no right to the use of it, until default has been made in payment of the annuities for forty days; but then he becomes a trustee both for the grantor and the grantee—for the latter to raise the arrears, and, to do that, he is entitled to take the rents. If he takes more rents than are sufficient to satisfy the arrears, he is bound to pay the surplus to the grantor; if he receives enough for that purpose, he is bound to permit and suffer the grantor of the annuities to receive the remainder; and it is a very different thing [\*589] for \*the grantor to have that species of possession, and one which cannot be disturbed without another ejectment being brought. In this case, therefore, I must either appoint a receiver, or compel the trustee so to authorize the grantor to receive the rents and profits, that he shall have the full benefit of them, short of obliging the trustee to bring an ejectment to remove him. An undertaking on the part of the grantor to deliver up possession when the annuities are in arrear for forty days is not sufficient, for the court may not be able to carry that into execution; as, for instance, in the case of the grantor's going out of the jurisdiction. If the grantor is made to receive the rents *in the name of the trustee*, it will not signify what becomes of the grantor, as the trustee may in that case receive them as well as he." And on a subsequent day his lordship observed, "The grantor must receive the rents so as to preserve the possession of the trustee under the term. The rents must be received by him as the agent of the trustee, and the receipts must be given in his name." And the order was that the trustee should permit the grantor to receive the rents until the further order of the court; but such rents were to be received by the grantor in the name of the trustee, and the receipts for the same were to be given accordingly; and the grantor was to be at liberty to use the name of the trustee in making and supporting distresses for rent, the grantor indemnifying the trustee from all costs and damages.

In *Baylies v. Baylies*<sup>(e)</sup> the testator devised his freehold, copyhold, and leasehold estates to two trustees, upon trust, to let and set the same, and receive the rents, issues, and profits thereof, and thereout to pay the expenses of renewals and repairs, and other outgoings; and subject thereto, to pay the rents, issues, and profits to the testator's widow, for her life, for her sole and separate use, without power of anticipation. The trustees had improperly made an agreement for a lease, and the widow filed a bill to have the lease set aside, and that the plaintiff might be admitted tenant upon giving security for repairs and renewals, &c., [\*590] and for a receiver. The lease \*was set aside, and the court considered that the plaintiff, upon giving security for the due performance of the objects of the will, ought not to be disturbed in the possession, and for that purpose it was referred to the master to appoint a receiver without salary, and if the master should approve of a person proposed by the plaintiff, such person was to be appointed in preference, and possession delivered to him, and the plaintiff was to give security for the payment of the costs of renewals, repairs, and other outgoings,

(e) 1 Coll. 537: and see *Denton v. Denton*, 7 Beav. 388; *Pugh v. Vaughan*, 12 Beav. 517.

until her death, or further order; and the receiver was to give the plaintiff the option of being tenant, reserving to the receiver a power of inspecting the estate and condition of the property.

In another case, a feme covert was entitled to her *separate use* for her life, and it was not thought incompatible with the nature of such an estate that she should be put in possession, though the claim was opposed by the trustees.<sup>(f)</sup>

The *cestui's que trust* right to the possession is recognised, we must remember, in a court of *equity* only; for in a court of *law* the *cestui que trust* is merely tenant at will.<sup>(g)</sup> The doctrines advanced by Lord Mansfield in the last century have been long since overruled. It was maintained in his day, that a *cestui que trust*, a plaintiff in ejectment, could not be nonsuited by a term outstanding in his trustee;<sup>(h)</sup> and that a trustee, a plaintiff in ejectment, could not recover against his own *cestui que trust*.<sup>(i)</sup> It was even decided, that, where a term had been created for securing an annuity, and subject thereto upon trust to attend the inheritance, the tenant of the freehold was entitled to recover the possession (provided he claimed subject to the charge,) notwithstanding the legal term was outstanding in a trustee upon trusts that were still unsatisfied.<sup>(k)</sup> Such at least were the doctrines in cases of *clear trusts*: for where the equity was at all *doubtful*, the rights \*of the parties were even then referred to the proper tribunal.<sup>(l)</sup> [\*591]

"Lord Mansfield," as was observed on one occasion by Lord Redesdale, "had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known, and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice."<sup>(m)</sup>

The law has accordingly since retired into its regular channel, and at the present day we may regard it as established:—First, that a *cestui que trust* cannot recover in ejectment,<sup>(n)</sup> unless a surrender to him of the legal estate can be reasonably presumed,<sup>(o)</sup> (which of course cannot be where the circumstance of the outstanding legal estate appears on the

(f) *Horner v. Wheelwright*, 2 Jur. N. S. 367.

(g) *Garrard v. Tuck*, 8 Com. B. Re. 231; *Melling v. Leak*, 1 Jur. N. S. 759; and see *Geary v. Bearcroft*, O. Bridge. 486-490; Bac. Us. 5; *Doe v. Jones*, 10 B. & Cr. 718; *Doe v. M'Kaeg*, 10 B. & Cr. 721.

(h) *Lade v. Halford*, B. N. P. 110. The doctrine is said to have originated with Mr. Justice Gundy.

(i) *Armstrong v. Peirse*, 3 Burr. 1901.

(k) *Bristow v. Pegge*, 1 T. R. 758, note (a); overruled by *Doe v. Staple*, 2 T. R. 684.

(l) *Doe v. Pott*, Doug. 695, per Lord Mansfield; *Goodright v. Wells*, Id. 747. *per eundem*.

(m) *Shannon v. Bradstreet*, 1 Sch. & Lef. 66.

(n) *Doe v. Staple*, *ubi supra*; see *Barnes v. Crow*, 4 B. C. C. 10 & 11; *Doe v. Sybourn*, 7 T. R. 3; *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Doe v. Wroot*, 5 East, 138.

(o) *Doe v. Sybourn*, 7 T. R. 2; see *Doe v. Staple*, 2 T. R. 696, *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Roe v. Reade*, 8 T. R. 122.



declaration or special case,)(*p*) and the *cestui que trust* has no alternative but to bring his action in the name of the trustee, who must be indemnified against the costs:(*q*) Secondly, that the trustee, as the tenant of the legal estate, may recover in ejectment from his own *cestui que trust*;(r) and the *cestui que trust* has no defence to the action at law, but must have recourse to an injunction in equity.(s)

The title deeds of an estate form no part of the usufructuary enjoyment; and therefore if an estate be vested in trustees upon strict settlement; and the deeds be delivered into their \*possession, they [\*592] have a right to the custody of them for the benefit of all parties interested.(t) Should the *tenant for life* obtain them from the trustees, and thereby be enabled to deal with the estate as absolute owner, the trustees, if it appeared they had acted fraudulently, or under such gross negligence as amounted to constructive fraud, would be held personally responsible for the consequences.(u) In case the title deeds had come originally into the hands of the equitable tenant for life, it is conceived that the trustees, as the owners of the legal freehold, could recover them in an action of trover, and it is at least doubtful whether the tenant for life, if there were no special circumstances, could obtain an injunction to restrain it.(v)

Upon the principle that the *cestui que trust* is *foro conscientie* entitled to the pernaney of the profits, he has been invested by the express language of some statutes, and by the equitable construction of others, with the various privileges conferred by the legislature upon the legal tenants of real estate.

By the 6th Geo. 3, c. 50, s. 1, "Every man between the age of 21 and 60, residing in any county in England, who shall have in his own name or *in trust for him* within the same county 10*l.* by the year, above reprises, in real estate," &c., &c., is qualified to serve as a juror.

The election of a coroner is a right vested in the *freeholders* of the county; and upon principle the privilege of voting must, it is conceived, have belonged originally to the *legal* freeholder. However, by the 58th Geo. 3, c. 95, s. 2, it was enacted that no person should be allowed to have any vote for or by reason of any trust estate or mortgage unless such trustee or mortgagee should be in actual possession or receipt of the rents and profits, but that the *cestui que trust* or mortgagor in possession should vote for the same estate. It is somewhat singular that upon [\*593] the repeal of the 58 Geo. 3, c. 95, \*by the late Coroners Act,(w) the provision referred to was not re-enacted, and although it is

(*p*) Goodtitle v. Jones, 7 T. R. 43; see Doe v. Staple, 2 T. R. 696; Roe v. Reade, 8 T. R. 122.

(*q*) Annesley v. Simeon, 4 Mad. 390; and see Reade v. Sparkes, 1 Moll. 11; Jenkins v. Milford, 1 J. & W. 635; Ex parte Little, 3 Moll. 67.

(*r*) See Roe v. Reade, 8 T. R. 122, 123. (*s*) Shine v. Gough, 1 B. & B. 445.

(*t*) See Duncombe v. Mayer, 8 Ves. 320. (*u*) See Evans v. Bicknell, 6 Ves. 174.

(*v*) See Denton v. Denton, 7 Beav. 388. Where the estates are legal, the person in possession of the deeds, whether tenant for life or remainderman, may hold them. The rule is, who first takes, he keeps. Foster v. Crabb, 12 Com. Ben. Re. 136.

(*w*) 7 & 8 Vict. c. 92. Reference to this statute at p. 269, *supra*, has inadvertently been omitted.

laid down in a text book of high legal authority(*x*) that *there can be no doubt that at the common law an equitable estate of freehold confers the right of voting*, the position thus asserted is not only opposed to principle but to the express views of Lord Chancellor Northington,*(y)* and in the absence of any more recent statutory enactment the right of voting is, it is conceived, now vested in the trustee.

By the Game Act, 22 & 23 Car. 2, c. 25, s. 3, persons were disqualified from sporting unless they had *lands and tenements*, &c., &c., of the clear value of 100*l. per annum*; and it was decided that a *cestui que trust* of lands to that amount was within the intention of the act. Lord Mansfield observing, that “the privilege was given to *property*, and the *cestui que trust* was *substantially* the owner, and the trustee only *nominally*.”*(z)* By the provisions of the late Game Act no qualification is now necessary.*(a)*

By the 6th Vict. c. 18, s. 74, “no trustee of lands or tenements shall in any case have a right to vote in any such election (*i. e.*, for a member of parliament,) for or by reason of any trust estate therein, but the *cestui que trust* in actual possession, or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust.”*(b)*

Hitherto we have spoken of the *cestui's que trust* right to the profits and privileges proceeding from *lands*. In trusts of *chattels personal*, as where heirlooms are vested in a trustee upon trust for the persons successively entitled under the limitations of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and possession of the goods during the continuance of his interest; and upon the ground of this right the goods are not forfeited on the bankruptcy \*or [\*594] insolvency of the tenant for life, though left in the possession of the bankrupt or insolvent by permission of the legal owner, for they are left with him *according to the title*.*(c)*

Where the chattels are mere *household goods*, it seems the *cestui que trust* may use them in his own or in any other person's house, and either alone or promiscuously with other goods, or may let them out to hire;*(d)* but, where the chattels are *heirlooms annexed to a house*, and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire but together with the house itself.*(e)* Of course the use of the chattels by the tenant for life does not enable him to pawn them beyond the extent of his own interest.*(f)*

Where the trust fund consists of stock, the *cestui que trust* is usually put in possession of the dividends by a power of attorney from the trustee to the *cestui's que trust* bankers, with a written authority from the trustee to the bankers to credit the *cestui que trust* with the dividends as and when received, by which arrangement the trustee is spared the trouble of repeated personal attendances at the Bank of England, and the entries

(*x*) Jervis on Coroners, by Welsby, 2nd Ed. p. 24.

(*y*) Burgess v. Wheate, 1 Ed. 251.

(*z*) Wetherell v. Hall, Cald. 230.

(*b*) See the statutory changes on this subject traced, pp. 270, 271, supra.

(*c*) See supra, p. 277.

(*d*) Marshall v. Blew, 2 Atk. 217.

(*e*) Cadogan v. Kennet, Cowp. 432.

(*a*) 1 & 2 W. 4, c. 32.

(*f*) Hoare v. Parker, 2 T. R. 376.

in the books of the private bankers are sufficient evidence of the receipt. In cases where the *cestui que trust* is tenant for life, this course seems free from objection; but where his interest is one which may determine in his life-time some risk is incurred of the power of attorney and authority being acted upon by the bankers after the determination of the *cestui's que trust* estate; and it is conceived that the trustee would be liable to the other *cestuis que trust* for any misappropriation thus taking place, though after his own death. Of course the trustee will be careful to see that the power of attorney extends only to the receipt of the dividends, and not to the sale of the stock itself; otherwise, if the bankers sell out the stock and the proceeds be misapplied, the trustee will of course be answerable.(g)

[\*595] \*2. The *cestui que trust* has *jus disponendi*, that is, may call upon the trustees to execute conveyances of the estate as the *cestui que trust* directs.(h) If the trustee refuse to comply, and the *cestui que trust* file a bill to compel him, the trustee will be visited with the costs,(i) unless there was some reasonable ground for his refusal,(k) or he acted *bona fide* under the advice of counsel,(l) and the trustee will have to pay the costs, though the *cestui que trust*, instead of filing a bill, might have enforced a conveyance by the summary process of a *petition*.(m) But a trustee has a right to be satisfied by the fullest evidence that the party requiring the conveyance is the exclusive *cestui que trust*.(n) Of course a *cestui que trust* cannot call for the conveyance of a larger legal estate than he has equitable: thus a tenant in tail of the trust cannot call for a conveyance of the legal fee simple.(o) And Lord Eldon was of opinion that a *cestui que trust* could not require the trustee to divest himself from time to time of different parcels of the trust estate; for the trustee had a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper."(p) And a trustee, like a mortgagee, cannot be called upon to convey the estate by any other words or description than that by which the conveyance was made to himself.(q)

[\*596] \*In a conveyance by trustees the word "grant" used frequently to be omitted, as supposed, though erroneously,(r) to

(g) See *Sadler v. Lee*, 6 Beav. 324.

(h) *Payne v. Barker*, Sir O. Bridgm. Rep. 24.

(i) *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr. 197; *Thornby v. Yeats*, 1 Y. & C. Ch. Ca. 438; *Penfold v. Boucher*, 4 Hare, 271; and see *Campbell v. Horne*, 1 Y. & C. Ch. Ca. 664.

(k) *Goodson v. Ellisson*, 3 Russ. 583; *Poole v. Pass*, 1 Beav. 600.

(l) *Angier v. Stannard*, 3 M. & K. 566; and see *Devey v. Thornton*, 9 Hare, 232; *Field v. Donoughmore*, 1 Dru. & War. 234.

(m) *Watts v. Turner*, 1 R. & M. 634.

(n) *Holford v. Phipps*, 3 Beav. 434.

(o) *Saunders v. Neville*, 2 Vern. 428. But though this point may have been mooted in the case and ruled as reported, yet the question in the cause was a different one, viz., whether under the circumstances the plaintiff was entitled to call for a conveyance of the legal estate even to him, and "the heirs of his body." See note by Raithby, correcting the text from the Reg. Book.

(p) *Goodson v. Ellisson*, 3 Russ. 594; and see *Smith v. Snow*, 3 Mad. 10. But if the *cestuis que trust* of a fund as tenant for life and remainderman assign part of the fund for valuable consideration, it is conceived that the trustee cannot refuse to transfer that part to the assignee.

(q) *Goodson v. Ellisson*, ubi supra.

(r) Co. Litt. 384 a; the Yorkshire Registry Acts, however, 6 Anne, c. 35, and 8



contain a warranty; or the trustees were made "by way of conveyance, and not by way of warranty," to "grant;" or the conveyance was qualified by the insertion of the words "according to their estate and interest as such trustees." All doubt on the subject is now removed by the 4th section of the 8 & 9 Vict. c. 106, which enacts that the word "grant" shall not imply any covenant in law except so far as the same may, by force of any act of parliament, imply a covenant.

A trustee to bar dower is or is not called upon to join in a conveyance, according to the circumstances of the case. The rule is understood to be, that where a power of appointment is exercised besides the common law conveyance, his joining is dispensed with; but where, no power being exercised, the fee cannot be passed without his concurrence, he is made a party.<sup>(s)</sup>

In general there are no intermediate steps of the equitable interest, so that if A. be trustee for B., who is trustee for C., A. holds in trust for C., and must convey the estate as C. directs.<sup>(t)</sup> But if any special confidence or discretionary power be reposed in B., which imposes the necessity of his taking the legal estate, he may then call upon the original trustee to execute a transfer to himself.<sup>(u)</sup>

Where trustees hold a fund upon such trusts as a person by an instrument to be executed in a particular manner may appoint, they must be careful in transferring it to the appointees to see that all the formalities attending the power have been duly observed, for if the execution of it be not regular, the trustees, except in those cases where courts of equity aid a defective execution, will be personally liable for the fund to the parties claiming in default of the power.<sup>(v)</sup>

## \*SECTION II.

[\*597]

### OF THE CESTUI'S QUE TRUST ESTATE IN THE SPECIAL TRUST.

This may be said to be, The right to enforce in equity the specific execution of the settlor's intention to the extent of that *cestui's que trust* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere strictly and literally to the line of duty prescribed to them.<sup>(w)</sup>

If there be only one *cestui que trust*, or there be several *cestuis que*

G. 2, c. 6, give the force of covenants for title to the words "*grant, bargain, and sell.*"

<sup>(s)</sup> See 1 Sug. Pow. 245, *et seq.*

<sup>(t)</sup> Head v. Lord Teynham, 1 Cox, 57; and see — v. Walford, 4 Russ. 372.

<sup>(u)</sup> Wetherell v. Wilson, 1 Keen, 86; Cooper v. Thornton, 3 B. C. C. 96, 186; Woods v. Woods, 1 M. & C. 409; Angier v. Stannard, 3 M. & K. 571; Onslow v. Wallis, 16 Sim. 483, 1 Mac. & Gor. 506; — v. Walford, 4 Russ. 372; Pool v. Sharp, 1 Beav. 600.

<sup>(v)</sup> Hopkins v. Myall, 2 R. & M. 86; Cocker v. Quayle, 1 R. & M. 535; Reid v. Thompson, 2 Ir. Ch. Re. 26.

<sup>(w)</sup> See Deeth v. Hale, 2 Moll. 317.

*trust*, and all of *one mind* (in each case *sui juris*,) the specific execution may be stayed, and the *special* trust will then acquire the character of a *simple* trust; for whatever modifications of the estate the settlor may have contemplated, through whatever channel he may have originally intended his bounty to flow, the *cestuis que trust*, as the persons to be eventually benefited, are in equity, from the creation of the trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors. Thus if a fund be given to trustees upon trust to accumulate until A. attains *twenty-four*, and then to transfer the gross amount to him, A. on attaining *twenty-one* may, as the party exclusively interested, call for the immediate payment.(x) So if a legacy be bequeathed to trustees upon trust to purchase an annuity, the intended annuitant, if *sui juris*, may claim the legacy.(y) So if a fund be vested in trustees in trust for the personal support, clothing, and maintenance [\*598] of A., an adult, A. is exclusively entitled to the benefit \*of the fund, and if he take the benefit of the Insolvent Act it passes to his assignees in insolvency.(z)

In *Pearson v. Lane*,(a) before Sir W. Grant, a conveyance had been made to trustees upon trust to sell, and with the proceeds to purchase other lands to be settled on the daughters of W. J. as tenants in common in tail, with remainder to them in fee. The daughters levied a fine of the *lands to be sold* to the uses and upon the trusts of their respective marriage settlements. It was doubted whether the entail had been effectually barred; but Sir W. Grant said, "It is clear, if the estate had been sold, and another estate purchased, the daughters would have been tenants in tail, with immediate remainders to themselves in fee. It is true in the lands to be sold they had no interest, legal or equitable, *expressly* limited to them: but the equitable interest in those lands must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to ascertain *who* they are, a court of equity inquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it. Where money is given to be laid out in land, which is to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out: so, on the other hand, where land is given upon trust to sell, and pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct: if there are also other purposes for which it is to be sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes; and if he provides for them, he may keep the estate unsold. The daughters electing to keep this estate, they acquired the fee, and it was discharged of every trust to which it had been subject."

(x) *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; Cr. & Ph. 240; see *Curtis v. Lukin*, 5 Beav. 147; *Rocke v. Rocke*, 9 Beav. 66.

(y) *Dawson v. Hearn*, 1 R. & M. 606, and cases there cited.

(z) *Younghusband v. Gisborne*, 1 Coll. 400.

(a) 17 Ves. 101.

But until the *cestui que trust*, or the joint *cestui's que trust*, countermand the specific execution, the special trust will \*proceed; as [\*599] if lands be devised to trustees upon trust to sell, and pay the proceeds to A., the property will remain personal estate in A. until he discharge the character impressed upon it by electing to take it as land.(b)

As an incident to the beneficial enjoyment of his interest by the *cestui que trust*, he has a right to call upon the trustee for accurate information as to the state of the trust.(c) Thus in a trust for sale for payment of debts, the party entitled, subject to the trust, may say to the trustee, what estates have you sold? what is the amount of the moneys raised? what debts have been paid? &c.(d) It is therefore the bounden duty of the trustee to keep clear and distinct accounts of the property he administers, and he exposes himself to great risks by the omission.(e) It is the *first duty*, observed Sir T. Plumer, of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect they all stand in the same situation) to be *constantly ready with his accounts*.(f)

A legatee, who is a quasi *cestui que trust*, is entitled to have a satisfactory explanation of the state of the testator's assets, and an inspection of the accounts, but not to require a copy of the accounts at the expense of the estate.(g)

When it is said that each *cestui que trust* may compel the specific performance of the trust to the extent of his own interest, it is of course understood that the trust is of such a lawful description, that the court will not on grounds of public policy, refuse to recognise its existence.(h)

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## \*CHAPTER XXIII.

[\*600]

### PROPERTIES OF THE CESTUI'S QUE TRUST ESTATE.

WE shall next enter upon the properties of the *cestui's que trust* estate as affected by the acts of the *cestui que trust*, or by operation of law.

## SECTION I.

### OF ASSIGNMENT.

An equitable interest may be assigned, though it be a mere possi-

(b) See *Walter v. Maunde*, 19 Ves. 429.

(c) *Walker v. Symonds*, 3 Sw. 58, per Lord Eldon; *Newton v. Askew*, 11 Beav. 152; *Gray v. Haig*, 20 Beav. 219; *Burrows v. Walls*, 5 De Gex, M. & G. 253.

(d) *Clare v. Ormond*, Jac. 120, per Lord Eldon.

(e) *Freeman v. Fairlie*, 3 Mer. 43, per Lord Eldon.

(f) *Pearse v. Green*, 1 J. & W. 140; and see *Hardwick v. Vernon*, 14 Ves. 510; *White v. Lincoln*, 8 Ves. 363; *Turner v. Corney*, 5 Beav. 515.

(g) *Outley v. Gilby*, 8 Beav. 602.

(h) See *supra*, CH. VI.



bility,(a) and either with or without the intervention of the trustee;(b) and the assignee of the *cestui que trust* may call upon the trustee to convey to him, and on his refusal may file a bill to compel a conveyance without making the assignor a party.(c)

Before the Statute of Frauds,(d) the transfer might have been made by *parol*; but now, by the ninth section of that act, all grants and assignments of any trust or confidence are required to be in *writing, signed by the party granting or assigning the same*, or else are declared utterly void. But though a deed be not *absolutely necessary*, it is the practice, *ex majori cautela* to employ the same species of instrument, and adopt the same form of words, in the transfer of an equitable as in the conveyance of a legal estate.

\*The power of an equitable tenant *in tail* to dispose of the equi-  
[\*601] *table fee* has been differently modified at different periods, and some account of the fluctuation of the law in this respect may serve to illustrate the general principles upon which trusts have been administered.

At common law all inheritable estates were in fee simple, and it was the statute *de donis*(e) that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the *common law* only, a trust limited to A. and the heirs of his body, with remainder over, had been construed a fee simple conditional, and the remainder had been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they should be barred.

In *legal* entails the only modes of unfettering the estate were by fine or recovery. A fine was by statutory enactment conclusive on all *privies*, and therefore a *cestui que trust*, though he had not the freehold, could nevertheless have barred his issue, who were his privies in blood and estate. A recovery had no operation unless the tenant to the *præcipe* was seised of the legal freehold in possession, and as the *cestui que trust* had merely a *right*, and not a *freehold*, it followed he could not by recovery bar either his issue or the remaindermen. There were certainly some doubts upon the law in this particular; but such was the conclusion drawn from the conflicting cases by Lord Chief Baron Gilbert. "If *cestui que use*," he observes, "aliene by fine, that is good, and bars the entry of the feoffees(f) after his death by the statute 4 H. 7; but if he

(a) *Courthope v. Heyman*, Cart. 25; *Warmstrey v. Tanfield*, 1 Ch. Re. 29; *Goring v. Bickerstaff*, 1 Ch. Ca. 8; *Cornbury v. Middleton*, ib. 211, per Judges Wyld and Rainsford; *Burgess v. Wheate*, 1 Ed. 195, per Sir T. Clarke; 21 Vin. Ab. 516, pl. 1.

(b) *Philips v. Brydges*, 3 Ves. 127, per Lord Alvanley.

(c) *Goodson v. Ellison*, 3 Russ. 583.

(d) 29 Car. 2, c. 3. And by the 8th & 9th Vict. c. 106, s. 3, assignments of chattel interests in land other than copyhold are void *at law* unless made by deed.

(e) 13 E. 1, st. 1, c. 1.

(f) By 1 R. 3, c. 1, the *cestui que use* in possession, though for life only, had authority to pass the legal fee; but when his right to the possession had determined, the feoffees might re-enter, and hold to the uses in remainder.

aliene by recovery, it does *not* bind the issue, because he is not tenant to the *præcipe*.”(g)

The statute of H. 8, merged the *use* in the possession, and \*when the *trust* succeeded to the use, and “appeared in its like- [\*602]ness,” the effect of a fine and recovery was now to be settled by the court *ab integro*. It was agreed, as before, that a *fine*, concluding all *privies*, would defeat the claim of the issue;(h) but, the *cestui que trust* having no *seisin* of the freehold, it was long disputed what should be the operation of a *recovery*. Lord Clarendon, assisted by Sir Harbottle Grimston and Justice Windham, held, that the recovery of a *cestui que trust* should bar and transfer the trust, as it should an estate at law, *if it were upon consideration*, but otherwise Justice Windham doubted of it.(i) But this was merely a resolution, and the next year an opinion was expressed by Lord Keeper Bridgman, that a recovery should *not* bar.(k) The point afterwards came before the lord keeper a second time,(l) and it was admitted a *fine* would bar the issue, though not the remainder over, but whether anything would be barred by the *cestui's que trust recovery* the court doubted; for “if tenant in tail at law suffer a recovery, legal exceptions might be taken to it, but if a recovery might be suffered in equity, all those exceptions would be taken away.” It was contended in the same case, that if *cestui's que trust recovery* was not allowed to bar, there would result a perpetuity: but a perpetuity was defined to be “where, if all who had interest joined, they would not bar or pass the estate; but if by the concurrence of all having interest the estate might be barred, it was no perpetuity;” and as *cestui que trust* could certainly estop his issue by fine, it was plain that with the concurrence of the remainderman the estate was disposable in fee. At length, Lord Nottingham, the father of equity, decided that a recovery *should* bar the issue and all remainders over,(m) “it being,” he said, “a general rule, that any legal conveyance or assurance by a *cestui que trust* should have the same effect and operation upon the trust as it should have had upon the estate at law in case the trustees had executed their trust: otherwise trustees, \*by refusing or not being capable to execute their trust, might [\*603]hinder the tenant in tail of that liberty which the law gave him to dispose of his estate, which would be manifestly inconvenient, and tend to the introduction of perpetuities.”(n) The stream now flowed in an opposite direction, and it was held by succeeding chancellors, (and Lord Nottingham himself appears to have countenanced the same doctrine,(o) that *cestui que trust* might bar his issue and the remainders over by *any* conveyance, as by bargain and sale, or lease and release,(p) or

(g) Gilb. Uses, 32.

(h) Goodrick v. Brown, 1 Ch. Ca. 49; Washborn v. Downes, Ib. 213.

(i) Goodrick v. Brown, 1 Ch. Ca. 49. (k) Digby v. Langworth, 1 Ch. Ca. 68.

(l) Washborn v. Downes, 1 Ch. Ca. 213.

(m) North v. Williams, 2 Ch. Ca. 63; North v. Champemoon, Ib. 78.

(n) North v. Champemoon, 2 Ch. Ca. 78.

(o) See North v. Williams, 2 Ch. Ca. 64; S. C. 1 Vern. 14.

(p) Carpenter v. Carpenter, 1 Vern. 440; Beverley v. Beverley, 2 Vern. 131; Bowater v. Elly, Ib. 344; and see Legate v. Sewell, 1 P. W. 91.

even by agreement,(q) or will.(r) As a trust was not within the statute *de donis*, there could in strictness be no entail of it, and therefore it was thought that equity, which regarded the Statute of Westminster "as an ambitious act in favour of the lords against the king,"(s) and viewed the trust as its own creature, and to be governed according to conscience, might allow the *quasi* tenant in tail of a trust to bar the issue and remainders over by any expression of intention.(1) At length \*one [\*604] consistent principle was established by Lord Hardwicke, that as entails with expectant remainders had gained a footing in trust by analogy to the statute, a court of equity was bound to follow the analogy throughout, and therefore a tenant in tail of a trust ought not to be at liberty to bar his issue and the remaindermen except by a conveyance which would have barred them had the entail been of the legal estate.

The doctrines of equity, as finally settled upon this principle, may be summed up as follows:—

1. For a good *equitable recovery* there must have been an *equitable tenant to the præcipe*, that is, the owner of the first equitable freehold must necessarily have concurred.(t)

2. An *equitable recovery* was a bar to *equitable* only, and not to *legal* remainders.(u)

3. An *equitable recovery* was not vitiated by the circumstance that the *equitable* tenant to the *præcipe* had also the *legal* freehold.(v)

4. An *equitable remainder* was well barred, though it was vested in a person who had also the *legal fee*.(w)

At the present day, by the operation of the fines and recoveries act,(x)

(q) See *Norcliff v. Worsley*, 1 Ch. Ca. 236.

(r) *Woolnough v. Woolnough*, Pr. Ch. 228; *Turner v. Gwinn*, 1 Vern. 41.

(s) *Norcliff v. Worsley*, 1 Ch. Ca. 236, per Lord Nottingham.

(t) *North v. Williams*, 2 Ch. Ca. 64, per Lord Nottingham; *Highway v. Banner*, 1 B. C. C. 586; and see *Wykham v. Wykham*, 18 Ves. 418.

(u) *Philips v. Brydges*, 3 Ves. 128, per Lord Alvanley; *Salvin v. Thornton*, Amb. 545; S. C. 1 B. C. C. 73, note.

(v) *Philips v. Brydges*, 3 Ves. 126, per Lord Alvanley; *Marwood v. Turner*, 3 P. W. 171; *Goodrick v. Brown*, 2 Ch. Ca. 49; S. C. Freem. 180.

(w) *Philips v. Brydges*, 3 Ves. 120; *Robinson v. Comyns*, Rep. t. Talb. 164; S. C. 1 Atk. 473.

(x) 3 & 4 Will. 4, c. 74.

(1) An estate *pur autre vie* is also not within the statute *de donis*, and the *quasi* tenant in tail, if in possession, may at any time by a simple conveyance, dispose of the absolute interest as against the issue, and the remainderman, and may even bind them in equity by his contract. But if the *quasi* tenant in tail be in remainder after a prior estate under the same settlement, he must have the consent of the tenant for life or other precedent freeholder, otherwise though he may bind his issue, he cannot destroy the remainders. We may here observe that if lands *pur autre vie* be limited to A. and the heirs of his body, with remainders over, the entirety of the legal estate is vested in A. The issue and remaindermen stand in the light of mere special occupants, that is, they have no title *jure suo* to any present interest, but merely take the estate by devolution where the owner has made no disposition. A limitation *pur autre vie* has been commonly referred to the nature of a fee conditional: but the principles of the two estates are not to be confounded. The tenant of a fee conditional can only aliene after issue born, but tenant *pur autre vie* may dispose absolutely as above without reference to the fact of there being issue or not. See the whole law upon this subject collected by Lord St. Leonards in *Allen v. Allen*, 1 Conn. and Laws. 428.



the equitable tenant in tail may dispose of the equitable fee by the same modes of assurance, and with the same formalities, as if he were tenant in tail of the legal estate.

To proceed with the subject of assignment of equitable interests—the purchaser, in the transfer of an equity, must, for his security, never dispense with the two following precautions. First, he must make inquiries of the trustee whether the equity of the vendor has been subjected to any prior incumbrance; for if the trustee be guilty of misrepresentation, or even of mis-statement from forgetfulness, the \*purchaser may charge him personally with the amount of the consequent loss.<sup>(y)</sup> [\*605] Secondly, upon the execution of the conveyance, the purchaser should give notice of his own equitable title to the trustee, by which means he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent his own postponement to subsequent incumbrancers more diligent than himself; and of course the trustee will be personally responsible, if, after such notice, he part with the fund to any person not having a prior claim.<sup>(z)</sup>

That a purchaser's notice will secure to him this advantage of priority, has even in *choses in action*, been only recently settled. In *Cooper v. Fynmore*,<sup>(a)</sup> Sir T. Plumer, vice-chancellor, decided that mere neglect to give notice would *not* postpone an incumbrancer, but that such *laches* ought to be shown as, in a court of equity would amount to fraud; but in *Dearle v. Hall*,<sup>(b)</sup> and *Loveridge v. Cooper*,<sup>(c)</sup> nine years after, his honor, when master of the rolls, came to a contrary conclusion, and delivered a very elaborate argument that notice *would* gain priority. His honor's judgments were affirmed on appeal,<sup>(d)</sup> and the doctrine has been recognized in several subsequent cases.<sup>(e)</sup>

The principles upon which Sir T. Plumer proceeded were these:—That “although the *cestui que trust* could not transfer the legal interest, which must remain with the executors, yet, wherever it was intended to complete the transfer of a *chose in action*, there was a mode of dealing which a court of equity considered tantamount to possession, viz., notice given to the legal depository of the fund. By such notice the legal holder was converted into a trustee for the new purchaser, and the *cestui que trust* was deprived of the power of carrying the same security repeatedly into the market. This precaution was always taken by diligent incumbrancers, and if it was not taken, there was neglect, and the *solicitor who conducted the \*business was responsible for that neglect*. To give notice was a matter of no difficulty; and wherever [\*606] persons treating for a *chose in action* did not give notice to the trustee or executor, they did not perfect their title, they did not do all that was necessary to make the thing belong to them in preference to all other persons, and they became responsible in some respects for the easily

<sup>(y)</sup> *Burrowes v. Lock*, 10 Ves. 470.

<sup>(z)</sup> *Hodgson v. Hodgson*, 2 Keen, 704; *Roberts v. Lloyd*, 2 Beav. 376; *Andrews v. Bousfield*, 10 Beav. 511.

<sup>(a)</sup> 3 Russ. 60.

<sup>(b)</sup> *Ib.* 1.

<sup>(c)</sup> 3 Russ. 30.

<sup>(d)</sup> *Ib.* 38, 48.

<sup>(e)</sup> *Hutton v. Sandys*, 1 Younge, 602, see 607; *Smith v. Smith*, 2 Cr. & Mees. 231; *Foster v. Blackstone*, 1 M. & K. 297, see 307.

forseen consequences of their negligence.(f) It was objected *qui prior est tempore potior est jure*; but it could not be contended that priority in time must decide where the legal estate was outstanding, for the maxim as an equitable rule admitted of exceptions, and gave way when the question did not lie between bare and equal equities. If there appeared to be, in respect of any circumstance independent of priority of time, a better title in the *puisne* purchaser to call for the legal estate than in the purchaser who preceeded him in date, the case ceased to be a balance of equities, and the preference, which priority of time might otherwise have given, was done away with and counteracted.(g) What title had the prior incumbrancer to call on a court of justice to interpose in his behalf, in order to obviate the consequences of his own misconduct? He had omitted to perfect his security: a third party had innocently advanced his money, and had perfected his security as far as the nature of the subject permitted, and was that court to interfere to postpone him to the other? It was said notice did not form part of the necessary conveyance of an equitable interest. If a person meant to rely on the contract of the individual, there was certainly no need of notice, for from the moment of the contract he with whom the party was dealing was *personally* bound; but if it was meant to go farther, and attach a right upon the thing itself which was the subject of the contract, it was necessary to give notice; and if an individual who contracted with another did not by giving notice to the trustee divest the vendor or mortgagor of the possession, but permitted him to remain the ostensible owner as before, he must take the consequences which might ensue from such a mode of dealing.”(h)

[\*607] \*In the case of *choses in action* these principles are now clearly established, and the doctrine holds even against the assignees of a bankrupt or insolvent neglecting to give notice; as, if A. be entitled to a *chose in action* and become an insolvent, and then assign it to a purchaser for valuable consideration without notice of the insolvency, who serves notice on the trustee, he thus gains a priority over the assignees, for nothing vests in the assignees but what the insolvent would have passed by an assignment, and if they neglect to complete their title by notice they must be postponed in equity.(i)

But between *choses in action* and *real estate* there is an observable distinction. In *personal* estate the purchaser knows the legal title is outstanding in a third person, and is therefore bound to give notice of his incumbrance; but in *lands* it often happens that the vendor professes to have the legal ownership in himself, whereas it afterwards appears it was really vested in some stranger. If the purchaser be not cognizant of the outstanding legal estate, he cannot give notice of his interest, and therefore cannot be held to have forfeited his right by having neglected a precaution that was impossible. On the other hand, to hold that the

(f) 3 Russ. 12-14.

(g) See observations of Vice-Chancellor Kindersley in *Rice v. Rice*, 2 Drewry, pp. 77, 78.

(h) 3 Russ. 20-22.

(i) *Re Atkinson*, 4 De Gex & Sm. 548; 2 De Gex, Mac. & Gor. 140.

doctrine of notice does not apply at all to real estate, renders any dealings with equitable interests therein extremely dangerous. Thus A. is entitled to an equitable interest, of which the legal estate is in B. upon trusts requiring B. to retain possession of the title-deeds, and not to part with the legal estate. A. conveys his interest to C., who makes no inquiries about incumbrances, and gives no notice to the trustee; A. afterwards, fraudulently concealing the previous assurance, conveys the same interest to D., who makes inquiries of the trustee respecting incumbrances, and gives him notice of his own charge. If, notwithstanding these precautions, D. should be postponed to C., who had priority in point of time, it is clear that no equitable interest can ever be purchased with safety. In *Jones v. Jones*(*k*) the point was not involved in the decision, but the vice-chancellor of England assumed that the principles of *Dearle v. Hall*, and *Loveridge v. Cooper*, \*were inapplicable to real estate. In the subsequent case of *Wiltshire v. Rabbits*,(*l*) [*\*608*] the vice-chancellor of England decided in conformity with the opinion expressed by him in *Jones v. Jones*; and the same view has since been adopted by other judges.(*m*) The result is much to be lamented.

A second incumbrancer on personal estate who gives notice, *but makes no inquiries as to prior charges*, is preferred to a prior incumbrancer who neglected to give notice.(*n*) This result appears at first open to observation, for an assignment of an equitable interest is perfectly valid, though without notice, as against the assignor, and all persons claiming under him who have no equity to postpone the first assignment. It is unimpeachable unless a subsequent purchaser can set it aside on the ground of fraud against himself; and if he made no inquiry, and therefore was not defrauded, why should he, labouring under the demerit of making no inquiry, displace the person who had the natural priority. The answer, however, which has been made by Sir James Wigram is as follows :(*o*) “ If the puisne incumbrancer advances his money *bona fide* without inquiry, it must be presumed he would equally have advanced it after inquiry, the result of which would have negatived the existence of any prior incumbrance. The injury he sustains, and which gives him priority, is, ‘ *ex post facto*.’ If, after advancing his money, he is informed that there is a prior incumbrance, he will immediately use diligence to get in or secure his property. If, on the other hand, he is not told when he gives the notice that there is a previous incumbrancer, he is led to suppose that his security is good, &c. The notice which, when it is given, has the effect of inquiry, is given either at the time the money is advanced or afterwards, and the only distinction between the two cases is a distinction \*between a party who advances money at the time of taking a security, and a party who takes a security [*\*666*]

(*k*) 8 Sim. pp. 642, 643.

(*l*) 14 Sim. 76.

(*m*) *Wilmot v. Pike*, 5 Hare, 14; *Bugden v. Bignold*, 2 Y. & C. Ch. Ca. 392; *Rochard v. Fulton*, 7 Ir. Eq. Rep. 131; *Lee v. Howlett*, 2 Kay & J. 531. As to railway shares, see *Dunster v. Glengal*, 3 Ir. Ch. Re. 47.

(*n*) *Foster v. Blackstone*, 1 M. & K. 297; *Foster v. Cockerell*, 9 Bligh, N. S. 376; *Timson v. Ramsbottom*, 2 Kean, 49; and see *Etty v. Bridges*, 2 Y. & C. Ch. Ca. 494; *Warburton v. Hill*, 1 Kay, 470.

(*o*) *Meux v. Bell*, 1 Hare, 86, 87; and see *Warburton v. Hill*, 1 Kay, 478.



for an antecedent debt, &c. The credit which the puisne incumbrancer gave to the fund after the notice is as good a consideration as that of any other creditor who takes a security for an antecedent debt." The only portion of the vice-chancellor's argument which seems open to question is the assumption that *notice* is equivalent to *inquiry*. It could hardly be contended that a trustee, upon merely receiving notice of an incumbrance, is *bound* to reply that prior incumbrances have been created. It would, however, be a proper act on his part so to do, and almost a matter of course, should he (as is usual) be requested to acknowledge the receipt of the notice. In a large proportion of cases, therefore, the reasoning of Vice-Chancellor Wigram would be strictly correct; but, however this may be, the point is now clearly concluded by authority.

If notice be given to one of several co-trustees it is sufficient as against all subsequent incumbrancers *during the lifetime of that trustee*, for a prudent incumbrancer is called upon to make inquiry of *all* the trustees, and if he did so in the supposed case, he would have come to a knowledge of the prior charge. Thus, in *Smith v. Smith*,<sup>(p)</sup> one Maberley, being indebted to Smith, assigned to him, by way of security, his life-interest in certain funds under his marriage-settlement, and afterwards became bankrupt. The assignee having mentioned his security to one of the trustees before the bankruptcy occurred, the question was, whether after such notice the fund was at the time of the bankruptcy in the power and disposition of the bankrupt, and it was determined in the negative. Lord Lyndhurst, in delivering the judgment of the court, observed, "It was argued that notice to one only of three trustees is insufficient—that it should have been given to each of them, and that, this not having been done, the property remained in the order and disposition of the bankrupt up to the time of his bankruptcy; but we are [\*610] of opinion that notice to one of the \*three trustees was sufficient: no valid assignment could have been made by the bankrupt after the notice to the trustee: a second assignee, in order to have obtained a priority over the first, must have shown that he had exercised proper precaution in taking the assignment; that he had applied to the trustees to know if any previous assignment had been made; and unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or done all that he ought to have done. But if he applied to each of the trustees, he would have been informed by one of them of the previous assignment to Smith, and he must then have taken the property, if at all, subject to the claim of Smith."

But if a prior incumbrancer content himself with giving notice to *one* of the trustees, and that trustee *dies*, and a second incumbrancer gives notice of his own assignment, then, as the first incumbrancer did not do his utmost to guard against the fraud, and the second incumbrancer employed all the means in his power of detecting the fraud, the loss will fall on the person who had so far occasioned that he might have prevented it.<sup>(q)</sup>

<sup>(p)</sup> 2 Cr. & Mees. 231; and see *Ex parte Hennessey*, 1 Conn. & Laws. 562; and see *Wise v. Wise*, 2 Jones & Lat. 412.

<sup>(q)</sup> See *Meux v. Bell, Hare*, 73; *Ex parte Hennessey*, 1 Conn. & Laws. 562.

The case of *Timson v. Ramsbottom*<sup>(r)</sup> may be referred to this principle. A testator appointed Bacon the elder, Timson, Ramsbottom the elder, and Ramsbottom the younger, his executors. In 1816, Ramsbottom the elder died. By indenture dated in 1819, and made between Bacon the younger of the one part, and Thomas Bacon (not the executor,) Langford, and Walford of the other part, Bacon the younger, who took an interest under the will, assigned it to trustees upon trust for securing the repayment to Bacon the elder of 5000*l.* and interest. In 1827, Bacon the elder died, without having communicated the charge to his co-executors. In 1828, a bill was filed, and the testator's estate was brought into court. By indenture, dated in 1832, Bacon the younger assigned the same interest to Corfield, who had no notice of the prior incumbrance and made no inquiries, for securing to Corfield the sum of 1000*l.* and interest. In 1833, a regular notice of \*the assign- [\*611] ment was sent by Corfield to the surviving executors.<sup>(s)</sup> Lord Langdale, in decreeing the priority of the second incumbrancer, observed, "None of the cases cited at the bar appear to me to be like the present—of a father and son having a transaction of this sort between themselves, the father being one of several executors—no allegation even that the other executors were informed before the notice was received from Corfield—no ground to presume that the transaction was communicated to the other executors, each of whom had separate authority to receive and pay on account of the estate, and who, if they had no notice of the assignment, might have made payment to the assignee without incurring any liability whatever on that account. I think, therefore, after, I admit, a good deal of hesitation, that the knowledge of one of several executors who were interested, and who does not appear to have communicated that knowledge to his co-executor, is not sufficient to create a trust in which the assignee has done nothing but accepted the assignment." A petition of appeal was presented, and the pleadings were opened; but the lord chancellor suggesting the necessity of some previous inquiries, the parties, rather than be involved in further litigation, agreed upon a compromise.

As an incumbrancer may, by giving notice to one trustee, complete his title for the time, and yet may afterwards by the death of the trustee be displaced, it becomes a question whether, if notice be sent to *all* the trustees, and they *all* die, a second incumbrancer, who gives notice to the succeeding trustees, will not gain the priority. Notice properly given at the time may be thought not to make an absolute title, but one liable to be defeated by an alteration of circumstances;<sup>(t)</sup> and an incumbrancer would do well not only to give notice to *all* the trustees in the first instance, but to watch as well as he can the changes in the state of the trust, and to take care, by repeating his notice, that there is never a

<sup>(r)</sup> MS.; S. C. 2 Keen, 35.

<sup>(s)</sup> The master of the rolls in his judgment states that notice was given to Timson; but his reasoning assumes, and I am informed the fact was, that notice was also given to Ramsbottom.

<sup>(t)</sup> See *Meux v. Bell*, Hare, 97; but see *Etty v. Bridges*, 2 Y. & C. Ch. Ca. 493.

[\*612] set of trustees \*of whom there is not at least *one* who has notice of his charge.

Notice of an equitable incumbrance ought to be given to the trustees as early as possible, but if delayed for any length of time, it will be equally efficacious, provided no notice of any other charge has been served in the interval.<sup>(u)</sup> Therefore, if the owner of an equitable interest, but who has given no notice to the trustees, contract for the sale of it, the purchaser cannot object to the title on the ground of no notice having been given, unless he can show some intermediate incumbrance; but it is the vendor's duty, by pointing out who were the trustees from time to time, to furnish full means to the purchaser of inquiring whether or no any such charge has been created.<sup>(v)</sup>

The notice, written or unwritten,<sup>(w)</sup> but better written, may be given either to the trustees themselves or to their solicitors;<sup>(x)</sup> and where notice to one trustee would be sufficient, it may be given to one who is not the acting trustee, there being no such distinction known to the law between an acting and a passive trustee.<sup>(y)</sup> It may even be communicated to the trustee incidentally in the way of conversation; for the only point to be ascertained is, whether the existence of the charge has in fact come to the personal knowledge of the trustee.<sup>(z)</sup> Where the trust fund consists of a share in a company, the notice may be sent to the secretary;<sup>(a)</sup> but notice to A., a director, and B., the actuary, has in one case been considered sufficient;<sup>(b)</sup> and in another notice to A., one of the directors, and B., an auditor;<sup>(c)</sup> and it was at one time held that, as notice to a partner is notice to the partnership, if by the \*constitution of [\*613] an assurance office the person insuring becomes a partner, the assignment of a policy by him is *ipso facto* notice of it to the society,<sup>(d)</sup> but the point has since been ruled the other way.<sup>(e)</sup> *Incidental* mention of the charge to a *clerk* of the company, though in the office of business, will not be constructive notice to the company itself.<sup>(f)</sup> The notice served on the trustee should set forth the entire amount of the assignee's claim, for it has been held that the trustee is affected by notice only of the amount stated upon the face of the memorandum served, and not by notice of all the contents of the instrument to which the memorandum

(u) *Meux v. Bell*, 1 Hare, 86, per Sir J. Wigram.

(v) *Hobson v. Bell*, 2 Beav. 17.

(w) *Smith v. Smith*, 2 Cr. & Mees. 231; *Ex parte Carbis*, 4 D. & C. 357, per Sir G. Rose; S. C. 1 Mont. & Ayr. 695, note, *per eundem*.

(x) *Foster v. Blackstone*, 1 M. & K. 297.

(y) *Smith v. Smith*, 2 Cr. & Mees. 233.

(z) *Smith v. Smith*, 2 Cr. & Mees. 231, see 233.

(a) *Ex parte Stright*, Mont. 502.

(b) *Ex parte Watkins*, 1 Mont. & Ayr. 689; S. C. 4 Deac. & Chit. 87; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(c) *Ex parte Waithman*, 4 Deac. & Chit. 412; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(d) *Duncan v. Chamberlayne*, 11 Sim. 126; *Ex parte Rose*, 2 Mont. Deac. & De Gex, 131; and see *Ex parte Cooper*, ib. 1; *Re Styan*, ib. 219; and 1 Phil. 105.

(e) *Ex parte Hennessey*, 1 Conn. & Laws. 559; *Thompson v. Spiers*, 13 Sim. 469; *Martin v. Sedgwick*, 9 Beav. 333; and see *Powles v. Page*, 3 C. B. R. 16.

(f) *Ex parte Carbis*, 4 Deac. & Chit. 354; S. C. 1 Mont. & Ayr. 693, note (a); *Ex parte Boulton*, 3 Jur. N. S. 425.



refers.(g) But notice of a charge in general terms without expressing any amount in particular will be sufficient.(h)

Where money has been paid into court by trustees, it would seem that they remain trustees for the purposes of notice until the fund has been dealt with by the court, and then the court becomes the trustee;(i) and where the court is trustee the step equivalent to notice in the ordinary case is the obtaining of a stop-order to restrain the transfer of the fund, and as between two assignees, the one who first gets a stop-order will have priority.(k) It may be difficult, however, in many cases to determine whether the sole trusteeship resides in the court, and the point is one which requires further decisions to elucidate it. If, therefore, the trust fund be in court, the following course should be adopted. The intended assignee should inquire at the accountant's-general and registrar's offices whether any stop-order has been made, to restrain the transfer of the fund, and *also* of the trustees, whether notice has been given of any prior incumbrance; and, on the completion \*of his [\*614] own assignment, he should give notice to the trustees personally, and obtain a stop-order himself, and leave it at the accountant's-general office to be entered. If the accountant's-general office is closed, the order should still be entered at the registrar's office.(l) The inquiry at the accountant's-general or registrar's offices is merely for the purchaser's greater satisfaction, and makes no part of his own title, for neither the accountant-general nor the registrar is the trustee, but the court is the trustee. The stop-order is the effective step, and whether previous inquiry was or not made at the accountant's-general or registrar's offices, is immaterial.(m)

Should an incumbrancer give notice to the trustees, but neglect to obtain a stop-order, he will still take precedence of a prior incumbrancer, who has neither obtained an order nor given notice, or who had given notice to one only of several trustees, and that trustee had died before the time of the second incumbrance. It is true the second incumbrancer did not adopt every precaution, but he resorted to one which the prior incumbrancer neglected, to the detriment of the second incumbrancer: while the first assignee either sent no notice, or one which, by the death of the trustee before the time of the second incumbrance, had become equivalent to no notice.(n)

It may happen that at the time of the incumbrance there is no representative of the trust on whom notice can be served, as if A. be trustee of stock for B., and A. dies intestate, or his executor declines to act. In such a case it has been held, that an incumbrancer gains priority by

(g) *Re Bright's Trust*, 21 Beav. 430.

(h) See same case.

(i) *Warburton v. Hill*, 1 Kay, 477; *Matthews v. Gabb*, 15 Sim. 51.

(k) *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463; *Elder v. Maclean*, 3 Jur. N. S. 283.

(l) The petition for the stop-order (viz., that the interest of the assignor may not be paid out of court without notice to the assignee) need not be served on any of the other parties to the suit, though the share of the assignor has not been set apart to a separate account. See General Order, April 3, 1841, 2 Beav. xi.

(m) See *Warburton v. Hill*, 1 Kay, 478.

(n) *Timson v. Ramsbottom*, MS.; S. C. 2 Keen, 35, pp. 49 and 50; *Matthews v. Gabb*, 15 Sim. 51; *Brearclyff v. Dorrington*, 4 De Gex & Sm. 122.

taking all the precautions that under the circumstances are practicable, as if he serve a *distringas* on the bank where the stock is standing.(o)

[\*615] Of course, a purchaser who gives notice, or obtains a stop-order, can gain no priority over an incumbrance of which he has notice himself, at the time of his own purchase.(p)

## SECTION II.

### OF TESTAMENTARY DISPOSITION.

An equitable interest is transmissible by devise,(q) indeed the use in the land was devisable before the statute of Henry VIII.(r)

But after the Statute of Frauds the courts held that a trust or equitable interest could only be passed by a will, executed and attested as required for the devise of the legal estate; for otherwise a door would have been opened to all the mischiefs and inconveniences the statute was intended to prevent.(s) Whether trusts are within the *letter* of the act, or equity brought them under its operation by *analogy*, it is not easy to determine;(t) undoubtedly the word "lands" has often extended to include trusts,(u) and, if so, there seems to be little reason why trusts should not have fallen within the *express* terms of the statute.

*Copyholds*, strictly speaking, are not at common law a devisable interest. A surrender is made to the use of the will, and the gift contained in the will operates as a declaration of the use. The devisee does not come in by the will, but by the surrender and the will taken together, as if the name had been inserted in the surrender itself.(v) Thus copyholds at law were out of the Statute of Frauds, and might have been devised by a will neither signed nor attested; and, as equity followed the law [\*616] \*the trust of a copyhold was devisable in the same manner.(w) "Where," said Lord Hardwicke, "the legal estate is in trustees, the *cestui que trust* cannot, consequently, surrender, but the lands shall notwithstanding pass by this devise according to the general rule that *equity follows the law*; for there (*i. e.* at law) a copyhold will pass under the will without three witnesses, or, where there are no witnesses at all; and if this nicety is not required in passing the legal estate, *à fortiori*, it is not in passing the equitable, and therefore the *cestui que trust* may

(o) *Etty v. Bridges*, 2 Y. & C. Ch. Ca. 486.

(p) *Warburton v. Hill*, 1 Kay, 470.

(q) *Cornbury v. Middleton*, 1 Ch. Ca. 211, per Wyld, Just.; *Greenhill v. Greenhill*, 2 Vern. 680, per Lord Harcourt; *Cole v. Moore*, Mo. 806, per Cur.; *Philips v. Brydges*, 3 Ves. 127, per Lord Alvanley.

(r) See p. 537, note 1.

(s) *Wagstaff v. Wagstaff*, 2 P. W. 259, per Lord Macclesfield; *Adlington v. Cann*, 3 Atk. 151, per Lord Hardwicke; *Burgess v. Wheate*, 1 Ed. 224, per Lord Mansfield.

(t) See *Burgess v. Wheate*, ubi supra; *Wagstaff v. Wagstaff*, 2 P. W. 261.

(u) See supra, p. 593.

(v) *Hussey v. Grills*, Amb. 300, per Lord Hardwicke.

(w) *Appleyard v. Wood*, Sel. Ch. Ca. 42; *Wagstaff v. Wagstaff*, 2 P. W. 258; *Tuffnell v. Page*, 2 Atk. 37; and see *Attorney-General v. Andrews*, 1 Ves. 225; but see *Anon. case*, cited *Wagstaff v. Wagstaff*, 2 P. W. 261.

by the same kind of instrument dispose of the trust estate as if he had the legal estate in them."<sup>(x)</sup> And the equitable interest might always have been passed by will, though not preceded by a surrender, which was required to pass the legal estate.<sup>(y)</sup> But, by 55 Geo. 3, c. 192, a surrender was dispensed with even in respect of the legal estate.

As equitable interests in copyholds were regulated by analogy to the custom affecting the legal estate, one might have supposed, that where the *legal* estate could not have been devised, the *equitable* estate in like manner must have been left to descend. However, it was decided by the court, that notwithstanding the want of the custom, the owner of the equitable estate could always have passed it by will.<sup>(z)</sup> Whether the will to have this effect must have been executed according to the Statute of Frauds, or whether any instrument sufficient for declaring the uses on a surrender would have been enough does not appear.

The doctrines laid down as to copyholds were not extended to *customary freeholds*.<sup>(1)</sup> The determination as to copyholds was grounded [\*617] on the circumstance that the interest passed, not by the will, but by the surrender; but customary freeholds are strictly and properly speaking devisable, the estate passing by the will. The *legal* estate of customary freeholds was, therefore, not excepted from the Statute of Frauds;<sup>(a)</sup> and, of course, a devise of the *equitable* interest must have been attended with the same formalities as if it had been a devise of the legal.<sup>(b)</sup>

Now, by the late Wills Act,<sup>(c)</sup> as to wills made on or after the 1st day of January, 1838, every devise or bequest of property, of whatever description, whether real or personal, freehold or copyhold, legal or equitable, must be made by will in writing, signed by the testator and attested by two witnesses.

### SECTION III.

#### OF SEISIN AND DISSEISIN.

The term *seisin* is properly applicable to legal estates; but a court of equity regards actual receipt of the rents and profits under the equitable title as equivalent to *seisin* at law, and has often adjudicated upon the rights of parties with reference to that circumstance.

Thus, in *Casborne v. Scarfe*,<sup>(d)</sup> it was disputed, whether, as curtesy

(x) *Tuffnell v. Page*, 2 Atk. 38.

(y) *Greenhill v. Greenhill*, 2 Vern. 679; *Tuffnell v. Page*, 2 Atk. 37; *Gibson v. Rogers*, Amb. 93.

(z) *Lewis v. Lane*, 2 M. & K. 449; *Wilson v. Dent*, 3 Sim. 385; and see ante, pp. 45, 46, and p. 537, note 1.

(a) *Hussey v. Grills*, Amb. 299; and see *Doe v. Danvers*, 7 East. 299.

(b) *Hussey v. Grills*, ubi supra; *Willan v. Lancaster*, 3 Russ. 108.

(c) 7 Gul. 4, & 1 Vic. c. 26. (d) 1 Atk. 603; *Parker v. Carter*, 4 Hare, 413.

(1) A copyhold is where the freehold is in the lord, and the copyholder's estate passes by surrender. A customary freehold is where the tenure is copyhold, but the freehold interest is in the tenant, and passes by deed. *Bingham v. Woodgate*, 1 R. & M. 32; S. C. Taml. 183.



did not attach at law without a *seisin* in fact, the husband could claim his curtesy out of the wife's equity of redemption; but Lord Hardwicke said, "It is objected there is no *seisin* whatever of the legal estate in the wife in the consideration of law. But that is not the present question: the true question is, if there was such a *seisin* or possession of the equitable estate in the wife, as in this court is considered equivalent to an actual *seisin* of a freehold estate at common law; and I am of opinion there was. Actual possession, clothed with the receipt of the rents and [\*618] profits, is the highest instance \*of an equitable *seisin*, both of which there were in this case."

And so it was held that there was *possessio fratris* of a trust, in other words, that if a person inherited a trust and died before actual *seisin* of the estate, it should descend to the brother of the half blood, as heir to the father, in preference to the sister of the whole blood; but if there had been such a receipt of the rents and profits as constituted equitable *seisin*, the sister of the whole blood, as heir to the brother, would exclude the brother of the half blood.(e)

The doctrines of the court upon the subject of equitable *disseisin* cannot be better illustrated than by a statement of the well known case of *The Marquis of Cholmondeley v. Lord Clinton*.(f) The circumstances were briefly as follows:—George, Earl of Orford, conveyed certain manors and hereditaments to the use of himself for life, remainder to the heirs of his body, remainder as he should by deed or will appoint, remainder to the right heirs of Samuel Rolle, with a power reserved of revocation and new appointment. Some time after the earl executed a mortgage in fee, which operated in equity as a revocation of the settlement *pro tanto*. In 1791, the earl died without issue and intestate, and upon his death the ultimate remainder (which had been a vested interest in the earl himself, as the heir of Samuel Rolle at the date of the deed,) should have descended to the right heir of the earl, but, the parties mistaking the law, the person who was heir of Samuel Rolle at the death of the earl was allowed to enter on the premises, and continued in possession, subject to the mortgage, up to the commencement of the suit. The bill was filed in 1812, by the assign of the right heir of the earl against the mortgagee, and the assign of the right heir of Samuel Rolle, for redemption of the premises, and on account of the profits. It was debated whether, as the legal estate was vested in the mortgagee, and the heir of Samuel Rolle had held the possession subject to a subsisting mortgage, the assign of [\*619] the Earl of Orford's heir, to whom the equity of redemption \*belonged in point of *right*, had been disseised of his equitable interest, and was now barred by the effect of time. Sir W. Grant argued, that "although there might be what was deemed a *seisin* of an equitable estate, there could be no *disseisin*, first, because the *disseisin* must be of the entire estate, and not of a limited and partial interest in it—the equitable ownership could not possibly be the subject of *disseisin*; and, secondly, because a tortious act could never be the foundation of an equitable title: that an equitable title might undoubtedly be *barred* by length

(e) But see now 3 & 4 Gul. 4, c. 106.

(f) 2 Mer. 171; 2 J. & W. 1.

of time, but could not be *shifted* or *transferred*.<sup>(g)</sup> It was admitted in the present case the equity of redemption subsisted: it must therefore belong to some one and could only belong to the original *cestui que trust*.<sup>(h)</sup> That so long as the trust subsisted, so long it was impossible that the *cestuis que trust* could be barred. The *cestuis que trust* could only be barred by barring and excluding the estate of the trustee."<sup>(i)</sup> Sir W. Grant did not then decide the point, but directed a case for the opinion of the Queen's Bench on a question of law, and retained the bill till the judge's certificate should be returned.

The cause was afterwards reheard on the equity reserved before Sir T. Plumer, who determined that the original *cestui que trust* had been dis-  
seised, and was consequently barred.<sup>(k)</sup> "The grounds," he said, "upon which it is contended that the holder of the rightful equity is not bound by *laches* and non-claim are, that the tortious possessor does not claim to be the owner of more than the equitable estate—the legal estate remains unbarred: that there is no *disseisin* abatement or intrusion of a trust—the possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal estate—he has therefore only a precarious and permissive possession: that tortious possession can never be the foundation of an equitable title."<sup>(l)</sup> But this reasoning proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question respects the plaintiff's right to the remedy, not the defendant's \*title to the estate. [\*620] A tortious act can never be the foundation of a *legal* any more than of an *equitable* title. The question is, whether the plaintiff has prosecuted his title in due time. The quiet and repose of the kingdom, the mischief arising from stale demands, the *laches* and neglect of the rightful owner, and all the other principles of public policy, take away the remedy, notwithstanding the title *veri domini*, and the tortious holding of the possessor.<sup>(m)</sup> As to the argument that a title in a court of equity may be *lost* by *laches*, but cannot be *transferred* without the act of the party, the case is the same in this respect both in equity and law. The title is changed in both by the operation of a public law upon public principles without regard to the original private right. If the negligent owner has for ever forfeited by his *laches* his right to any remedy to recover, he has in effect lost his title for ever. What, then, is to become of the title, whether legal or equitable? Is it to become *hereditas jacens*, belonging to no one? Is it to devolve on the crown, or to pass by escheat? The plaintiff is barred of his remedy: the defendant keeps possession without the possibility of being ever disturbed by any one: the loss of the former owner is necessarily his gain; it is more—he gains a positive title under the statute at law, and, by analogy, in equity.<sup>(n)</sup> If the mere existence of an old legal estate would have the effect of preventing the bar attaching upon the equitable estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate

(g) See *Hopkins v. Hopkins*, 1 Atk. 590.

(h) 2 Mer. 357-359.

(i) 2 Mer. 361.

(k) 2 J. & W. 1.

(l) *Ib.* 153.

(m) 2 J. & W. 155.

(n) *Ib.* 155, 156.

is outstanding, in an old term, for instance, to attend the inheritance, the earliest equitable title must in all cases prevail: quiet enjoyment for sixty, one hundred, or two hundred years or more, would be no security, if the old term had existed longer: it would always be open to inquiry in whom was vested the equitable title which originally existed when the old term was created.”(g)

On appeal to the house of lords his honor's decision was affirmed, and the principle on which it proceeded was approved. \*Lord [621] Eldon said, “The connection between the legal estate in the term and the equities of the persons entitled to the inheritance was by no means indissoluble;” and he instanced the case of a second mortgagee, without notice of the incumbrance of the first, getting in an outstanding term by which he shifted to himself the equity that was previously in the first. “He could not agree, and had never heard of such a rule as that adverse possession, however long, would not avail against an equitable estate: his opinion was, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and *worked the same effect as abatement or intrusion with respect to legal estates, and that for the quiet and peace of titles and the world it ought to have the same effect.*”(h)

## SECTION IV.

### OF DOWER AND CURTESY.

A trust,(i) or equity of redemption,(k) of freeholds, was until the late act(l) exempt from the *lien* of dower, but was and still remains subject to the curtesy of the husband,(m) unless the husband be an alien.(n)

An equitable interest in copyholds (as the late act does not apply to them(o) is not subject to freebench.(p)

In *Banks v. Sutton*,(q) a case of *dower*, Sir J. Jekyll took a [\*622] \*distinction between trusts created by the husband himself, and trusts originating from a stranger—that in the former case the wife should *not* be dowable, for it might reasonably be supposed the husband had intended to bar her dower, but in the latter case there was no ground

(g) 2 J. & W. 157.

(h) 2 J. & W. 190, 191.

(i) *Colt v. Colt*, 1 Ch. Re. 254; *Bottomley v. Lord Fairfax*, Pr. Ch. 336; *Attorney-General v. Scott*, Rep. t. Talb. 138; *Chaplin v. Chaplin*, 3 P. W. 229; *Shepherd v. Shepherd*, Id. 234, note (D); *Curtis v. Curtis*, 2 B. C. C. 630, per Lord Alvanley; *Lady Radnor v. Rotherham*, Pr. Ch. 65, per Lord Somers; *Godwin v. Winsmore*, 2 Atk. 525.

(k) *Dixon v. Saville*, 1 B. C. C. 326; *Reynolds v. Messing*, cited *Casborne v. Scarfe*, 1 Atk. 604; 2 J. & W. 194.

(l) 3 & 4 W. IV. c. 105.

(m) *Chaplin v. Chaplin*, 3 P. W. 234, per Lord Talbot; *Attorney-General v. Scott*, Rep. t. Talb. 139, *per eundem*; *Watts v. Ball*, 1 P. W. 108; *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Casborne v. Scarfe*, 1 Atk. 603; *Dodson v. Hay*, 3 B. C. C. 405.

(n) See *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92.

(o) *Smith v. Adams*, 5 De Gex, Mac. & Gor. 712.

(p) *Forder v. Wade*, 4 B. C. C. 521.

(q) 2 P. W. 700.



for such a presumption, and therefore the title to dower should attach. His honor, however, did not rest his decision upon this distinction,<sup>(r)</sup> and in subsequent cases the refinement has been rejected.<sup>(s)</sup>

With respect to *curtesy*, as at *law* the wife, to entitle her husband to curtesy, must have had *seisin* in deed of the freehold, the question arises whether in the instance of a *trust* there must not have been such a *seisin* of the equitable estate in the wife, as is considered equivalent to legal *seisin*, as actual possession of the estate clothed with the receipt of the rents and profits. It seems to be admitted that if the equitable interest be in the possession of a stranger, adversely to the right of the wife, there is no such *seisin* in deed as to entitle the husband to his curtesy.<sup>(t)</sup> But if money be *artieled* or directed by will to be laid out in a purchase of land to be settled on a married woman in fee or in tail, the husband is entitled to curtesy, though no rent or interest may have been actually paid during the coverture.<sup>(u)</sup> This proceeds on the principle that the *laches* of the trustees shall not prejudice the right of a third person, and, therefore, the claim to curtesy, arises in the same manner as if the trustees had actually laid out the money on land and completed the settlement, and put the parties in possession.

However, it has been lately held, that in the case of an ordinary trust, any *seisin* of the wife, though she has not possession or receipt of rents, is sufficient to entitle the husband to curtesy. An estate had been vested in trustees upon trust for Carter, during the joint lives of himself and Mary his wife, and upon the death of either of them, and in default of appointment upon trust for the children in fee. There were \*two children, a son and a daughter Elizabeth, and the daughter [\*623] married Parker; Carter died in 1817, and on his decease the widow, although she had no life estate, held possession of the estate until her own death in 1839. Elizabeth Parker died in 1836, and the question was, whether Parker the husband was tenant by the curtesy, although his wife had never been in receipt of rents. The vice-chancellor ruled, that the possession of Carter was the possession of his trustee, and gave to that trustee a *seisin* of the inheritance; that the death of Carter did not interrupt that *seisin*, but the trustee was still in actual possession, not by a new title then for the first time accruing, but by continuance of the *seisin* acquired during the coverture; that the trustee was in such possession for the benefit of the party lawfully entitled thereto, and that he continued in such possession until the entry of Mary, which might be supposed to be a month or more after the death of her husband, and that such interval, there being no adverse possession, would entitle the husband to his curtesy.<sup>(v)</sup>

If the trust be for the *separate use* of the wife, so that her *seisin* would not entitle her husband to the possession or profits, it was formerly doubted whether in this case curtesy was not excluded. Lord Hardwicke

(r) 2 P. W. 715.

(s) See *Curtis v. Curtis*, 2 B. C. C. 680; *D'Arcy v. Blake*, 2 Sch. & Lef. 391; *Godwin v. Winsmore*, 2 Atk. 526; *Burgess v. Wheate*, 1 Ed. 197.

(t) *Parker v. Carter*, 4 Hare, 413.

(u) *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 B. C. C. 405.

(v) *Parker v. Carter*, 4 Hare, 400; see *Casborne v. Scarfe*, 1 Atk. 696.

was originally in favour of the curtesy;(w) but in a subsequent case (without any allusion, however, to his former opinion,) he decided against the claim of the husband.(x) It has since been determined that the husband is entitled.(y)

It was observed by Sir John Leach, that "At law the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in *equity* he might, and that not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly by a direction that upon the death of the wife, the *inheritance should descend to the heir of the wife, and that the husband should not be entitled to be tenant by the curtesy;*"(z) but [\*624] \*this doctrine may admit of question, as there appears no reason why a person should be able to exempt an equitable any more than a legal estate from the ordinary incidents of property. A declaration, for instance, by a settlor, that a trust should be inalienable or not available to creditors would be absolutely void. In the case of *Bennet v. Davis*,(a) which is cited by Sir J. Leach for his position, the question discussed was not whether curtesy attached on an equitable estate, but whether any equitable estate arose. A testator had devised lands "to his daughter, the wife of Bennet, for her separate use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon the wife's death go to her heirs." It was contended that the wife could not be a trustee for herself, and the husband could not be a trustee for the wife, they both being but one person, and, therefore, as there was no trustee the husband was entitled to the estate beneficially. But the court held clearly that the husband was a trustee for the wife, and observed, "though the husband might be tenant by the curtesy (viz., of the legal estate,) yet he should be but a trustee for the *heirs* of the wife." The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate, but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the court. Even assuming the remark to have been made advisedly, the view of the court may have been that the curtesy of the husband was excluded on a ground now overruled, viz., that the trust being not simply for the wife and her heirs but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon.(b)

It must be acknowledged on all hands, that, as dower and curtesy stand exactly on the same footing upon principle, either the rejection of [\*625] dower, or the admission of curtesy, was \*an anomaly. Some high authorities, as Lord Talbot,(c) Sir T. Clarke,(d) and Lord

(w) *Roberts v. Dixwell*, 1 Atk. 609.

(x) *Hearle v. Greenbank*, 3 Atk. 715, 716; and see *Bennet v. Davis*, 2 P. W. 316.

(y) *Morgan v. Morgan*, 5 Mad. 408; *Follett v. Tyrer*, 14 Sim. 125.

(z) *Morgan v. Morgan*, 5 Mad. 411. (a) 2 P. W. 316.

(b) See *Hearle v. Greenbank*, 3 Atk. 715, 716; *Morgan v. Morgan*, 5 Mad. 408.

(c) *Chaplin v. Chaplin*, 3 P. W. 234; *Attorney-General v. Scott*, Rep. t. Talb. 139.

(d) *Burgess v. Wheate*, 1 Ed. 196-198.

Loughborough,<sup>(e)</sup> regarded *curtesy* as the exception; and the ground upon which they proceeded was, that as trusts followed the likeness of the use, and there was no curtesy of the use, there could be none of the trust. On the other hand, Sir J. Jekyll,<sup>(f)</sup> Lord Hardwicke,<sup>(g)</sup> Lord Cowper,<sup>(h)</sup> Lord Mansfield,<sup>(i)</sup> Lord Henley,<sup>(k)</sup> and Lord Redesdale,<sup>(l)</sup> thought that consistency would be restored by the admission of the title to *dower*; for, since the Statute of Frauds, they argued the system of trusts had undergone considerable alteration, and was conducted at present upon a much more liberal footing: the rule now was, that, as between the *cestui que trust* and the trustee and all claiming by or under them, whoever would have a right against the legal estate had a like right against the equitable. Thus, either argument had a fair show of reason to support it; but the latter view was, no doubt, more in harmony with the system of trusts as at present established.

Why the courts should have been induced to leave dower an exception, has been accounted for, not more ingeniously, than satisfactorily, by Lord Redesdale:—"The courts of equity," he said, "had assumed as a principle in acting upon trusts to *follow the law*; and, according to this principle, they ought in all cases where rights attached on legal estates to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of dower upon a contrary principle—that by the creation of a trust the right of dower would be prevented from attaching. \*Many persons had purchased under [\*626] this idea; and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule with respect to trusts in cases of dower. But the same objection did not apply to *tenancy by the curtesy*; for no person would purchase an estate subject to tenancy by the curtesy without the concurrence of the person in whom that right was vested. Pending the coverture, a woman could not aliene without her husband, and therefore nothing she could do would be understood by a purchaser to affect his interest. But when the husband was seised or entitled in *his own right*, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that, as the existence of a trust estate previously created prevented the right of dower from attaching at law, it would also prevent the property from all claim of dower in equity, and many titles depending on this opinion, it was found that it would be mischievous, in this instance, to act on the general principle."

Now, by a late act,<sup>(n)</sup> the widow is entitled to dower *in equity* where the husband shall die beneficially entitled to any interest (not conferring

(e) Dixon v. Saville, 1 B. C. C. 327.

(f) Banks v. Sutton, 2 P. W. 713, 714.

(g) Casburne v. Casburne, 2 J. & W. 200.

(i) Burgess v. Wheate, 1 Ed. 224.

(l) D'Arcy v. Blake, 2 Sch. & Lef. 388.

(m) D'Arcy v. Blake, 2 Sch. & Lef. 388.

(h) Watts v. Ball, 1 P. W. 109.

(k) Ib. 249-251.

(n) 3 & 4 W. 4, c. 105.



a title to dower at law,) which, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, other than an estate in joint tenancy.(o) But in either case the wife will not be entitled to dower out of any property absolutely disposed of by the husband in his lifetime or by will.(p) And by the act a widow is not entitled to dower out of any land, when in the deed of conveyance thereof to her husband, or in any deed executed by him, it shall be declared that his widow shall not be entitled to dower;(q) and the widow's right of dower will also be barred by the husband's declaration of intention contained in his will.(r) [\*627] The act does not extend to \*the dower of any widow married on or before the 1st day of January, 1834, and does not affect copyholds.(s)

## SECTION V.

### OF THE ESTATE OF A FEME COVERT CESTUI QUE TRUST.

Under the above title we shall first advert shortly to the effect of marriage upon property, held upon trust for a *feme covert* simply, and not for her separate use; treating, in order, of pure personalty, chattels real, and real estate of freehold or inheritance; and we shall then proceed to consider the nature of the wife's *separate estate*.

1. As respects pure personal estate, such as chattels personal, money, legacies, and *choses in action* not settled to the wife's separate use, the husband's power depends in cases of trust just as in cases where the title of the wife is legal, upon the fact of *reduction into possession*.(t) If the wife's equitable interest be possessory, and the trustee be willing to facilitate the reduction into possession by payment, transfer, &c., to the husband, the *feme's* rights are at an end. Nothing, however, short of an actual reduction into possession will suffice; and in the absence of reduction by the husband during his life, the equitable interest goes to the wife by survivorship. It follows from what has been stated, that where the wife's interest remains reversionary until after the husband's death, and the wife survives, she necessarily takes by survivorship.(u) And a similar principle applies, where the interest of the wife may be viewed as partly possessory and partly reversionary,—as where the wife is entitled during her own life; in which case, the husband cannot bind the interest of the wife beyond the duration of the coverture.(v) So, even if the husband assign the wife's reversionary interest, and it subsequently, *during the husband's lifetime*, become possessory, the wife's right by

(o) Sect. 2; and see *Smith v. Spencer*, 2 Jur. N. S. 778.

(p) Sect. 4.

(q) Sect. 6. This enactment operates prospectively only, and does not apply to a declaration against dower contained in a conveyance executed previously to the act. See *Noble v. Fry*, 20 Beav. 598, and sect. 14 of Act.

(r) Sect. 7.

(s) *Powdrell v. Jones*, 2 Sm. & Gif. 407.

(t) *Purdew v. Jackson*, 1 Russ. 45, 46.

(u) *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65.

(v) *Stiffe v. Everitt*, 1 M. & Cr. 37; *Harley v. Harley*, 10 Hare, 325.

\*survivorship remains, unless reduction into possession be actually effected by the husband in his lifetime.(w) [\*628]

So far the analogy between interests legally vested in the *feme*, and those which are held for her by a trustee, is perfect; but in the case of the equitable interest, the husband's rights are further subject to the wife's *equity to a settlement*. This equity appears to have had its origin(x) in cases where the trustee, declining to pay, transfer, &c., the wife's *possessory interest* to the husband, and the husband filing a bill against the trustee to compel *payment, transfer, &c.*, the court held that those who seek equity must do equity; and declined to assist the husband in obtaining the wife's equitable interest, except upon the terms of some portion of it being settled for the benefit of the wife and her issue.(y)

But whatever may have been the source of this equity, it is undoubtedly one which the wife has a right, according to the now established practice of the court, to assert *actively*, either by bill,(z) or, in the case of an already existing suit, by petition,(u) at any time before the husband has finally reduced the equitable interest into possession. It is equally clear that the equity is one which the wife has a right to waive, by consenting in open court to the receipt of the equitable interest by the husband.

It must be remembered, that the wife's equity to a settlement, and her right by survivorship, are two entirely distinct things. The former arises only when the fund is ready for reduction into possession and may be waived by the wife in open court; the latter the wife cannot, by any act during coverture, deprive herself of; and the court, as we have seen elsewhere,(b) treats as nugatory any act done by the husband, or by his procurement, for the purpose of rendering the wife's *\*reversionary interest possessory*, and thus diminishing her rights by survivorship. [\*629]

2. The effect of marriage being, as a general rule, the same upon equitable as upon legal interests, it follows that, as the husband may assign the *chattels real* of the wife at law, so he may assign her trust of a term in equity,(c) though it be merely a contingent interest;(d) and, of course without the concurrence of either the wife or the trustee, and without consideration. And this doctrine has not been interfered with by the case of *Purdew v. Jackson*;(e) for a trust of chattels real is not a *chose in*

(w) *Allison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Coll. 553; *Baldwin v. Baldwin*, 5 De Gex & Sm. 319.

(x) See *Bosvil v. Brander*, 1 P. W. 458; *Browne v. Elton*, 3 P. W. 202.

(y) As to the present practice of the court in settling the whole or part, see pp. 369, 370, *supra*, and cases there referred to.

(z) *Lady Elibank v. Montolieu*, 5 Vesey, 737.

(u) *Greedy v. Lavender*, 13 Beav. 62; *Scott v. Spashett*, 3 Mac. & Gor. 599.

(b) Pages 371, 372, *supra*.

(c) *Roupe v. Atkinson*, Bumb. 162; *Mitford v. Mitford*, 9 Ves. 99, per Sir W. Grant; *Packer v. Wyndham*, Pr. Ch. 418, 419, per Lord Cowper; *Franco v. Franco*, 4 Ves. \*528, per Lord Alvanley; *Bullock v. Knight*, 1 Ch. Ca. 266, per Lord Nottingham; *Sanders v. Page*, 3 Ch. Re. 223, per Cur.; *Macaulay v. Phillips*, 4 Ves. 19, per Lord Alvanley; *Wikes's case*, Lane, 54, per Barons Snig and Altham; S. C. Roll. Ab. 343; *Jewson v. Moulson*, 2 Atk. 421, per Lord Hardwicke; *Inledon v. Northcote*, 3 Atk. 435, *per eundem*; *Clark v. Burgh*, 2 Coll. 221.

(d) *Donne v. Hart*, 2 R. & M. 360.

(e) 1 Russ. 1.

*action*, but a present interest—an estate in possession. (*f*) If, however, the equitable interest in the chattel be such that it could not by possibility vest in the wife during the coverture, then, inasmuch as a legal interest of a similar kind could not be disposed of by the husband, he cannot dispose of the equitable one. (*g*)

Whether the doctrine regarding the wife's equity to a settlement extends to the equitable chattels real of the wife, has been much doubted. It was held in a late case, by Vice-Chancellor Wigram, as a result of the principles laid down by Lord Cottenham, in *Sturgis v. Champneys*, (*h*) that even where the husband could dispose of the equitable chattel, the wife was entitled to a provision out of the equitable interest as against the assignee of the husband, for valuable consideration. (*i*) The opinion of the vice-chancellor himself was the other way, but he considered himself bound by the authority of the chancellor in the case referred to.

\*The result of these decisions is very remarkable. Thus, a [\*630] mortgage by the husband of the wife's legal term bars her of all right, except in the equity of redemption; (*k*) while under a similar mortgage of the equitable term, she would have an equity to a settlement as against the mortgagee. Again, the legal reversionary term of the wife, provided it be such as may by possibility vest during the coverture, is capable of absolute assignment by the husband; and the wife has no right by survivorship, such as exists in the case of her *chose in action*, whereas as respects the assignment of a similar equitable interest, there would be an equity to a settlement in the wife. Supposing then the not improbable case to arise of an actual assignment by the husband of the wife's equitable term, and of his death before any question raised as to the rights of the parties, the court will have to decide, either that the wife's equity to a settlement may be asserted after the husband's death (an entirely new doctrine,) or that the death of the husband places the assignee in a better position than he was in so long as the husband lived. The difficulties, indeed, of applying the doctrine of the *wife's equity* to the case of chattels real, must, undoubtedly, prove considerable; but it can be hardly expected, that the steps of which Lord Cottenham, in *Sturgis v. Champneys*, took the first, will now be retraced.

It is conceived that if the husband, or the assignee from him of the wife's equitable term, can procure an assignment of the legal estate from the trustee, the wife's equity to a settlement is at an end; but the point is untouched by authority.

If a judgment be acknowledged to A. in trust for a *feme sole*, and she marries, and the conusee of the judgment sues an *elegit*, and possession of the lands is delivered to him in trust for the wife, the husband may assign the extended interest, as he might have assigned the trust of a term

(*f*) See *Mitford v. Mitford*, 9 Ves. 98, 99; *Holland's case*, Style, 21; *Burgess v. Wheate*, 1 Ed. 223, 224; *Box v. Jackson*, 1 Drury, 84.

(*g*) *Duberly v. Day*, 16 Beav. 33.

(*h*) 5 M. & Cr. 97; and see *Wortham v. Pemberton*, 1 De Gex & Sm. 644.

(*i*) *Hanson v. Keating*, 4 Hare, 1.

(*k*) *Hill v. Edmonds*, 5 De Gex & Sm. 603; *Clark v. Cook*, 3 De Gex & Sm. 333.



certain;(l) and the law is the same where the *feme* is put in possession of lands by a decree of the Court of Chancery until a certain sum be raised by way of *equitable elegit*.(m) But a mere judgment, recovered by the \*wife before the coverture, is clearly a *chose in action*, and as [\*631] such cannot be disposed of by the husband, except by actual re-duction into possession.(n)

And it has been held that a mortgage term in trust for the wife,(o) or a term in trustees for raising a portion for her,(p) may be assigned by the husband so as to carry the beneficial interest. But in these cases a doubt arises whether the debt or portion may not be held to be the principal thing; and as the doctrine that a *chose in action* of the wife is not disposable by the husband is of far more recent date than the decisions referred to, the question cannot be considered as settled. The cases in which it has been held under the order and disposition clause in bankruptcy, that the land draws with it the debt, so as to exclude the operation of the clause, tend strongly to support the old authorities, but are hardly decisive.(q)

A second husband may assign the trust of a term limited to the separate use of a *feme* upon her first marriage, or during her first coverture, unless it appear that it was the intention to extend the separate use to a subsequent marriage.(r) It was held, indeed, by Lord Nottingham in Sir Edward Turner's case,(s) that a term thus limited could not be disposed of by the second husband; but the decree, it is said, originated in mistake;(t) and was reversed in the house of lords on appeal.(u)

3. The case of the wife's equitable estate in lands of freehold or of inheritance, presents in the main the same general similarity to that of her legal estate in like lands as has been noticed in the case of chattels real. Thus the husband without the wife can, in the case of the equitable as in that of the \*legal interest, convey an estate [\*632] for the joint lives of himself and his wife, or for his own life after issue born. So he and his wife conjointly can, by deed acknowledged by the latter under the Fines and Recoveries Act, dispose of the equitable as of the legal interest, and bar an equitable entail as they might a legal entail, by deed enrolled in chancery. But according to Lord Cottenham's decision in *Sturgis v. Champneys*, the sole acts of the husband cannot affect the wife's equity to a settlement; and his power over the equitable interest is, in this respect, less extensive than that which he possesses over the legal. And it has been held, that the mere

(l) *Lord Corteret v. Paschal*, 3 P. W. 201, per Lord King. But this was before the case of *Purdew v. Jackson*, 1 Russ. 1.

(m) S. C. ib. 197.

(n) *Fitzgerald v. Fitzgerald*, 8 Com. B. R. 611.

(o) *Bates v. Dandy*, 2 Atk. 207; *Packer v. Wyndham*, Pr. Ch. 412, see 418.

(p) *Walter v. Saunders*, 1 Eq. Ca. Ab. 58; *Inclendon v. Northcote*, 3 Atk. 430, see 435; and see *Mitford v. Mitford*, 9 Ves. 99; *Hore v. Becher*, 12 Sim. 465.

(q) *Jones v. Gibbons*, 9 Vesey, 407; and see *Rees v. Keith*, 11 Sim. 388.

(r) *Tudor v. Samyue*, 2 Vern. 270; *Barton v. Briscoe*, Jac. 603; *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, ib. 126; and see *Howard v. Hooker*, 2 Ch. Re. 81; *Edmonds v. Dennington*, cited *Carleton v. Earl of Dorset*, 2 Vern. 17.

(s) 1 Ch. Ca. 307.

(t) See *Sanders v. Page*, 3 Ch. Re. 224; but see *Pitt v. Hunt*, 1 Vern. 18.

(u) 1 Vern. 7.

circumstance of the existence of a jointure-term preceding the estate of a *feme covert* tenant in tail in possession subject to the term, sufficiently renders the wife's estate equitable to entitle her to a settlement on a bill filed by her.<sup>(v)</sup>

The effect of the husband, or the husband's assignee, procuring a conveyance of the legal estate so as to clothe his equitable interest therewith, must be the same as in the case of an equitable term of years adverted to above.

4. We now proceed to the consideration of the wife's separate estate. Where property is settled to the *separate use* of a *feme covert*, unquestionably it is competent to her, unless her power of anticipation be restrained,<sup>(w)</sup> and without the concurrence of her trustees, unless the terms of the settlement require it,<sup>(x)</sup> to deal with the property directly and expressly, precisely in the same manner as if she were a *feme sole*.

The general principle that governs the law of separate use was laid down by Lord Thurlow, and has been recognized by the highest authorities, viz., that a "*feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*."<sup>(y)</sup>

[\*633] \*A *feme covert*, therefore, as regards her separate property, sues separately by her next friend, and may obtain an order to answer separately,<sup>(z)</sup> and if out of the jurisdiction be served with process by leave of the court,<sup>(a)</sup> will be bound by a submission in her bill,<sup>(b)</sup> or answer,<sup>(c)</sup> or by a contract for sale,<sup>(d)</sup> and her declarations may be read in evidence against her,<sup>(e)</sup> and she will be liable to an attachment for want of answer where she answers separately,<sup>(f)</sup> and similarly for disobeying the order of the court in a suit to which she is a party in re-

(v) *Wortham v. Pemberton*, 1 De Gex & Sm. 644.

(w) The words "without power of anticipation" are those most commonly used to deprive a *feme* of the power of forestalling the income, but this phraseology need not necessarily be adopted, as it is a question of intention upon the whole of the instrument whether her power of anticipation was or not to be restrained. See *Ross's Trusts*, 1 Sim. N. S. 199; *Scott v. Davis*, 4 M. & Cr. 89; *Doolan v. Blake*, 3 Ir. Ch. Re. 349, and cases cited ib.

(z) *Grigby v. Cox*, 1 Ves. 518, per Lord Hardwicke; *Dowling v. Maguire*, Rep. t. Plunket, 19, per Lord Plunket.

(y) *Hulme v. Tenant*, 1 B. C. C. 20.

(z) *Jackson v. Haworth*, 1 Sim. & St. 161.

(a) *Copperthwaite v. Tuite*, 13 Ir. Eq. Re. 68.

(b) *Allen v. Papworth*, 1 Ves. 163.

(c) *Clerk v. Miller*, 2 Atk. 379; *Bailey v. Jackson*, C. P. Cooper's Rep. 1837-8, 495. Husband and wife put in a joint answer, and the wife admitted certain indentures to be in her possession and claimed the estates to which the indentures related to her separate use for her life. The plaintiff moved for production, but it was argued that the answer was the husband's and could not be read as an admission by the wife. However, the court said though there was some logical difficulty, there was none in substance. That if the wife claimed the benefit of the separate use she must take it with its disadvantages, and ordered the production by the wife, and that the husband should permit her to produce. *Cowdery v. Way*, V. C. Knight Bruce, 2d Nov. 1843; and see *Callow v. Howle*, 1 De Gex & Sm. 534; *Darbishire v. Home*, 3 De Gex, Mac. & Gor. 113.

(d) *Davidson v. Gardner, Vend. & Purch.* 891, 11th ed.; *Stead v. Nelson*, 2 Beav. 248; and see *Harris v. Mott*, 14 Beav. 169.

(e) *Peacock v. Monk*, 2 Ves. 193, per Lord Hardwicke.

(f) *Graham v. Fitch*, 2 De Gex & Sm. 246; *Taylor v. Taylor*, 12 Beav. 271.

spect of her separate estate,(g) or her separate property may be ordered to be sequestered.(h)

The courts have further determined, that if, without any *direct* or *express* reference to her separate property, a *feme covert* bind herself by any *written* instrument, the implication of law is, that she meant to charge her separate estate, for except with reference to that the instrument was without meaning and nugatory. Thus, if a *feme covert* execute a bond,(i) even to her husband,(k) or join in a bond with \*another even with her husband,(l) or sign a promissory note,(m) or bill [\*634] of exchange,(n) or agree to take a leasehold house for a terms of years,(o) though she is not personally bound, yet her separate estate is liable. So if she give a written retainer to a solicitor, it entitles him to have his costs out of her separate estate,(p) though the circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate is not "*per se*" sufficient to make that estate directly liable for the amount of his costs;(q) and if she contract for the purchase of an estate, she may enforce it against the vendor, as it creates a valid obligation in respect of her property.(r) And it is immaterial whether the contract expressly refer to the separate property, or whether the vendor knew or not that purchaser was a married woman.(s) In one case a *feme* executed a bond *before* her marriage, and her property having been settled upon her marriage to her separate use, the obligee filed his bill against the husband and wife to have the debt paid out of her separate estate, and the husband having absconded, the court made the order.(t)

It has been stated that a *feme covert* makes her separate property liable by the execution of any *written* instrument: to that extent there can be no question; but the principles upon which the liability was held to attach were until recently involved in much doubt. Thus it was considered by Lord Loughborough,(u) Sir J. Leach,(v) and the late vice-

(g) *Otway v. Wing*, 12 Sim. 90.

(h) *Keogh v. Cathcart*, 11 Ir. Eq. Rep. 280; and see cases cited ib.

(i) *Lillia v. Airey*, 1 Ves. jun. 277; *Norton v. Turvill*, 2 P. W. 144; *Peacock v. Monk*, 2 Ves. 193, per Lord Loughborough; *Tullet v. Armstrong*, 4 Beav. 323, per Lord Langdale.

(k) *Heatley v. Thomas*, 15 Ves. 596.

(l) *Heatley v. Thomas*, 15 Ves. 596; *Stanford v. Marshall*, 2 Atk. 68; *Hulme v. Tenant*, 1 B. C. C. 20.

(m) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Tullett v. Armstrong*, 4 Beav. 323, per Lord Langdale; *Fitzgibbon v. Blake*, 3 Ir. Ch. Re. 323.

(n) *Stuart v. Kirkwall*, 3 Mad. 387; *Coppin v. Gray*, 1 Y. & C. Ch. Ca. 205; *Tullett v. Armstrong*, 4 Beav. 323, per Lord Langdale. But where there is no separate use a married woman cannot contract under the Fines and Recoveries Act. *Crofts v. Middleton*, 2 Kay & J. 194.

(o) *Gaston v. Frankum*, 2 De Gex & Sm. 561; S. C. on appeal, 16 Jur. 507.

(p) *Murray v. Barlee*, 4 Sim. 82; 3 M. & K. 209.

(q) *Callow v. Howle*, 1 De Gex & Sm. 521; and see *Re Pugh*, 17 Beav. 336.

(r) *Dowling v. Maguire*, Rep. t. Plunket, 1; but see *Chester v. Platt*, Vend. & Purch. 173, 13th edit.

(s) *Dowling v. Maguire*, Rep. t. Plunket, 1.

(t) *Biscoe v. Kennedy*, cited *Hulme v. Tenant*, 1 B. C. C. 17.

(u) See *Bolton v. Williams*, 2 Ves. jun. 142, 150, 156; *Whistler v. Newman*, 4 Ves. 145.

(v) See *Greatley v. Noble*, 3 Mad. 94; *Stuart v. Kirkwall*, ib. 389; *Aguilar v.*



[\*635] chancellor \*of England,<sup>(w)</sup> that the separate estate of a *feme covert* was not subject to her *general engagements*, and that upon the notion that a *feme covert* could not contract, but that every dealing in respect of her estate was in the nature either of an appointment or of a disposition.<sup>(x)</sup> However, it is clear that a *feme covert* can, in respect of her separate use, contract,<sup>(y)</sup> and that her written obligations are not to be viewed as appointments, and do not operate merely by way of disposition. The principles that govern the liability of a *feme's* separate property have been very satisfactorily explained by Lord Brougham and Lord Cottenham.

"The wife," said Lord Brougham, "has a separate estate subject to her own control, and exempt from all other interference or authority; if she cannot affect it, no one can, and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discoverd. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power (where that view was supported by the nature of the settlement,) but afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist, just as an instrument [\*636] expressing to be in execution of a power was always of course \*considered as made in execution of it; but so if by any reference to the estate it could be gathered that such was her intent, the same conclusion followed. Thus if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate, it was held that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation, in the same manner as an instrument which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general engagement only is raised, that is, where she becomes indebted without executing

Aguilar, 5 Mad. 418; Field v. Sowle, 4 Russ. 114; Chester v. Platt, V. & P. 173, 13th ed.

<sup>(w)</sup> See Murray v. Barlee, 4 Sim. 82; and see Digby v. Irvine, 6 Ir. Eq. Re. 149.

<sup>(x)</sup> See Bolton v. Williams, 2 Ves. jun. 150; Greatley v. Noble, 3 Mad. 94; Stuart v. Kirkwall, ib. 389; Aguilar v. Aguilar, 5 Mad. 418; Field v. Sowle, 4 Russ. 114.

<sup>(y)</sup> See Owens v. Dickenson, 1 Cr. & Ph. 53; Dowling v. Maguire, Rep. t. Plunket, 19; Master v. Fuller, 4 B. C. C. 19; Stead v. Nelson, 2 Beav. 245; Wainwright v. Hardisty, 2 Beav. 363; Bailey v. Jackson, C. P. Cooper's Rep. 1837-8, 495; Francis v. Wigzell, 1 Mad. 261; Crosby v. Church, 3 Beav. 489; Tullett v. Armstrong, 4 Beav. 319.

any written instrument at all.<sup>(z)</sup> *I own I can perceive no reason for drawing any such distinction.* If in respect of her separate estate the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."<sup>(a)</sup>

"A writing," said Lord Cottenham, "is operative upon a *feme's* separate estate, not by way of the execution of a power, although that has been an expression sometimes used, but, as \*I apprehend, very [\*637] inaccurately used in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power, nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. Besides, as it was argued in the case of *Murray v. Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*; whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power; what it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a *lien* on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract, and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, 1 B. C. C. 16, is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and in as much as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to

(z) It may be observed that the late V. C. of England while expressing his opinion upon the hearing below, that the general engagements of the *feme covert* did not affect the separate estate, does not appear to have conceived that any distinction existed between a written and unwritten obligation; see 4 Sim. 94.

(a) *Murray v. Barlee*, 3 M. & K. 223.

give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied. I observe that in *Clinton v. Willes*, 1 Sug. Pow. 208, n., Sir Thomas Plumer suggested a doubt whether it was necessary that the *feme's* [\*638] engagement should be \*secured by writing: it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction not recognized in any other case. On that point, however, I give no opinion at present.”(b)

The judgments of Lord Cottenham and Lord Brougham in the cases last referred to must be held to have clearly established that the dealings of the *feme covert* with her separate estate do not operate by way of appointment or disposition, and if this be so, it is difficult to see on what ground any valid distinction can be sustained between *verbal* and *written* engagements, the point which was left undecided by Lord Cottenham. If a written promise to pay, as a promissory note, referring neither to the instrument of trust nor to the property, be held to bind the separate estate, upon what ground can a verbal *assumpsit* be distinguished? So long as it could be maintained that the dealing of the married woman operated by way of *disposition* of the separate estate, there seemed room for contending that the disposition, as being an assignment of a trust, must have been in writing;(c) but so soon as it is admitted that the general engagement *in writing* binds, it seems impossible to resist the conclusion that a *verbal* general engagement must bind likewise. When it is attempted to imply a promise from mere *acts* of the *feme*, which may be construed as intended to bind either her husband or herself, there seems room for a distinction, but an *express* verbal promise, and an *express* written promise to pay must, it is conceived, stand on the same footing. The question, however, is one which still requires further elucidation by decision, and in a late case we find Vice-Chancellor Kindersley expressing himself in the following guarded language:

“It has not yet, indeed, been made the subject of positive decision, that the principle embraces a *feme's* verbal engagements or cases of common *assumpsit*. Considering, however, the opinions expressed and [\*639] the reason of the thing, I think \*it very probable that when that question arises for decision it will be decided in the affirmative.”(d)

It may be suggested that there is still another distinction, viz., that allowing the general engagements of the wife, whether written or unwritten, to bind her separate estate, yet, supposing the doctrine of these cases to be founded on the intention to charge the settled property as implied by the circumstance that otherwise the act would be nugatory, the same principle will not apply where it was clearly *not* the intention of the *feme* to create any charge, but, if any exist, it arises upon an *assumpsit* in law, wholly disconnected from the actual intention. In

(b) *Owens v. Dickenson*, 1 Cr. & Ph. 53.

(c) See page 600, *supra*.

(d) *Vaughan v. Vanderstegen*, 2 Drew. 183; and see *Newcomen v. Hassard*, 4 Ir. Ch. Re. 274.



accordance with this view it was held that where a *feme covert* granted an annuity which was void for want of a proper memorial, the annuitant had no remedy against the separate estate for the repayment of the purchase-money, as no implication of an *assumpsit* could be raised against her.<sup>(e)</sup> So where a *feme covert* misapplied some trust-money, and had she been a *feme sole* would have been liable for the amount, the court thought the *cestui que trust* could not charge the separate estate, in the total absence of the *feme's* intention to make her property liable.<sup>(f)</sup> However, there appears to be but a thin partition between the general engagements of a *feme* not in writing, and an *assumpsit* raised in law upon facts done *alio intuitu*; and considering that recent decisions have rather regarded the *feme covert* as in all respects a *feme sole* to the extent of her separate estate, it may not be safe to rely upon cases which have evidently proceeded upon principles that have since been abandoned.

Where a *feme covert* was privy to a breach of trust affecting the fund of which she was tenant for life to her separate use, it was decided by Lord Loughborough that she could proceed against the trustee, and compel the replacement of the \*fund.<sup>(g)</sup> It would seem difficult to support this decision, even on the assumption that the wife's deal- [\*640] ings operated by way of disposition. And in a case before Lord Langdale, where a married woman had concurred actively in dealings with the trust fund, amounting to a breach of trust, and she subsequently to her husband's decease filed a bill to have the trust fund replaced, his lordship treated the acts of the *feme* as an actual disposition of the fund to the extent of her separate estate therein, and made the separate estate available in partial exoneration of the trustee's liability.<sup>(h)</sup>

In a subsequent case before Lord St. Leonards, in Ireland, his lordship expressed himself thus: "I hope that the court may feel itself at liberty to treat a woman entitled for her separate use in possession as *sui juris*, so as to bind her interest where she prevails upon her trustees to commit a breach of trust." But his lordship in the same case in which the separate use of the *feme covert* was to arise upon a contingency, viz., the insolvency of the husband, which had not yet occurred, held that the *feme covert* could not by any act bind her interest.<sup>(i)</sup>

Supposing a person entitled to establish his claim against the separate estate, the limits of his remedy appear to be these. He cannot file a bill against the *feme covert* as the sole defendant and *personally* liable. "There is no case," said Sir T. Plumer, "in which this court has made

(e) *Jones v. Harris*, 9 Ves. 486; *Aguilar v. Aguilar*, 5 Mad. 414; *Bolton v. Williams*, 4 B. C. C. 297; S. C. 2 Ves. jun. 138; but in the latter case, when before Lord Thurlow, the point was not argued, and Lord Loughborough, on the rehearing, thought he had no jurisdiction to decide it.

(f) *Greatley v. Noble*, 3 Mad. 79; and see *Nantes v. Corrock*, 9 Ves. 182; *Stuart v. Kirkwall*, 3 Mad. 387.

(g) *Whistler v. Newman*, 4 Ves. 129; see observations of Lord Eldon on this case; *Parkes v. White*, 11 Ves. 223.

(h) *Crosby v. Church*, 3 Beav. 485; and see *Brewer v. Swirles*, 2 Sm. & Giff. 219; and the observations of L. J. (then V. C.) Turner in *Hughes v. Wells*, 9 Hare, pp. 772, 773; *Hanchett v. Briscoe*, 22 Beav. 496.

(i) *Mara v. Manning*, 2 Jones & Lat. 311.

a *personal* decree against a *feme covert*. She may pledge her separate property and make it answerable for her engagements; but where her trustees are not made parties to a bill and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained.”(k) But the party aggrieved may file a bill against her and her trustees, (and the death of the husband, which puts an end to the separate use, either after the filing of the bill,(l) or even before [\*641] it,(m) will not defeat the \*suit,) and may pray payment of his demand out of all *personal estate* in the hands of the trustees to which she is entitled absolutely, (including *arrears* of rents,) and also out of the *accruing* interest or rents, if there be no clause against anticipation, until the claim and costs have been satisfied.(n)

“Determined cases,” said Lord Thurlow, “seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate*, and *rents and profits when they arise*, to the satisfaction of such general engagement; but this court has not used any *direct* process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice or of the engagement of the wife, to be carried into execution.” His lordship then adds, “I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale, mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife.”(o) But it is conceived that if in any case the instrument were so specially worded as to place the *corpus* also at the disposal of the *feme covert* as entitled to it for her separate use, the engagements of the wife would, upon principle, bind the whole interest settled to the the separate use, whether *corpus* or income.

If there be a clause against anticipation, the court directs payment out of the *feme's* separate estate, except that part of which she has no power of anticipation.(p) But where there is a restraint upon anticipation the [\*642] engagements of the \*wife will operate upon any *arrears* of the separate use that may have already accrued.(q)

In one case the court refused to hold the bank annuities of a *feme covert* liable, as stock could not in the case of a person *sui juris* be taken in execution;(r) but now that stock is available to the creditor,(s) the distinction may be considered as gone.

(k) Francis v. Wigzell, 1 Mad. 262.

(l) Field v. Sowle, 4 Russ. 112.

(m) Heatley v. Thomas, 15 Ves. 596; but see Kenge v. Delavall, 1 Vern. 326.

(n) Hulme v. Tenant, 1 B. C. C. 20; Standford v. Marshall, 2 Atk. 68; Murray v. Barlee, 4 Sim. 82; 3 M. & K. 209; Field v. Sowle, 4 Russ. 112; Nantes v. Corrock, 9 Ves. 182; Bullpin v. Clarke, 17 Ves. 365; Jones v. Harris, 9 Ves. 492, 493, 497; Stuart v. Kirkwall, 3 Mad. 387.

(o) Hulme v. Tenant, 1 B. C. C. 20, 21; and see Broughton v. James, 1 Coll. 26.

(p) Murray v. Barlee, 4 Sim. 95.

(q) Fitzgibbon v. Blake, 3 Ir. Ch. Re. 328.

(r) Nantes v. Corrock, 9 Ves. 182.

(s) 1 & 2 V., c. 110, s. 11.

After the death of the *feme covert* the creditor may file a bill for payment of his debt out of her separate estate,<sup>(t)</sup> and where there are other creditors, specialties and simple contract debts will be paid *pari passu*, as the separate property is considered equitable assets.<sup>(u)</sup>

A *feme covert* has, as incident to her separate estate, a power to dispose of it, and of all accumulations therefrom, by testamentary instrument in the nature of a will.<sup>(v)</sup> And if a *feme* leave a will and make bequests, the usual course of administration will be observed. Thus the undisposed of estate will be first applied, then, general legacies, and, if there still be a deficiency, the specific legacies.<sup>(w)</sup>

If a *feme* having personal estate settled to her separate use die without disposing of it, the husband will be entitled to it; as to so much thereof as may consist of cash, furniture, or other personal chattels in his marital right, and as to so much as may consist of "*choses in action*," upon taking out administration to his wife.<sup>(x)</sup>

If the husband receive the wife's separate income, though there was a clause against anticipation,<sup>(y)</sup> and the wife survives, it is clear that she or her personal representative cannot claim against his estate more than one year's arrears, but it is still *sub judice* whether the wife or her representative \*can claim even so much. Lord Macclesfield,<sup>(z)</sup> Lord Talbot,<sup>(a)</sup> Lord Loughborough,<sup>(b)</sup> Sir W. Grant,<sup>(c)</sup> and Lord [\*643] Chancellor Brady<sup>(d)</sup> held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell,<sup>(e)</sup> Lord Camden,<sup>(f)</sup> Lord King,<sup>(g)</sup> Lord Hardwicke,<sup>(h)</sup> Lord Eldon,<sup>(i)</sup> Sir J. Leach,<sup>(k)</sup> Sir J. Stuart,<sup>(l)</sup> and Lord St. Leonards,<sup>(m)</sup> the husband's estate is liable to an account for one year. The more commonly received opinion in the profession is thought to be that an account for one year should be given.<sup>(n)</sup>

(t) See *Owens v. Dickenson*, 1 Cr. & Phil. 48; *Gregory v. Lockyer*, 6 Mad. 90.

(u) *Anon.* 18 Ves. 258; *Owens v. Dickenson*, 1 Cr. & Ph. 53, per Lord Cottenham.

(v) *Fettiplace v. Gorges*, 1 Ves. jun. 46; *Humpherey v. Richards*, 2 Jur. N. S. 432.

(w) *Norton v. Turvill*, 2 P. W. 144.

(x) *Molony v. Kennedy*, 10 Sim. 254; *Bird v. Peagram*, 13 Com. B. R. 639; *Johnstone v. Lumb*, 15 Sim. 308; *Drury v. Scott*, 4 Y. & C. 264.

(y) *Rowley v. Unwin*, 2 Kay & J. 138. (z) *Powell v. Hankey*, 2 P. W. 82.

(a) *Fowler v. Fowler*, 3 P. W. 353. (N. B. A case of pin-money.)

(b) *Squire v. Dean*, 4 B. C. C. 325; *Smith v. Camelford*, 2 Ves. jun. 716.

(c) *Dalbiac v. Dalbiac*, 16 Ves. 126. (d) *Arthur v. Arthur*, 11 Ir. Eq. Re. 511.

(e) *Burdon v. Burdon*, 2 Mad. 286, note. (f) *Ib.* p. 287, note.

(g) *Countess of Warwick v. Edwards*, 1 Eq. Ca. Ab. 170. In *Thomas v. Bennett*, 2 P. W. 341, his lordship probably held only that *ten years'* arrears could not be given.

(h) *Townshend v. Windham*, 2 Ves. sen. 7; *Peacock v. Monk*, 2 Ves. sen. 190; *Aston v. Aston*, 1 Ves. sen. 267.

(i) *Parkes v. White*, 11 Ves. 225; *Brodie v. Barry*, 2 Ves. & B. 36.

(k) *Thrupp v. Harman*, 3 M. & K. 513. (l) *Lea v. Grundy*, 1 Jur. N. S. 953.

(m) Property as administered, by D. P., p. 169.

(n) In *Howard v. Digby*, 2 Cl. & Fin. 643, 665, Lord Brougham thought that in *separate use*, as distinguished from *pin-money*, the wife or her representatives could recover the whole arrears, but this is clearly untenable; see *Arthur v. Arthur*, 11 Ir. Eq. Rep. 513. In the same case the V. C. of England, when the cause was before him, hesitated whether the general rule gave an account for a year or none at all; see *Digby v. Howard*, 4 Sim. 601.



The principle upon which the relief is thus limited is that the court presumes the acquiescence of the wife in the husband's receipt *de anno in annum*. If, therefore, the wife did not in fact consent to the husband's receipt, but remonstrated and required that the separate income should be paid to herself, which was promised, the court will carry back the account of the arrears to the time of the wife's assertion of her claim.<sup>(o)</sup> But the court requires very clear evidence that the demand [\*644] was seriously pressed by the wife, and will not charge the \*husband's estate from any idle complaints against his receipt which the wife may have occasionally made.<sup>(p)</sup>

As the court proceeds upon the notion of the wife's acquiescence, the question arises where she is *non compos*, and so incapable of waiving her right, whether the husband's estate shall not be liable for the entire arrears; and it would seem that in such a case the husband's estate must account for the whole, but that the husband's estate will be entitled to an allowance for payments made for the wife's benefit, and which ought properly to have fallen on her separate estate.<sup>(q)</sup>

In *Howard v. Digby*<sup>(r)</sup> a woman's *pin-money* was distinguished from ordinary *separate use*, and it was held as to *pin-money* that the wife's *representatives*<sup>(s)</sup> could make no claim to any arrears. The ground upon which the house proceeded was, that *pin-money* was for the personal use and ornament of the wife, and the husband had a right to see the fund properly applied, and that if the husband himself found the necessaries for which the *pin-money* was intended, the wife or her representative could have no claim against the husband's estate when the requirements for her personal use and ornament had ceased.<sup>(t)</sup> Lord St. Leonards has justly questioned these principles,<sup>(u)</sup> and it remains to be seen whether *Howard v. Digby* will be followed, except under exactly similar circumstances.

In the foregoing discussion of the "separate use," no distinction has been taken between real and personal estate. It must be observed, however, that in the case of *realty* it was formerly held that the *feme covert* [\*645] could not by virtue of \*the separate use, if there were no express power, dispose of the freehold, at least not for any larger interest than during the coverture,<sup>(v)</sup> for between real and personal estate it was

(o) *Ridout v. Lewis*, 1 Atk. 269; *Moore v. Moore*, 2 Atk. 272; see *Moore v. Earl of Scarborough*, 2 Eq. Ca. Ab. 156; *Parker v. Brooke*, 9 Ves. 583.

(p) *Thrupp v. Harman*, 3 M. & K. 512.

(q) *Attorney-General v. Parnter*, 3 B. C. C. 441, 4 B. C. C. 409; *Howard v. Digby*, 2 Cl. & Fin. 671, 673.

(r) 2 Cl. & Fin. 634; 4 Sim. 588.

(s) Lord Brougham considered that the wife herself might in her lifetime have recovered one year's arrears; see 2 Cl. & Fin. 643, 653, 659.

(t) *Pin-money*, said Lord Hardwicke, shall not be allowed for more than one year, not merely on a supposal of her having given the arrears to her husband, but on this; that having lived with the husband she is *supposed to have received satisfaction that way*; *Aston v. Aston*, 1 Ves. sen. 267; and see *Fowler v. Fowler*, 3 P. W. 355.

(u) *Law of Property as administered*, by D. P., p. 162.

(v) *Churchill v. Dibben*, 2 Lord Kenyon's Rep. 2d part, 68, p. 84; case cited in *Peacock v. Monk*, 2 Ves. 192; and see 2 *Rop. Husb. and Wife*, 182, 2d ed.; 1 *Sand. on Uses*, 345, 4th ed.

said there was this distinction, that on the death of the *feme* in her husband's lifetime, the absolute interest in the personal estate would devolve on the husband, but the inheritance of the real estate would descend upon the heir, who was not to be disinherited but in some formal mode. However, the favour shown anciently to the heir, has in later times been disregarded: and it is presumed that at the present day, if lands be conveyed to a trustee and his heirs upon trust as to the fee simple for a *feme covert* "for her separate use," she may deal with the fee as if she were a *feme sole*.(w) It is simply a question of intention. A married woman may have limited to her a power of disposition over a fee simple estate, and if the separate use be so worded as to show that the separate use was meant to extend not only to her life-interest but to the fee, she ought, upon principle, to be able to deal with the absolute property by virtue of the separate use, whether by act *inter vivos*, or by testamentary instrument, as fully as she might in the case of personal estate. It cannot, however, be said that the question is free from doubt. In a late case in Ireland,(x) Sir T. B. C. Smith, master of the rolls, appears to have considered the freehold interests of the wife extending beyond her own life settled to her separate use as forming a special exception; and where freehold and copyhold premises were devised to a *feme covert* for her separate use, and the wife entered into a contract for sale and died, having devised the property to her husband, who filed a bill against the purchaser for specific performance, the court considered the question of the wife's power to devise the estate as being too doubtful to \*compel the defendant to take the title in the absence of the [ \*646 ] heir.(y)

It has been decided that where a *feme* is dealing with property by virtue of her separate use, the deed need not be acknowledged by her under the Fines and Recoveries Act.(z)

## SECTION VI.

### OF JUDGMENTS AGAINST THE CESTUI QUE TRUST.

Before entering upon this topic, it may be useful to notice briefly how *legal interests stand affected by judgments*.

At *common law* the plaintiff in the action had only two writs of execution open to him against the property of the defendant: the  *fieri facias*, to levy the debt *de bonis et catallis*; and the *levari facias*, to levy it *de terris et catallis*.(a) The execution under the latter writ affected no interest in land of a higher description than a mere chattel interest, which last the sheriff might sell in like manner as a personal chattel, and affected not the *possession* of the lands,(b) but merely enabled the sheriff,

(w) See *Stead v. Nelson*, 2 Beav. 245; *Wainwright v. Hardisty*, Ib. 363; *Crosby v. Church*, 3 Beav. 485; *Baggett v. Meux*, 1 Coll. 138; 1 Phill. 627; see p. 628; *Major v. Lansley*, 2 R. & M. 355.

(x) *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274.

(y) *Harris v. Mott*, 14 Beav. 169. (z) *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268.

(a) *Pinch's Law*, 471. (b) *Id.* 471; *Sir E. Coke's case*, Godb. 290.

besides taking the chattels, to levy the debt from the present profits, as from the rents payable by the tenants,<sup>(c)</sup> and the emblements,<sup>(d)</sup> that is, the corn and other crops at the time growing on the lands.<sup>(e)</sup> If the sheriff, when he made his return, had not levied the full amount of the debt, a new *levari facias* might have issued, to be executed by the sheriff in like manner.<sup>(f)</sup>(1)

[\*647] \*In order to provide for the creditor a more effectual remedy, the Statute of Westminster<sup>(g)</sup> introduced the writ of *elegit*, and enacted, that when debt was recovered or acknowledged, or damages awarded, the suiter should at his choice<sup>(h)</sup> have a writ of *feri facias*<sup>(i)</sup> from the debtor's lands and chattels, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and *one-half of his land, until the debt should be levied upon a reasonable price or extent.*

It was by virtue of this statute that judgment creditors were first enabled to sue execution of one moiety of the debtor's *lands*, whether vested in him at the time of the judgment or subsequently acquired.

Chattel interest in lands were, *even before the Statute of Frauds*, not bound until after execution awarded. And since the statute, according to the better opinion, they have, as falling within sect. 16, been bound only from the *delivery* of the writ to the sheriff; and it would seem that, by the 19 & 20 Vict. c. 97, s. 1, the protection conferred by the Statute of Frauds has, in favour of persons *bona fide* and for value acquiring a title without notice, been extended to the time of actual seizure.<sup>(k)</sup>

[\*648] \*We now come to the inquiry, what is the effect of judgments upon interests in *equity*?

(c) Finch's Law, 472; Davy v. Pepys, Plowd. 441.

(d) 4 Com. Ab. 118.

(e) Harbert's case, 3 Re. 11 b; 2 Inst. 394; 2 Bac. Ab. Execution (C) 4, note (b).

(f) F. N. B. 265.

(g) 13 Ed. 1, st. 1, c. 18.

(h) Whence the term *elegit*.

(i) In these words the legislature meant to include the *two* writs of *feri facias* and *levari facias*. 2 Inst. 395.

(k) The word "*goods*" used in the latter act is the same as that used in the Statute of Frauds. The only doubt would seem to be whether the words *actual seizure* can be held to apply to a chattel real.

(1) There was also another species of *levari facias*, of which the plaintiff might under particular circumstances, have indirectly availed himself. In case the defendant was outlawed in the action, the sheriff, on the issuing of the *capias ultegatum*, took an inquisition of the lands of the debtor, and extended their value, and made his return to the Exchequer. A *levari facias* from the crown then followed, commanding the sheriff to levy the extended value *de exitibus*, from the *issues* of the lands, till the plaintiff should be satisfied his debt. These issues were defined to be the "rents and revenues of the land, corn in the grange, and all moveables, except horse, harness, and household stuff." 13 Ed. 1, c. 39, st. 1; 2 Inst. 453. The sheriff might have agisted or mown the grass. *Britten v. Cole*, 5 Mod. 118, per Lord Holt. But if at the date of the inquisition, the agistment was already let, the money agreed to be paid was a sum *in gross*, and was not subject to the *levari facias*. S. C. 1 Raym. 307, *per eundem*. The cattle of a stranger, if *levant and couchant* on the land, were seizable under the writ, as included in the word "issues." S. C. Ib. 305. The lands were bound by the *levari facias* from the date of the writ, so that any subsequent disposition, though it served to pass the freehold and possession, yet did not interrupt the king's title to the profits. Ib. 307, per Lord Holt.



First, with respect to the *feri facias*, it is clear that under the system of *uses* no relief could have been granted; for the creditor, coming in by operation of law, did not possess that *privity* of estate which could alone confer upon him the right to sue a *subpoena*. During the earlier period of *trusts* the same technical notions prevailed; but Lord Nottingham introduced a more liberal principle, and established, what is now law, that a creditor who was prevented from executing the legal process by the interposition of a trust, might come into chancery, and prosecute an *equitable feri facias*.<sup>(l)</sup>

But as the analogy to law must be strictly pursued, the trust of a chattel cannot be attached in equity until the writ of execution has been actually sued out; for till that time there is no *lien* upon the debtor's effects, which is the very ground of the application.<sup>(m)</sup>

And as equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel of which the trust has been created, is not in itself amenable to any legal process. An opinion, indeed, is subjoined to the case of *Horn v. Horn in Ambler*,<sup>(n)</sup> that a trust of *stock* might, before the late act, have been taken by a judgment creditor in equitable execution; and *Taylor v. Jones*,<sup>(o)</sup> before Sir W. Fortescue, M. R., was even a decision to the same effect; but such a doctrine, inasmuch as stock could not have been reached at law, was clearly contrary to all principle, and afterwards incurred the express disapprobation of Lord Thurlow,<sup>(p)</sup> Lord Manners,<sup>(q)</sup> Sir W. MacMahon,<sup>(r)</sup> Sir Archibald \*Macdonald,<sup>(s)</sup> and Lord Eldon;<sup>(t)</sup> [\*649] Lord Thurlow observing, that the opinion in *Horn v. Horn* was so anomalous and unfounded, that forty such would not satisfy his mind.<sup>(u)</sup> Now, however, by the late act for extending the remedies of creditors (1 & 2 Vict. c. 110, s. 14,) a judgment debtor's interest in stock, whether legal or equitable, is rendered available for the payment of debts.<sup>(v)</sup>

The judgment creditor is of course entitled to the same relief (subject to such restrictions as we have mentioned) against the *equity of redemption* of a chattel.<sup>(w)</sup>

As regards the *levari facias*, a court of equity would, it is presumed, as in the instance of the *feri facias*, assist in the execution of it where obstructed by the interposition of a trust; but the writ being a *lien* at law, not upon the lands, but only on the present profits of the lands, a

(l) *Pit v. Hunt*, 2 Ch. Ca. 73; *Gore v. Bowser*, 3 Sm. & Giff. 1; *Anon. case*, cited *Balch v. Wastall*, 1 P. W. 445; and see *Scott v. Scholey*, 8 East. 485; *Eastwick v. Caillaud*, 5 T. R. 420. *Kirkby v. Dillon*, C. P. Cooper's Rep. 1837-38, 504; *Simpson v. Taylor*, 7 Ir. Eq. Rep. 182; *Bennett v. Powell*, 3 Drew. 326; *Gore v. Bowser*, 3 Sm. & Giff. 1.

(m) *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200.

(n) *Amb.* 79.

(o) 2 Atk. 600; and see a note of S. C. in *Grogan v. Cooke*, 2 B. & B. 233.

(p) *Dundas v. Dutens*, 2 Cox, 240.

(q) *Grogan v. Cooke*, 2 B. & B. 233.

(r) *Plasket v. Dillon*, 1 Hog. 328.

(s) *Caillaud v. Estwick*, 2 Anst. 384.

(t) *Rider v. Rider*, 10 Ves. 368.

(u) *Grogan v. Cooke*, 2 B. & B. 233.

(v) See pp. 669, 670, *infra*.

(w) *King v. Marissal*, 3 Atk. 192; *Shirley v. Watts*, *Ib.* 200; *Burdon v. Kennedy*, *Ib.* 739; and see *King v. De la Motte*, *Forr.* 162.

court of equity could not go farther and affect either the *freehold* or the *possession*.

The *elegit* owing its origin to a statute, a doubt may suggest itself *in limine*, whether, when the legislature has passed an enactment against the *legal estate*, a court of equity can, consistently with its general principles, apply by analogy the same provision to the case of a trust. A legal estate, for example, was by act of parliament made forfeitable without inquest for treason, and, as the statute enumerated "uses," it was contended, and seems to be established, that trusts have also under that expression become forfeitable to the crown; but it was never pretended that, had "uses" not been inserted in the act, a court of equity could have subjected trusts to forfeiture by any inherent jurisdiction of its own. It must be remarked, however, that the act which originated the *elegit* was, like the statute *de donis*, prior to the introduction of the use; and as equity, by analogy to the Statute of Westminster, has admitted entails [350] and remainders of trusts, why may it not, by analogy to \*another act of the same statute, allow equitable interests to be affected by judgments?(x)

It would seem that in Lord Keeper Bridgman's time a trust was not subject to an *elegit*.(y) But the authority of that distinguished lawyer has not been followed in succeeding times.

It was long ago established that a judgment creditor might redeem a mortgage in fee,(z) and it is now equally settled that he may prosecute his *elegit* against any other equitable interest.(a)

Davidson v. Foley,(b) and Plasket v. Dillon,(c) were cases of a *legal elegit*, but may be usefully noticed to prevent misapprehension. In the former case, Lord Foley had devised an estate to trustees for a term of ninety-nine years upon certain trusts, and subject thereto, to Thomas Foley for life, with remainders over. His lordship had also devised other estates to trustees for a term of one hundred and one years, and subject thereto, to Thomas Foley for life, &c., as before judgments were entered up against Thomas Foley, and the trusts of the terms having been satisfied, and the beneficial interest resulting to the tenant for life, the creditors sued out *elegits*, and filed a bill praying to have the terms declared attendant on the inheritance, and that the trustees might be restrained from setting up the terms at law. The warrants of attorney on which

(x) See Ryall v. Rolle, 1 Atk. 184.

(y) See Pratt v. Colt, Freem. 139.

(z) Greswold v. Marsham, 2 Ch. Ca. 170; Crisp v. Heath, 7 Vin. Ab. 52. (The former case has been compared with Reg. Lib., A. 1685, f. 399, and the report appears substantially correct: the latter case has not been found.) Plucknett v. Kirke, 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 184, see *infra*; Sharpe v. Earl of Scarborough, 4 Ves. 538, and the cases cited *Ib.* 541; Stileman v. Ashdown, 2 Atk. 477; Fothergill v. Kendrick, 2 Vern. 234; and see Steele v. Phillips, 1 Beat. 188; Forth v. Duke of Norfolk, 4 Mad. 503; King v. De la Motte, Forr. 162; and see Freeman v. Taylor, 3 Keb. 307.

(a) Forth v. Duke of Norfolk. 4 Mad. 504. per Sir J. Leach: Serj. Hill's opinion, *Ib.* 506, note (a); Foster v. Blackstone, 1 M. & K. 311, per Sir J. Leach: and see Lodge v. Lyselev. 4 Sim. 70; Kirkby v. Dillon, C. P. Cooper's Rep. 1837-38, 504; Neate v. Duke of Marlborough, 9 Sim. 60, 3 M. & Cr. 407; Adams v. Paynter, 1 Coll. 530.

(b) 2 B. C. C. 203; 3 B. C. C. 598.

(c) 1 Hog. 324.

the judgments were grounded were \*afterwards discovered to be void; but Lord Thurlow, in dismissing the bill, observed, "All [\*651] he could gather from the cases was that where the court could see there was a good judgment it would not stop without aiding that title by what was called an *equitable elegit*, but he could not carry it higher than that. The *equitas sequens legem* must be such as to assure the court the case was such as it could be followed by a legal execution; but where it appeared the judgment could not be followed by a *legal elegit*, the court could not follow it by an *equitable elegit*."

In *Plasket v. Dillon*, Lord Dillon, *the tenant for life*, had demised an estate to trustees *for ninety-nine years*, if he should so long live, upon trust, after discharging certain incumbrances, to pay to himself for life an annuity of 5000*l.*, and, subject thereto, upon certain trusts for his creditors. A judgment was afterwards entered up against him, and an *elegit* sued out, but as there was no beneficial interest upon which the *elegit* could operate at law, the judgment creditor filed a bill to attach the rent-charge of 5000*l.* a year in equity. Sir William MacMahon said, "The rule of law is, that the freehold property of the debtor shall be liable to the demands of his judgment creditors. Lord Dillon insists that the magical operation of a voluntary deed shall clear it from all incumbrances. If the statute of uses had executed the trusts of this deed, Lord Dillon's interest would have been extendible, and the interposition of a trust cannot exempt it in this court." (*d*) His honor's decision in favour of the judgment creditor was affirmed on appeal by Lord Manners, and afterwards, on a further appeal, by the house of Lords. (*e*)

These then were cases of a judgment creditor having a *legal elegit*, and seeking to remove an impediment to the *legal* execution of it; but in *Tunstall v. Trappes* (*f*) the *elegit* was, strictly and properly speaking, equitable. By an indenture of 1811, Trappes appointed an estate to the use that Davis should receive an annuity, and, subject thereto, to the use of Withy and his heirs, upon trust in the first place to secure the \*annuity, and then in trust for Trappes. In 1812, a judgment [\*652] was entered up against Trappes by Sir Henry Lawson. In the beginning of the year 1814, Trappes proposed to one Cranmer, that Cranmer should pay off Davis's annuity, and several incumbrances which were prior to it, and take a mortgage of the property for securing the advances he should thus make. On the 1st July, 1814, Cranmer paid off Davis's annuity, and took a conveyance of the legal estate from Withy to himself in fee, by way of security for the moneys advanced and to be advanced. He afterwards paid off several charges prior to the annuity, and took assignments of the terms by which they were secured in the names of trustees. It was proved that Cranmer had notice of the judgment some time between the first and eleventh days of July, 1814, and with such notice had continued to make advances to a very considerable amount. The question was, whether Cranmer was bound by the judgment, and if bound at all, then to what extent. The vice-chancellor decided that Cranmer was entitled to priority over the judgment

(*d*) 1 Hog. 328.

(*e*) 2 Bl. N. R. 239.

(*f*) 3 Sim. 286; and see *Lewis v. Lord Zouche*, 2 Sim. 388.



creditor in respect of the sums paid by him for procuring the assignments of the *prior* charges, and for redeeming the annuity, *those incumbrances having been created prior to the time when Cranmer had notice of the judgment*; but that his claim in respect of the moneys advanced by him subsequently to that period should be *postponed to the judgment*. In other words, the trust estate was bound by the judgment in the hands of a purchaser with notice, where he could not protect himself under the assignment of a prior charge.

The right of an *elect* creditor upon an equitable interest has also since been assumed in the case of *Neate v. Duke of Marlborough*.<sup>(g)</sup>

The present doctrines of the court have been well expressed by Sir J. Leach. "A judgment creditor," he said, "has at law by the Statute of Frauds execution against the equitable freehold estate of the debtor in the hands of his trustee,<sup>(h)</sup> provided the debtor has the whole beneficial interest; but if <sup>\*</sup>he has left a partial interest only in his [653] equitable freehold estate, the judgment creditor has no execution at law, though he may come into a court of equity, and claim there the same satisfaction out of the beneficial interest, as he would be entitled to at law if it were legal. Every *voluntary assignee* of this equitable interest of the debtor will be in the same situation, with respect to the claim of the judgment creditor, as the debtor himself was. Every *assignee for valuable consideration* will hold the equitable interest discharged of the claim of the judgment creditor, unless he has notice of it."<sup>(i)</sup>

An estate given by A. to trustees upon trust to convert into personalty for the benefit of B. has in equity all the properties of personalty, and under the old law therefore a judgment against the person to whom the proceeds of the sale were directed to be paid conferred no lien upon the proceeds.

Thus in *Foster v. Blackstone*<sup>(k)</sup> estates were conveyed by the Duke of Marlborough to trustees in fee upon trust, if the said trustees *should in their discretion think proper, but not otherwise*, to raise any sum of money for satisfaction of any debts due and owing from his son the Marquis of Blandford, which the trustees should consider advisable to be paid; and to pay the surplus, if any, of such moneys as should be raised in the lifetime of the duke unto the duke, and the surplus of such as should be raised after his decease unto the Marquis of Blandford; and, subject to the trusts aforesaid, the trustees were to stand seised of the said hereditaments in trust for the said duke for his life, and after his decease in trust for the marquis in fee. After the death of the duke the trustees converted the whole of the estate into personalty; and a creditor, whose judgment had been entered up against the Marquis of Blandford, sought to attach the trust moneys in the hands of the trustees, as bound by the judgment. Sir J. Leach said, "The creditor insists, that by force of his judgment he has a *lien* upon the moneys pro-

(g) 9 Sim. 60; 3 M. & C. 407; and see *Bennett v. Powell*, 3 Drewry, 236.

(h) As to the operation of the Statute of Frauds, see *infra*, p. 664.

(i) *Forth v. Duke of Norfolk*, 4 Mad. 504.

(k) 1 M. & K. 297; and see *Browne v. Cavendish*. 1 Jones & Lat. 633.

duced by the sale of the trust estates ; and if the interest of the marquiss were \*a vested interest in land, the creditor would be entitled ; [\*654] but the creditor had no *legal lien* upon the trust estates, but a [\*654] *possible equitable lien* depending upon a contingency. The trustees had a full authority to sell, and to convert the realty into personalty. If any part had been unsold by the trustees, it would have remained land, and the judgment would have attached upon it ; but it was all sold by the trustees, and the contingency which would have entitled the judgment creditor never took effect."

Whether the same principle applied were a judgment was entered up against a person after he had contracted to sell was much doubted.

Upon this subject we have the following opinion of Mr. Serj. Hill :—  
H. A. S., seised in fee of an estate, subject to his mother's jointure and to younger children's portions, contracted for the sale of the property in lots to different purchasers. After the date of the contracts, H. A. S. executed a conveyance to trustees, upon trust to convey to the different purchasers, and to invest part of the purchase-money in the funds as an indemnity against the jointure and portions, and to pay the residue to himself. *Subsequently to the deed of trust*, H. A. S. acknowledged a judgment. Mr. Serj. Hill was consulted on the part of the trustees, whether they would be safe in paying the money to H. A. S., as against the judgment of which they had notice, and also as against judgments, if any, of which they had no notice. The opinion was as follows : "As to the judgment of which the trustees had notice, though, to many purposes, the estate agreed to be sold is from the time of the contract the estate of the purchaser ; yet I think the vendor is not before payment of the money to be considered a mere trustee, for the estate continues his at *law*, and even in *equity* he has a right to detain it until payment of the purchase-money ; and, therefore, the judgment creditor hath a right to so much of the purchase-money as is sufficient to satisfy the judgment ; and the trustees having notice of his right ought to pay it, if the money is in their hands. As to the judgments, if any, of which the trustees have no notice, I think a court of equity will not make them pay the money over again, if they apply it according to the deed of trust, because \*I think equity in the case of a judgment creditor, and a *bona fide* purchaser or a trustee without notice, will not interpose on [\*655] either side, but will leave the law to take its course." (l)

And Sir J. Leach appears to have concurred in this opinion, that the vendor's interest after the contract is bound by a judgment ; for in *Forth v. The Duke of Norfolk*, (m) where a person had mortgaged an estate in fee, and then contracted to sell, and afterwards, before the conveyance, acknowledged a judgment, Sir J. Leach said, "An assignee for valuable consideration is discharged of the claim of the judgment creditor, *unless he had notice of it before the consideration paid*. If A., before the actual conveyance to him, had received notice of the judgment, then, being a purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase-money, he would have been equally

(l) Cited *Forth v. Duke of Norfolk*. 4 Mad. 506. note (a).

(m) 4 Mad. 503.

affected with the judgment as the debtor himself; and if he had afterwards paid the whole purchase-money to the debtor, he would have still remained liable to the judgment creditor."

But in a subsequent case Sir L. Shadwell said, "he should not have given the opinion which the learned serjeant had done, for it appeared to him that from the time H. A. S. entered into binding contracts to sell the lands, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed."<sup>(n)</sup> And it may be argued that if the vendor die after the contract, but before the conveyance, the purchase-money would go to the executor;<sup>(o)</sup> and that if the contract work a notional conversion of the land into money in respect of the vendor's representatives, the same consequence ought to follow in respect of the vendor's judgment creditors.

The case where A. conveys to trustees upon trust to sell for a limited [656] purpose, as payment of incumbrances, and to pay the \*surplus to himself, and where, before sale, a judgment is entered up against A., presents still more difficulty than that last discussed; as does also the case of a mortgage by A. with power of sale to the mortgagee and of a judgment entered up before sale. It is of course clear that in either case the power of giving receipts binds as against the judgment creditor, so that a purchaser from the trustee or mortgagee is not concerned to see that the judgments are satisfied;<sup>(p)</sup> but this still leaves open the question whether the judgment was, under the old law, a lien or charge on the proceeds in the hands of the mortgagee or trustee, a point, however, which is now unimportant, save so far as it bears upon the present state of the law.

How far the principles discussed in *Foster v. Blackstone* and the other cases referred to are applicable to the altered state of the law under the 1 & 2 Vict. c. 110, has not yet been settled. As between the purchaser and the judgment creditor, the power of the trustee or mortgagee to give receipts, remains, it is conceived, the same. But the large words of section 13 of the 1 & 2 Vict. c. 110, will, doubtless, in many cases, confer an equitable charge where, under the old law, the judgment would not have created a lien. Thus, where A. was entitled to an annuity secured by a covenant and an assignment of leaseholds in *trust to sell*, it was held that A.'s interest under the deed might, under the act, be made available for payment of a judgment debt due from her.<sup>(q)</sup> So where a testator gave real estate to trustees upon trust to levy and raise, during the life of A., an annuity of 400*l.*, and directed the annuity to be held upon trust for the support, clothing, and maintenance of A., the court, having previously decided that the trust was one for the benefit of A. generally,<sup>(r)</sup> held that a judgment creditor of A. was entitled to a charge on the annuity under the act.<sup>(s)</sup> Again, where a person covenanted to pay A.

(n) *Lodge v. Lyseley*, 4 Sim. 75; and see *Craddock v. Piper*, 14 Sim. 310, where, however, it does not appear whether the judgments were entered up before the actual sale or the decree for sale.

(o) See *Farar v. Winterton*, 5 Beav. 1, and *Curre v. Bowyer*, ib. 6, note.

(p) *Lodge v. Lyseley*, 4 Sim. 75; *Alexander v. Crosbie*, 6 Ir. Eq. Rep. 513.

(q) *Harris v. Davidson*, 15 Sim. 128.

(r) *Younghusband v. Gisborne*, 1 Coll. 400. (s) S. C. 1 De Gex & Sm. 209.



5000*l.*, and that the sum should be a charge on certain \*land, it was held that a judgment creditor of A. was entitled to a charge [\*657] on the land in respect of A.'s interest therein.<sup>(t)</sup> Again, where a mortgage with power of sale was executed, and before sale a judgment was entered up against the mortgagor, who was subsequently discharged under the Insolvent Act, and after such discharge the mortgagee sold under the power of sale, it was held that the judgment creditor was entitled to the surplus proceeds of sale.<sup>(u)</sup>

It is clear therefore that, in the actual state of the law and decisions, a vendor or mortgagee holding surplus proceeds of sale in his hands could not properly be advised to pay them to the settlor or mortgagor without the discharge or concurrence of the judgment creditor. Neither could a purchaser, where, as in the case before Serjeant Hill, judgments have been entered up against the vendor subsequently to the contract, safely complete without the discharge or concurrence of the judgment creditor. If, however, the owner of an estate contract to sell, and then judgments are entered up against him, it is clear that the judgments, though they may attach at law upon the land, yet cannot affect it in equity, and therefore, if the purchase-money can be properly applied, the purchaser may compel the creditor to release the judgment, and if the legal estate at the time of the judgment was not in the vendor but in a trustee for him, the judgment cannot affect the *land* either at law or in equity, though it may affect the *purchase-money*; and should there be any intervening incumbrances between the contract and the judgment which would exhaust the whole purchase-money, it is conceived that the purchaser might safely pay off the intervening incumbrances, and take the legal estate from the trustee. The judgment creditors in such a case, would have no legal lien, and the purchase-money has been properly applied.

The question, *how far*, under the old law, the *lien* of the judgment creditor against the trust estate extended, was one \*of considerable difficulty, and the authorities could only be reconciled by [\*658] the aid of a somewhat subtle distinction.

A judgment creditor might have come into a court of equity upon two grounds. First, upon a *legal* title where he either sought to remove an impediment to the execution of his legal *degit*, or, after the death of the conusor, sued for payment of his debt out of the conusor's personal assets, and, if they should be insufficient, then by sale<sup>(c)</sup> of the real estate: or, secondly, upon an *equitable degit*, on the ground that he had no legal *lien*, and therefore could have no legal process.<sup>(w)</sup>

As the extent of relief ought in both these cases to be the same, and

<sup>(t)</sup> Russell v. McCulloch, 1 Kay & John. 313; and see Clare v. Wood, 4 Haro. 81. But by 18 & 19 Vict. c. 15, s. 11, when the mortgagee is paid off, the judgment against him ceases to bind the land.

<sup>(u)</sup> Robinson v. Hedger, 13 Jur. 846; and 14 Jur. 784.

<sup>(v)</sup> An *degit* would at law give the *possession* of the lands till the satisfaction of the debt, but equity assumes the jurisdiction of facilitating the remedy by a *sale*. See Barnwell v. Barnwell, 3 Ridg. 61; O'Fallon v. Dillon, 2 Sch. & Lef. 19; O'Gorman v. Comyn. ib. 139; Stileman v. Ashdown, 2 Atk. 610; but see Bedford v. Leigh, 2 Dick. 709; Neate v. Duke of Marlborough, 3 M. & C. 417.

<sup>(w)</sup> These grounds of suit still subsist, in addition to that conferred by the 13th section of the 1 & 2 Vict. c. 110, giving the judgment creditor a charge in equity.

the court never attempted to take a difference, the authorities determined upon either head may be relied upon as applicable to the other. The result of the cases upon this principle, notwithstanding an early authority [659] to the contrary,<sup>(x)</sup> \*was that a judgment creditor could sue an equitable *clegit* of a moiety only of a trust estate.<sup>(y)</sup>

The grounds of the doctrine was thus delivered by Lord Hardwicke in the leading case of *Stileman v. Ashdown* :<sup>(z)</sup> "The judgment affects the land," said his lordship, "as it is bound by the judgment. Equity follows the law in this case, and as the plaintiff can extend only a moiety *there*, he shall have no more *here*. Suppose it was the case of a *bond creditor*; he might have an action of debt against the heir, and judgment against him upon assets descended, and this he is entitled to at common law, for it is the debt of the heir, and the action is in the *debet* and *detinet*; but if a *judgment* was obtained against the ancestor, a *scire facias* could not be brought against the heir at common law, because the heir was not bound. Before the Statute of Westminster, there was no remedy against the ancestor in his lifetime upon a judgment on his land; and it is that statute which subjects one moiety thereof to the judgment. In what right then is the *scire facias*

(x) *Compton v. Compton*, cited in *Stileman v. Ashdown*, Amb. 15. The case as stated in the Registrar's Book, was this: Richard confessed a judgment, and died intestate. Henry, his son and heir, filed a bill against the administratrix of his father and the persons entitled to the benefit of the judgment, praying that the debt might be discharged out of his father's personal estate to the relief of the lands. Henry died, and the suit was revived by Hoby, his son and heir, and at the hearing it was decreed, somewhat unaccountably, that the *plaintiff* should pay the judgment. Upon this *Pigott*, the party interested in the judgment, filed a cross-bill against the plaintiff in the former suit to have the decree carried into execution, and the court on the hearing made the order as before. Against this decree the plaintiff Hoby appealed, and Lord Keeper Harcourt then directed that the personal estate of Richard should be applied in the first instance, and that Hoby should not be *personally* charged with the judgment debt, but should make good the same so far only as any rents and profits of the real estate of Richard had come to his hands; but in case such personal estate, rents, and profits should fall short of the judgment, then the deficiency should be made good "by sale of the *whole* real assets of Richard liable to the judgment." (Reg. Lib. A. 1711, f. 134.) The authority of this case cannot however have much weight, for, as was observed by Lord Hardwicke (*Stileman v. Ashdown*, Amb. 17,) the point whether the whole or a moiety should be sold appears not to have been discussed.

(y) *Stileman v. Ashdown*, 2 Atk. 477, 608; *Rowe v. Bant*, Dick. 150 (as corrected from Reg. Lib., the case was as follows:—Rowe, the conusee of a judgment confessed by one Dingle, deceased, filed a bill against Bant, the executor of Dingle and who was also in possession of Dingle's real estate by the double title of grantee in Dingle's lifetime and general devisee in his will, praying payment of the judgment out of the real and personal estate of the testator, and that the grant to Bant in Dingle's lifetime might be declared void, as against the judgment, for want of consideration. The personal estate proved insufficient, and thereupon the court ordered a sale of *one moiety* of the real estate comprised in the grant. B. 1750, f. 427); *Barnwell v. Barnwell*, 3 Ridg. P. C. 24; *O'Dowda v. O'Dowda*, 2 Moll. 483; *Anon.* case, *ib.*; *O'Gorman v. Comyn*, 2 Sch. and Lef. 137; *Burroughs v. Elton*, 11 Ves. 33; *Williamson v. Park*, 2 Moll. 484; *Armstrong v. Walker*, *ib.* In *O'Fallon v. Dillon*, 2 Sch. and Lef. 13, the sale of the estate was *not* confined to a moiety; but there the creditor had entered up *two* judgments the *same term*, and then as both judgments were of the same date, the creditor might at *law*, have taken both moieties in execution. See *Attorney-General v. Andrew*, Hard. 23.

(z) 2 Atk. 608.

brought against the heir or purchaser? Why, only as *terre-tenant*,<sup>(a)</sup> and by virtue of the statute. I thought of the objection myself, that a bond creditor would be in a better situation than a judgment creditor; and so he is, for as soon as the bond debt is turned \*into a judgment, it is extinct against the ancestor, and the creditor cannot, [\*660] in the lifetime of the ancestor, bring any action upon the bond: can he then bring any action against the heir after it is entirely extinct?<sup>(b)</sup> But still he obtains a great advantage by a judgment, as it gives him an opportunity of binding the land immediately, and likewise gives him a preference over all other bond creditors; and therefore the creditor prefers this real advantage to a precarious one of assets descending upon the heir after the death of the ancestor. If this is the case at law, what is there in equity to better his case? Why, nothing more than to accelerate the payment by directing a sale of the moiety, and not let the judgment creditor wait till he has been paid out of the rents and profits; but equity cannot change the rights of parties."

An *equity of redemption* was, however, governed by a very different rule.

If A., seised of an estate, mortgaged it to B. in fee, and then confessed a judgment to C., it was clear C. had a *lien* which entitled him to redeem B. But should he redeem a whole or a moiety? So far as the judgment creditor had any claim of his own, a moiety only; but as B. could not be compelled to part with the smallest fraction of the estate until he had been satisfied his whole debt, C. was under the necessity of redeeming the entirety. Again, when C. had taken a transfer of the security, it followed, that as mortgagee with a judgment against the mortgagor he had a right to tack, and no one could redeem any part of the estate out of his hands until payment, not only of the original mortgage debt, but also of the judgment. Thus it arose from a kind of necessity, and not from any wanton violation of principle, that in the instance of an equity of redemption the judgment creditor was paid by a sale of the *whole* estate.<sup>(c)</sup>

\*Thus in *Stileman v. Ashdown*,<sup>(d)</sup> Lord Hardwicke, at the same time that he gave the judgment creditor a moiety only of [\*661] the *trust estate*, ordered a sale of the *whole* of the lands in *mortgage*.<sup>(e)</sup> So, where there were several incumbrancers by judgment upon an equity of redemption, and the court decreed a sale, the first judgment creditor was not confined to a moiety of the estate, but the common decree was, that the

(a) See *Harbert's case*, 3 Re. 12 b; *Bowyer v. Rivitt*, Sir W. Jones. 87; *Dyer*. 271, a pl. 25.

(b) Sir A. Hart, alluding to this point, said, "The courts have got rid of *Stileman v. Ashdown*, as savouring too much of technicality." *Leahy v. Dancer*, 1 Moll. 319. But *Crispe v. Blake*, 1 Ch. Ca. 23, had decided that the bond was extinguished by the judgment, and accordingly in *Barnwell v. Barnwell*, 3 Ridg. P. C. 24, and *O'Gorman v. Comyn*, 2 Sch. & Lef. 137, though the judgments were preceded by bonds, a sale of only a moiety was directed.

(c) *Stonehewer v. Thompson*, 2 Atk. 440; *Sish v. Hopkins*, Blunt's Amb. 793.

(d) 2 Atk. 477.

(e) Sir A. Hart, not observing the ground of the distinction, has charged Lord Hardwicke with inconsistency, *Leahy v. Dancer*, 1 Moll. 322.



incumbrancers should be paid their full demands out of the proceeds of the sale, according to their priority.(f)(1)

There is one species of interest which, though bordering closely upon the nature of an equity of redemption, yet ought perhaps to be distinguished from it. In *Tunstall v. Trappes*,(g) before cited, Trappes, in 1811, appointed an estate to the use that Davis might receive an annuity, and, subject thereto, to the use of Withy in fee upon trust, in case the annuity should be in arrear for six months, to sell the premises, and out of the proceeds to purchase an annuity of the same amount for Davis, and pay the surplus, after discharging the existing incumbrances, to Trappes; provided, that in case Trappes should be desirous of repurchasing the annuity, and should pay the price to Davis, then the annuity should cease, and Withy, the trustee, should reconvey. In 1812, Trappes confessed a judgment, and the question was, whether it should affect the whole or only a moiety of the estate; and Sir L. Shadwell, on the ground that a judgment creditor might redeem the entirety of lands in mortgage, held that the *lien* should extend to the whole. Now, there appears to be this distinction between an equity of redemption and the case just mentioned. In the former, the whole interest is in the mortgagee by non-fulfilment of the condition; and if the \*judgment [662] creditor redeem the mortgagee, and then the mortgagor come to be relieved against the forfeiture, the court will impose terms upon the mortgagor, and oblige him to discharge *every lien* upon the estate before he can be permitted to redeem the smallest part. But in *Tunstall v. Trappes* the whole interest was never in the annuitant either at law or in equity. The *legal* estate was limited to a third person in fee, and the *equitable* interest to the extent of securing the annuity only was in trust for the annuitant, but as to all the residue was in trust for the grantor. There was nothing to be redeemed, but merely a trust to be executed. The judgment creditor might take an assignment of the annuity, but he had no right to tack the judgment: the grantor could call for a reconveyance from the trustee on payment of the price agreed upon for the annuity, and the court could impose no terms, for no favour was asked.

Is the judgment creditor, when he comes into equity for a sale of the estate, either in the lifetime of the conusor, or after his death, obliged, before the jurisdiction of the court can attach, to sue out an actual *elegit*? If the judgment be a *legal lien*, and the creditor seek to remove some impediment to the *legal* execution of it, it is clear he must first lay a foundation for the interference of equity by suing out an *elegit* at law;(h) and the same rule is now established even where the judgment

(f) *Sharpe v. Earl of Scarborough*, 4 Ves. 538; the cases cited ib. 541; and see *Berrington v. Evans*, 3 Y. & C. 384.

(g) 3 Sim. 286, see 300.

(h) See *Dillon v. Plasket*, 2 Bligh, N. R. 239; *Neate v. Duke of Marlborough*, 3 M. & C. 407; *Mitford on Plead.* 126, 4th edit.

(1) It has been ruled, upon a similar principle, that, where freeholds and copyholds are blended in one mortgage, the equity of redemption of the whole is liable as assets to a bond creditor, though copyholds by themselves are not assets. *Acton v. Peirce*, 2 Vern. 480.

is merely an *equitable lien*; (i) but the *elegit* need not be returned; (k) and where the trust estates were in three counties an *elegit* in one only was held sufficient. (l)

When, however, the interest sought to be affected is an equitable chattel real, it is sufficient to sue out a writ of *feri facias*. (m) And when the assistance of the court is sought in favour of a [\*663] county court judgment against an equitable chattel real, it is sufficient to pursue the analogous step of placing a writ of execution in the hands of the high bailiff, pursuant to the County Court Act. (n)

Again, it seems that a judgment creditor may *redeem a mortgage* without suing out an *elegit*; for inasmuch as the court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it does what it does in all similar cases, it gives to the party the right to come in and redeem other incumbrancers upon the property. (o)

And so whether the judgment be *legal* or *equitable*, if the creditor file his bill *after the death of the conusor* for satisfaction of his claim out of the personal assets, and, in case of their deficiency, by a sale of the real estate, (p) it has been held that an actual *elegit* is *not* an essential requisite. The observations of Lord Fitzgibbon upon this point appear worthy of attention: "An objection," he said, "has been made at the bar, that the creditor's bill ought not to be entertained, because he did not *revive the judgments and sue out elegits*; and it has been asserted, that *until the judgment has been revived against the heir and terre-tenants of the conusee, and an elegit has been sued forth*, a court of equity will not entertain a bill against the heir and executor to levy the debt. The equity upon which bills of this nature have been entertained, is founded on the Statute of Westminster, and has been adopted no less for the ease of the creditor in levying his debt with expedition, than in mercy to the representatives of the debtor, by relieving his estate from the ruinous expense of an extent at law, and of the suits which might arise in consequence of it. It is notorious to every man of the profession, that if a *scire facias* to revive a judgment against the heir and terre-tenants of the conusor is put into the hands of a solicitor versed in the science of *\*accumulating costs*, he will be enabled to charge [\*664] the estate with costs equal to the debt, if it be not considerable. If the terre-tenants are charged unequally with payment of the debt, it lays a ground for fresh suits between them for contribution, and if the

(i) Neate v. Duke of Marlborough, 9 Sim. 60; 3 M. & C. 407; but see Tunstall v. Trappes, 3 Sim. 286; Rolleston v. Morton, 1 Conn. & Laws. 257. But where the creditor sues upon the equitable charge created by sect. 13 of the 1 & 2 Vict. c. 110, an *elegit* is not necessary, and the decree will be for sale. See Carlon v. Farlar, 8 Beav. 525; Footner v. Sturgis, 5 De G. & Sm. 736; Smith v. Hurst, 1 Coll. 705; 10 Hare, 30; Jones v. Bailey, 17 Beav. 582; but quare, rightly decided.

(k) Dillon v. Plasket, 2 Bligh, N. S. 239; and see Campbell v. Farrell, Rep. t. Plunket, 388.

(l) Dillon v. Plasket, 2 Bl. N. S. 239.

(m) Gore v. Bowser, 3 Sm. & Giff. 1; Smith v. Hurst, 10 Hare, 30.

(n) Bennett v. Powell, 3 Drewry, 326.

(o) Neate v. Duke of Marlborough, 3 M. & C. 416, per Lord Cottenham.

(p) Barnwall v. Barnwall, 3 Ridg. P. C. 24; Neate v. Duke of Marlborough, 3 M. & C. 416, per Lord Cottenham.

creditor levies the debt by extending the real estate of the debtor when there is a personal fund applicable to the payment of it, this lays a ground for a suit also by the heir against the executor to have the personal estate applied to reimburse him; and therefore it is that courts of equity have in this country, certainly for more than a century, entertained bills in the first instance *after the death of the consor* for an account of his real and personal estate, and of the sum due for principal, interest, and costs on the foot of the judgment.”(q)

Thus much concerning the judgment creditor's *equitable* remedy against a trust. We proceed now to the provision in the Statute of Frauds,(r) which enabled a judgment creditor in certain cases to sue a writ of execution against an equitable estate at law.

The 10th section enacted, that “it should be lawful for the sheriff, or other officer, to whom any writ or precept should be directed at the suit of any person upon any judgment statute or recognizance, to deliver execution unto the party in that behalf suing of all such lands and hereditaments as any other person or persons might be in any manner of wise *seised or possessed* in trust for the party against whom execution was so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution should be so sued had been *seised* of such lands and hereditaments of such estate as they were *seised* of in trust for him *at the time of the said execution sued*.”

Upon the construction of this enactment the following points were resolved:—

1. As the statute spoke only of lands, &c., of which other persons were *seised*(s) in trust for the debtor, it did not extend \*to trusts [\*665] of chattels real of which the legal proprietor was said not to be *seised*, but *possessed*.(t)

2. An *equity of redemption* was not within the terms of the act.(u)

3. A *bare and simple* trust only was intended—not one of a complicated nature, where the interests of other parties are mixed up with the debtor's title.(v)

4. From the concluding words, “like as the sheriff might have done, if the *cestui que trust* had been *seised* of the estate whereof other persons be *seised* in trust for him *at the time of the execution sued*,” if, after the judgment was entered up, but before actual execution, the estate had been disposed of to a purchaser, so that when execution was sued there was no trust for the debtor *in esse*, in that case the words of the statute had failed to provide a remedy, and the judgment creditor could not be put in possession.(w)

The question was much discussed whether in that case, though the

(q) *Barnwell v. Barnwell*, 3 Ridg. P. C. 61.

(r) 29 Car. 2, c. 3.

(s) In the first part of the clause are the words “*seised or possessed*,” but afterwards, in two places, there occurs the word “*seised*” only.

(t) *Lyster v. Dolland*, 3 B. C. C. 478; S. C. 1 Ves. jun. 431; *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 B. & P. 461.

(u) *Lyster v. Dolland*, *Scott v. Scholey*, *Metcalf v. Scholey*, *ubi supra*; *Burdon v. Kennedy*, 3 Atk. 739.

(v) *Doe v. Greenhill*, 4 B. & Ald. 684; *Harris v. Booker*, 4 Bing. 96; *Forth v. Duke of Norfolk*, 4 Mad. 504, per Sir J. Leach.

(w) *Hunt v. Coles*, Com. 226; *Harris v. Pugh*, 4 Bing. 335.



judgment creditor could not prosecute a *legal* execution, he might not subject the purchaser, if affected with notice, to an *equitable elegit*.<sup>(x)</sup> It was said, that as there was no execution at law and equity followed the law, the creditor was without redress; but in this argument the principle that equity follows the law seems to be wrongly applied. A judgment binds a *legal* estate, and, as equity follows the law, a judgment is therefore in equity a *lien* upon the trust. The Statute of Frauds introduced an additional remedy by enabling the judgment creditor, in certain cases, to take *legal* execution of a trust. But affirmative statutes do not abridge the common law,<sup>(y)</sup> and therefore the creation of a *legal* remedy in certain cases provided for by the act cannot preclude the judgment creditor from \*prosecuting his equitable *elegit* in other cases [666] for which the statute has made no provision. The enactment was clearly meant to be remedial, but the doctrine contended for would impress on it a restrictive character, and convert it into a disabling statute. Lord St. Leonards observes, "The difficulty in the way of the relief would be, that no instance of it can be found after the most diligent search." The reason probably is, that judgments have only in modern times been held to bind equitable interests at all: the doctrine was certainly not established before the Statute of Frauds. But the system of trusts has from that period downwards been gradually maturing, and the principles which governed uses, and were thence transferred into trusts, have since not indeed been abandoned, but received a much more enlarged and liberal application. Now that judgments are acknowledged to be *liens* upon equitable interests, the consequence must necessarily follow, that a purchaser must be bound by notice of a judgment, as he would be bound by notice of any other equitable incumbrance.

By the late act for extending the remedies of creditors,<sup>(z)</sup> it is enacted 1. By sect. 11, That execution at *law* may be had under an *elegit* of the *whole* lands freehold and copyhold, of which the debtor was seised or possessed at law or *in equity*, or over which he had a disposing power,<sup>(a)</sup> at or subsequently to the entering up of the judgment. 2. By sect. 13, That in *equity* a judgment shall operate as a *charge* upon the whole of the lands freehold and copyhold of which the debtor was seised or possessed at law or in equity, or over which he had a disposing power, at or subsequently to the entering up of the judgment, with a proviso that the creditor shall not sue until the expiration of a year from the date of the judgment,<sup>(b)</sup> and that the protection in equity of purchasers for valuable consideration without notice shall not be disturbed. 3. By sect. [667] 18, \*That decrees and orders of courts of equity, rules of courts

<sup>(x)</sup> See 2 Vend. and Purch. 386, 10th ed.; Coote on Mortg. p. 71; 2 Powel, Mortg. 620.

<sup>(y)</sup> Attorney-General v. Andrew, Hard. 27; 2 Inst. 472.

<sup>(z)</sup> 1 & 2 V. c. 110.

<sup>(a)</sup> A trust for the separate use of a married woman is not an estate over which she has a disposing power within the meaning of the act; Digby v. Irvine, 6 Ir. Eq. Rep. 149. Neither is the power of the settlor to defeat a voluntary settlement by means of the 27 Eliz. c. 4, a *disposing power* within the Act of Vict.; Beavan v. Earl of Oxford, 2 Jur. N. S. 121.

<sup>(b)</sup> See Smith v. Hurst, 1 Coll. 705, and S. C. 10 Hare. 43; Mackinnon v. Stewart, 1 Sim. N. S. 76, p. 91.

of common law, &c., whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments.<sup>(c)</sup> But, 4. By sect. 19, That no judgments, decrees, or orders, shall affect real estate *by virtue of the act*, unless and until they have been registered with the senior master of the Court of Common Pleas.

It is observable upon these clauses, that an *equitable* estate, whether of freehold or copyhold tenure, and whether of freehold or leasehold interest, and without any restriction *to the time of execution sued*, as in the 10th section of the Statute of Frauds, was subjected by the act to execution at law by writ of *elegit* (s. 11), and to *quasi* execution in equity by way of charge (s. 13). In the latter case purchasers without notice were expressly protected (s. 13), but in the former case not: a purchaser, therefore, even of an equitable interest, after the commencement of the act, was required by this statute to search the registry at the common pleas for judgments entered up against the vendor; and that whether before or subsequently to the act, for the time of entering up the judgments was immaterial, provided they had been registered. It may be thought anomalous and inconsistent that a purchaser should not be protected at law by want of notice, while he was in equity; but the intention of the legislature probably was, in giving a remedy both at law and in equity, not to disturb the principles upon which the respective courts acted; and therefore if the trust was a *plain* one, and so amenable to a legal *elegit*, the judgment creditor might take the lands in execution even against a purchaser without notice; but if the trust was so complicated as to oblige him to apply to a court of equity, and treat the judgment as a charge, the court by the act was not to disregard its established rules, but, as in all other cases, was to protect a purchaser without notice.

\*Afterwards another statute was passed (2 & 3 V. c. 11,) by [\*668] which it was enacted,—1. By section 2, that no judgment whatsoever should affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless previously registered at the common pleas, according to the provisions of the act 1 & 2 V. c. 110. 2. By section 4, that all judgments, decrees, rules, and orders, registered, or to be registered, at the common pleas according to the provisions of the act 1 & 2 V. c. 110, should at the expiration of five years, be null and void against lands, tenements, and hereditaments, as to *purchasers, mortgagees, or creditors*,<sup>(d)</sup> unless they should have again been registered in the common pleas within five years before the right, title, estate, or interest

(c) A decree for an account merely is not within the section; *Chadwick v. Holt*, 2 Jur. N. S. 918. Neither is a rule of a court of common law which does not specify the sum to be paid; *Jones v. Williams*, 11 Ad. & Ell. 175; *Doe v. Amey*, 8 M. & W. 565; though, as respects costs, the case is different; *Jones v. Williams*, 8 M. & W. 349; *Doe v. Barrell*, 10 Q. B. Rep. 565.

(d) These words mean *purchasers, &c.*, becoming such after the omission to re-register, so that, if A. and B. be respectively first and second judgment creditors who both duly register, A. does not, by subsequently omitting to re-register, lose his priority over B.; *Beavan v. Lord Oxford*, 1 Jur. N. S. 1121; and see *Simpson v. Morley*, 1 Kay & J. 71; *Beavan v. Earl of Oxford*, now reported, 6 De Gex, M. & G. 492.

of such purchasers, mortgagees, or creditors accrued.(e) 3. By section 5, that as against purchasers and mortgagees *without notice*, no judgment, decree, or order, should have a greater effect than a judgment would have had against such purchaser or mortgagee before the passing of 1 & 2 V. c. 110. By virtue of these clauses the execution that might under the former statute have been taken out at *law* against an equitable interest in the hands of a purchaser without notice was, in common with every other advantage given by the former statute against such purchaser, recalled,(f) and a purchaser was not required to carry his search back beyond the period of five years.

A singular result of the 5th section is, that in the occasional, though rarely occurring cases of a purchase or mortgage without notice of a previously registered judgment, the old law, as it existed before the 1 & 2 Vict. c. 110, must be resorted to for guidance. It is therefore impossible to treat the old law respecting judgments as obsolete.

This act, however, still left open the question whether by analogy to the cases under the registry acts a purchaser, mortgagee, or creditor, if he had actual notice of an unregistered \*judgment, was not bound by it; and a subsequent act, 3 & 4 V. c. 82, was passed to obviate this objection. It was thereby enacted, by the second section, that no judgment, decree, order, or rule should, *by virtue of the said act* (1 & 2 V. c. 110,) affect any lands at law or in equity as to purchasers, mortgagees, or creditors, until registration(g) under the said act at the common pleas, any notice of such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor, in anywise notwithstanding.

It being, however, doubted whether this act protected a purchaser, mortgagee, or creditor from the effect of notice as to any remedy against him which the judgment creditor had before, independently of the 1 & 2 V. c. 110, or whether its effect was not limited to protection against the additional remedy given to the judgment creditor by that act,(h) it was in order to obviate this inconvenience, enacted generally, by the 18 & 19 V. c. 15, s. 4, that no judgment, decree, &c., which might be registered under the 1 & 2 Vict. c. 110, should affect any lands, &c., at law or in equity, as to purchasers, mortgagees, or creditors, unless and until the memorandum, &c., should have been left with the proper officer, any notice of any such judgment, decree, &c., to any such purchaser, mortgagee, or creditor, in any wise notwithstanding.

It has been held under the acts extending the remedies of the judgment creditor, that as to *equitable interests* they are to receive the same construction as the Statute of Frauds, and consequently that simple trusts only can be taken in execution at law.(i)

The 14th section of the 1 & 2 Vict. introducing a new species of exe-

(e) And see 18 & 19 Vic. c. 15, s. 6. (f) *Westbrook v. Blythe*, 3 Ell. & Bl. 737.

(g) The framer of this act appears either to have overlooked, or to have been ignorant of the intermediate act of 2 & 3 Vict. c. 11, and to have left it doubtful whether re-registration within five years was necessary to exclude the title of a purchaser with notice. This doubt is now set at rest by sect. 5 of the 18 & 19 Vict. c. 15.

(h) See *Beere v. Head*, 3 Jo. & Lat. 340.

(i) *Digby v. Irvine*, 6 Ir. Eq. Rep. 149.



cution against stock and shares in public funds and public companies, deserves a separate consideration. By that section it was enacted that [\*670] if any person against whom \*any judgment(*k*) should have been entered up in any of her majesty's superior courts at Westminster, should have any government stock, funds, or annuities, or any stock or shares of or in any company in England, standing in his name in his own right, or in the name of any person in trust for him, (*l*) it should be lawful for the judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, &c., should stand charged with the payment of the amount for which judgment should have been recovered, and such order should entitle the judgment creditor to all such remedies as he would have been entitled to if such charges had been made in his favour by the judgment debtor, provided that no proceedings should be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order; and by the next following section of the act it is provided that the order of the judge shall be *ex parte* in the first instance, and on notice to the bank or company shall operate as a *distringas*, and that no disposition of the judgment debtor in the mean time shall be valid as against the judgment creditor.

The leading points decided and discussed with reference to this new species of execution will be shortly adverted to.

1. In the ordinary case of a judgment at law, the application for the charging order must be made to one of the common law judges, even though the stock to be charged be standing in the name of the accountant-general of the Court of Chancery. (*m*) But where a charging order is to be made in furtherance of a *decree* of the Court of Chancery, it will properly be made by a judge of the Court of Chancery. (*n*)

2. Where stock or funds are vested in trustees, and a judgment debtor appears to be interested therein, the charging order will be made at law, so as to affect the interest of the judgment debtor, whatever it may be, leaving it to the trustees, \*if the precise amount of the debtor's [\*671] interest is not sufficiently defined, to say they will not act except under the direction of the Court of Chancery. (*o*)

3. Where a charging order is made upon the partial interest of a *cestui que trust* in stock or shares, the bank or public company whose stock or shares are affected by the charging order, is not concerned with questions arising between the judgment creditor and other persons interested in the trust fund, but is bound, in like manner as before the charging order, to pay the dividends to the trustees. (*p*)

4. The proviso at the end of the 14th section, forbidding proceedings until after six calendar months, applies only to proceedings for enforcing immediate payment of the debt by realizing the security, and does not

(*k*) Extended to *Decrees*, &c., by sect. 18.

(*l*) By the 3 & 4 Vict. c. 82, s. 1, the property intended to be embraced by this section is further defined.

(*m*) *Hulkes v. Day*, 10 Sim. 41.

(*n*) *Stanley v. Bond*, 7 Beav. 386; *Westby v. Westby*, 5 De G. & Sm. 516; *Wells v. Gibbs*, 22 Beav. 204.

(*o*) *Fowler v. Churchill*, 11 M. & W. 57.

(*p*) *Churchill v. Bank of England*, 11 M. & W. 323.

prevent the judgment creditor from taking steps to prevent the security given him by the statute from being in the mean time defeated or diminished. Thus, where the funds are standing in the name of the accountant-general, the judgment creditor may, within the six months, apply for a stop order to restrain the debtor from receiving dividends accruing within the six months.<sup>(q)</sup>

5. The question as to the precise effect of the charge obtained under a charging order, in reference to the claims of other incumbrancers on the trust fund, has been the subject of much difference of opinion. In a late case, where stock was vested in trustees, and A., having a beneficial interest therein, charged that interest in favour of B., and subsequently C. recovered judgment against A., obtained a charging order on A.'s interest, and, before any notice given by B., gave notice to the trustees of his having obtained the charging order, it was held by three judges of the Court of Queen's Bench, Lord Campbell, C. J., Wightman & Crompton, J. J., (Erle, J., *dissentiente*,) that C., the judgment creditor, was entitled to priority over B.<sup>(r)</sup> This decision has been much criticised. It is opposed to the analogous decisions on the \*11th and 13th sections of the act,<sup>(s)</sup> and it may safely be said, [\*672] in the words of high legal authority, that the opinion of the single judge seems to be the correct one.<sup>(t)</sup>

The law as to priority of judgments in the case of lands lying in a register county is, by the combined effects of the County Registry Acts and of the Acts of the Queen before referred to, in a singular position.

It is clearly settled that the County Register Acts are still in force, and consequently that, in order to give priority to a judgment creditor over a subsequent purchaser or mortgagee *without notice*, his judgment must be registered both in the county register and in the common pleas, before the completion of the purchase or mortgage.<sup>(u)</sup> And as between two judgment creditors, having no notice of each other's claim, the one who first completes his registry in both the county registry and the common pleas, obtains precedence.<sup>(v)</sup>

Where the subsequent purchaser or mortgagee *has notice* of a prior judgment, the question will be, whether the judgment was registered at the common pleas before the completion of the purchase or mortgage, since, as we have before seen, unless so registered it cannot bind, *notwithstanding the notice*. But if duly registered in the common pleas, then, according to the old decisions, notice to the purchaser or mortgagee will, *in equity*, though not at law, supply the want of registration in the county.<sup>(w)</sup>

It is difficult, however, to reconcile the expressions with reference to

(q) *Watts v. Jefferyes*, 3 Mac. & Gor. 372; and see *Bristed v. Wilkins*, 3 Hare, 235; *Wells v. Gibbs*, 22 Beav. 204.

(r) *Watts v. Porter*, 3 Ell. & Bl. 743.

(s) *Whitworth v. Gaugain*, 3 Hare, 416, 1 Phil. 728; *Beavan v. Earl of Oxford*, 2 Jur. N. S. 121; *Kinderley v. Jervis*, 22 Beav. 1.

(t) *Vend. and Pur.*, 13th edit. p. 430, note (I).

(u) *Westbrook v. Blythe*, 3 Ell. & Bl. 737.

(v) *Hughes v. Lumley*, 4 Ell. & Bl. 274.

(w) *Tunstall v. Trappes*, 3 Sim. 301; *Davis v. Earl of Strathmore*, 16 Ves. 427.

this subject contained in a late judgment of the present lord chancellor (when vice-chancellor) with the older cases.(x)

[\*673]

## \*SECTION VII.

## OF EXTENTS FROM THE CROWN.

A trust, whether of a term or of a freehold, is liable to an extent from the crown;(y) and this not by the effect of any legislative enactment, but *per cursum scaccarii* at common law.(z) The words of the writ issued to the sheriff are to hold inquest of the lands whereof the debtor, not *seisitus fuit*, but *habuit vel seisitus fuit*, and a person may be said to *have* lands, when by subpoena in chancery he may exercise any dominion over them.(a)

At common law the extent of the crown did not authorize a sale of the lands, but only the perception of the rents and profits, until the amount of the debt was levied;(b) this defect was supplied partially by a statute of Elizabeth,(c) and more effectually by the 25 G. 3, c. 35. It is by the latter statute enacted, that "it shall be lawful for his majesty's court of exchequer, and the same court is thereby authorized, on the application of his majesty's attorney-general(d) in a summary way by *motion*(e) to the same court, to order that the *right, title, estate, and interest* of *any debtor* to his majesty, his heirs and successors, and the right, title, estate, and interest of the heirs and assigns of such debtor, which have been or shall be extended under and by virtue of any extent or *diem clausit extremum*, shall be sold as the court shall direct, and the conveyance shall be made by his majesty's remembrancer in the said court of exchequer or his deputy, \*under the direction of the said court, by a

[\*674] deed of bargain and sale to be inrolled in the said court."

By the effect of this enactment, a trust or equity of redemption(f) of a crown debtor may now be sold upon summary application to the Court of Exchequer by motion.

## SECTION VIII.

## OF FORFEITURE.

A trust of lands is not forfeitable at common law for attainder either of treason or felony;(g) for forfeiture works only upon *tenure*, and a trust

(x) *Johnson v. Holdsworth*, 1 Sim. N. S. 106.

(y) *King v. Lambe*, M'Clel. 422, per Sir W. Alexander; *Chirton's case*, Dyer, 160 a; S. C. cited Sir E. Coke's case, Godb. 293; the cases cited Id. 294; Id. 298; *Babington's case*, cited Id. 299; *King v. Smith*, Vend. & Purch. Append. No. xv; 11th ed., per Ch. Baron Macdonald.

(z) *Attorney-General v. Sands*, Hard. 495, per Lord Hale.

(a) See Sir E. Coke's case, Godb. 294.

(b) *Rex v. Blunt*, 2 Y. & J. 122, per Baron Hullock.

(c) 13 Eliz. c. 4.

(d) See *Rex v. Bulkeley*, 1 Y. & J. 256.

(e) See *Rex v. Blunt*, 2 Y. & J. 120.

(f) *King v. De la Motte*, Forr. 162.

(g) *Attorney-General v. Sands*, Hard. 495, per Lord Hale; 1 Hale's P. C. 247; Jenk. 190.



is *holden* of nobody. The ground of the forfeiture is, that all estates are upon condition of duty and fidelity to the lord, and upon breach of allegiance they return to the king, from whom they originally proceeded.<sup>(h)</sup>

The exemption of the *use* from forfeiture was remedied in the case of *treason*, by the 26 H. 8, c. 13, s. 5, whereby it was enacted, that "every offender convicted of high treason by *presentment, confession, or process of outlawry*, according to the due course and custom of the common laws of the realm, should forfeit to the king all such lands, &c., which such offender should have of any estate of inheritance in *use or possession*."

The following year was passed the 27 H. 8, by which uses were abolished, and, as the trust which grew up in the place of the use was held to be an interest *sui generis*, and not within reach of the statutes directed against uses, the legislature was again called upon to interpose some special enactment to remedy the defect.

The 33 H. 8, c. 20, s. 2, declared, that "if any person or persons should be attainted of high treason by the course of the *common laws or statutes of the realm*, every such attainer \*by the *common law*<sup>(i)</sup> [\*675] should be of as good strength, value, force, and effect, as if it had been done by authority of parliament; and that the king's majesty, his heirs and successors, should have as much benefit and advantage by such attainer, as well of *uses, rights, entries, conditions*, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament, and should be deemed and adjudged in *actual and real possession* of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which his highness ought lawfully to have, and which they, so being attainted, ought or might lawfully lose and forfeit, if the attainer had been done by authority of parliament, *without any office or inquisition to be found of the same*."

Notwithstanding this statute, it was held in *King v. Dacombe*,<sup>(k)</sup> and is said to have been also resolved in *Abington's case* that the *trust* of a freehold was *not* forfeited upon attainer of treason; and it has been remarked, that this doctrine "may be thought to be founded on reason, because it is not pretended that the statute of 26 H. 8, can embrace trusts which have succeeded to uses, and it does not appear to have been the intention of the 33 H. 8, to create a forfeiture of any equitable estates which has sprung up since the former act. The statute had other objects."<sup>(l)</sup>

To understand the scope of the enactment it must be observed,—1. That previously to the 33 H. 8, it was only in the case of a person attainted by act of parliament, and then by a special proviso, that the king was put in *immediate possession* of the offender's lands, for in attainders by ordinary course of law, whether by common law or under a statute, the

<sup>(h)</sup> Gilb. on Uses, 38.

<sup>(i)</sup> This includes the general statutes of the realm, as opposed to a special act attainting a particular individual.

<sup>(k)</sup> Cro. Jac. 512.

<sup>(l)</sup> Gilb. on Uses, by Lord St. Leonards, 78, note 9; and see *Burgess v. Wheate*, 1 Ed. 221.

king was not in possession *until office found*. 2. That the 26 H. 8, had extended the forfeiture to lands in *use or possession*, but not to *rights, entries or conditions*; and now that the 27 H. 8, had passed, the 26 H. 8, was not even applicable to *uses*, or, as they were henceforth to be called, [\*676] *trusts*. 3. That the \*26 H. 8, had embraced attainders by *presentment, confession, verdict, or process of outlawry*, but had omitted other cases, as where the offender stood mute. The intention of the legislature then, in passing the 33 H. 8, was, as resolved in Dowtie's case,<sup>(m)</sup>—

1. To vest the actual possession in the king by the attainder *without office*;
2. To extend the forfeiture to *rights, entries, conditions, &c.*, which had hitherto not been affected by attainder; and,
3. To apply the statutory provisions to all cases of attainder, including those which the 26 H. 8, had accidentally omitted.

Assuming the act to have had a remedial scope, can it be supposed, that, when “rights, entries, and conditions,” were, for the first time, made forfeitable by virtue of this enactment, the word “uses,” which occupies the first place in the series, should have been inserted as mere surplusage, remembering that uses, by having been turned into possessions by the 27 H. 8, had escaped the forfeiture imposed upon them by the 26 H. 8? The insertion of the word “uses” can be no argument that “trusts” were not intended, for at that day “uses” and “trusts” were not as now contradistinguished, but were employed indifferently, as terms perfectly synonymous.

In support of this reasoning may be cited the opinions expressed by Baron Turner and Lord Hale, in the well-considered case of Attorney-General v. Sands.<sup>(n)</sup> And Lord Hale afterwards recurs to the subject in his pleas of the crown,<sup>(o)</sup> and argues the point there with considerable strength of reasoning:—“By the statute of 27 H. 8,” he says, “all uses were drowned in the land; but there have succeeded certain equitable interests called *trusts*, which differ not in substance from uses; nay, by that very statute they come under the same name, viz., uses or trusts. By the statute 33 H. 8, there is a special clause that the person attainted shall forfeit all ‘uses;’ and what other uses there could be at the making of the statute 33 H. 8, but only trusts such as are now in practice and retained in chancery, I know not. It was agreed in the Earl of Somerset's case, and so resolved \*in Abington's case, that a trust of a [\*677] freehold was not forfeited by attainder of treason. But how this resolution in Abington's case can stand with the statute of 33 H. 8, I see not; for certainly the uses there mentioned could be no other than trusts; and therefore the *equity or trust itself*, in cases of attainder of treason, seems forfeited by the statute, though possibly the *land itself be not in the king*.”<sup>(p)</sup>

*Equities of redemption* appear to be forfeitable for attainder of treason

(m) 3 Re. 9, b.

(n) Hard. 495; S. C. Nels. 131; S. C. Freem. 130.

(o) 1 P. C. 248.

(p) In Attorney-General v. Sands. it was laid down, according to Nelson's report (p. 131.) that the estate was executed in the king by force of the statute; but, according to Freeman (p. 130.) that the estate was to be executed in the king by a court of equity. Id. qu.

under the 33 H. 8;(*q*) for the statute has enumerated *conditions*, and the interest of the mortgagor is a condition which, though broken at law, is saved whole to him in a court of equity.

A trust in favour of an *alien* is forfeitable to the crown without statute on the principle of public *policy*; for at *law* an alien has no capacity to purchase lands, lest the realm should be impoverished, if the revenues might be transported into foreign countries, and put in subjection under a foreign prince;(*r*) and if an alien were allowed to receive the rents and profits of lands *in equity*, the mischief would be the same. However, the *legal* estate is not forfeited, but the king must prosecute his right by *subpœna* in the Court of Chancery:(*s*) and this he may do without any office found or inquisition taken.(*t*)

Trusts of *chattels*, whether real or personal, were always deemed forfeitable to the crown;(u) and if a term be in trust for the *wife* of the felon, but not for her separate use, it seems the trust shall be affected by the forfeiture of the husband.(*v*) But in these cases the forfeiture reaches not to the chattel \*itself, but merely entitles the king to sue a [*\*678*] *subpœna* in equity.(*w*)

At law a tenant for life may, by certain tortious acts, as by a feoffment of the fee simple, forfeit his estate to the remainderman;(x) but if an equitable tenant for life affect to dispose of the equitable fee, no forfeiture is incurred, for nothing passes beyond the grantor's actual interest.(*y*)

## SECTION IX.

### OF ESCHEAT.

A trust in fee of lands is not subject to escheat.(*z*) This was determined in the great case of Burgess v. Wheate,(a) before Lord Northington, assisted by Lord Mansfield and Sir T. Clarke. The arguments of these eminent judges, too long for insertion in this place, are replete with learning, and will amply repay a very careful perusal: it must be men-

(*q*) Anon. case, cited Reeve v. Attorney-General, 2 Atk. 223.

(*r*) See Holland's case, Styl. 21; Collingwood v. Pace, O. Bridg. 431.

(*s*) Attorney-General v. Sands, Hard. 495, per Lord Hale.

(*t*) Burgess v. Wheate, 1 Ed. 187, per Sir T. Clarke.

(*u*) Wikes's case, Lane, 54, agreed; King v. Dacombe, Cro. Jac. 512; Jenk. 190, case 92; Attorney-General v. Sands, Hard. 495; Pawlett v. Attorney-General, Hard. 467, per Lord Hale; Sir J. Dack's case cited Holland's case, Al. 16. Chattel interests accruing to a felon after conviction, but before restoration to civil rights, are forfeited to the crown. Roberts v. Walker, 1 R. & M. 752. *Secus* as to chattels accruing subsequently to such restoration. Stokes v. Holden, 1 Keen, 145; Gough v. Davies, 2 K. & J. 623; Thompson's Trusts, 22 Beav. 506.

(*v*) Wikes's case, Lane, 54, per Barons Snig and Altham.

(*w*) Holland's case, Al. 14; Sir J. Dack's case as cited by Rolle, J. Id. 16; Attorney-General v. Sands, Hard. 495, per Lord Hale; and see Kildare v. Eustace, 2 Ch. Ca. 188; S. C. 1 Vern. 405, 419, 423, 428, 437.

(*x*) See Co. Lit. 251 a.

(*y*) Lethieullier v. Tracy, 3 Atk. 728, 730; Lady Whetstone v. Bury, 2 P. W. 146.

(*z*) Attorney-General v. Sands, Hard. 488; and see 1 Harg. Jurid. Exerc. 383.

(*a*) 1 Ed. 176; S. C. 1 W. Black. 123.



tioned, however, that Sir. T. Clark and Lord Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by uses, and, therefore, as no escheat in equity was of a use, there could be none of a trust. But this position is too large; for trusts do not follow absolutely the law of uses: for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine, that, as lands escheat at law, so trusts must escheat in equity; that trusts, since the statute of H. 8, are not regulated by uses, but the maxim is, "Equity follows law,"—"The trust is the estate." But to this it must be answered, that a trust has always been recognised as a thing *\*sui generis*, not as identical with the legal fee: it binds [\*679] not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northington are to be regarded as those most in accordance with the general system: trusts, he thought, were to be administered on the footing of uses; but not, as Sir Thomas Clark maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8: he agreed with Lord Mansfield, that trusts imitated the legal possession; but he added the qualification, *as between the privies to the trust only*, and not as respected strangers. "Equity," he said, "follows the law; and, *as between the CESTUI QUE TRUST and those claiming by, from, and under him*, it is equity that he should be considered as formally possessed of that estate of which he is and appears substantial owner. It is true this court has considered trusts, *as between the trustee, CESTUI QUE TRUST, and those claiming under them*, as imitating the possession; but it would be a bold stride, and, in my opinion, a dangerous conclusion, to say, therefore, this court has considered the creation of a trust as a mere nullity, and the estate in all respects the same as if it still continued in the *seisin* of the creator of the trust or the person entitled to it. My objection to the claim of the lord is, that it is for the execution of a trust that does not exist. Where there is a trust, it should be considered in this court as the real estate *between the cestui que trust, and the trustee, and all claiming by or under them*; and the trustee should take no beneficial interest that the *cestui que trust* can enjoy; but, for my own part, I know no instance where this court ever permitted the creation of a trust to *affect the right of a third.*"(b)

The determination in *Burgess v. Wheate* has been followed in more recent cases,(c) and the principles there laid down have been held by the present master of the rolls to apply to the case of a mortgage in fee, and the subsequent death of the mortgagor intestate, his honor deciding that in such case the equity of redemption does not escheat to the crown, but belongs to the mortgagee, subject to the debts.(d)

(b) 1 Ed. 250.

(c) *Taylor v. Haygarth*, 14 Sim. 16; *Davall v. New River Company*, 3 De G. & Sm. 394; *Cox v. Parker*, 22 Beav. 168.

(d) *Beale v. Symonds*, 16 Beav. 406.

\*SECTION X.

[\*680]

THE DESCENT OF THE TRUST.

A trust is governed by the same rules of descent as the legal estate is on which the trust is ingrafted, and that whether the legal estate descends according to the course of common law, or is subject to a *lex loci*.

If one seised of land *ex parte materna* convey to a person upon trust, and no trust is expressed, the resulting interest is part of the original estate, and will descend in the maternal line, and, failing the heirs on the part of the mother, will rather absolutely determine, than pass into the paternal line.<sup>(c)</sup> But if one seised *ex parte materna* devise to A and his heirs upon trust for a person for life, and then in trust to convey to the testator's heir at law, this breaks the descent, and the heir *ex parte paterna* is entitled to the equitable remainder.<sup>(f)</sup>

If the land be subject to gavelkind, borough English, or other custom, the equitable interest will follow the same course of inheritance.<sup>(g)</sup>

And a trust of copyholds as well as of freeholds is governed by the descent of the legal estate.<sup>(h)</sup>

The analogy to law is so strictly preserved, that if the last *cestui que trust* had no seisin of the equitable estate corresponding to *possessio fratris* at law, the trust will descend to the brother of the half blood, not to the sister of the whole blood.<sup>(i)</sup> But, by the late act the half blood is now capable of inheriting estates, whether legal or equitable.<sup>(h)</sup>

If a settlement contain a power of sale, with a trust to \*rein-vest the proceeds in a purchase to the same uses, and the lands [\*681] be sold, but the proceeds be not reinvested, though the bulk of the estate sold was of *gavelkind* tenure, yet if one of the uses be to A. and his heirs, the proceeds of the sale will descend to the heirs of A. at common law, and not to the heirs by the custom of gavelkind.<sup>(l)</sup>

And if gavelkind lands be limited to a person's heirs as *purchasers* the common law heirs and not the customary heirs are entitled; as where a testator directed trustees to stand seised of gavelkind lands for the separate use of A. for life, and so as her husband should not intermeddle therewith, and after her death upon trust to convey to the heirs of her body for ever, Lord Hardwicke held that the trust was executory, and that the court must therefore look to the intention, which was to give a life-estate to A., and the remainder to the heirs as purchasers; for, as the husband was not to intermeddle therewith, his curtesy was

(c) Burgess v. Wheate, 1 Ed. 177, see 186, 216, 256; Langley v. Sneyd, 1 Sim. & Stu. 45.

(f) Davis v. Kirk, 2 Kay & John. 391.

(g) Fawcett v. Lowther, 2 Ves. 304, per Lord Hardwicke; Banks v. Sutton, 2 P. W. 713, per Sir J. Jekyll; Jones v. Reasbie, 22 Vin. Ab. 185, pl. 7.

(h) Trash v. Wood, 4 M. & Cr. 324.

(i) Banks v. Sutton, 2 P. W. 713, per Sir J. Jekyll; Cowper v. Earl Cowper, Ib. 736, per eundem; Cunningham v. Moody, 1 Ves. 174; Co. Lit. 14 b; and see the cases cited Casborne v. Scarfe, 1 Atk. 604.

(k) 3 & 4 W. 4, c. 106, s. 9.

(l) Hougham v. Sandys, 2 Sim. 95, see 153.

to be excluded, which would not be the case if A. were tenant in tail. A conveyance of the legal estate was therefore directed to the *eldest son* and the heirs of his body, with remainder to the second son, and the heirs of his body, &c. "Not," added Lord Hardwicke, "according to the custom of gavelkind, because it must go according to the rule of common law, being not a trust executed, but executory."<sup>(m)</sup>

## SECTION XI.

### OF ASSETS.

The trust of a *chattel* was always accounted assets in equity.<sup>(n)</sup>

But whether the trust of a *freehold* should be assets in the hands of the heir for payment of debts by specialty was for a long time *vexata* [\*682] *questio*. On the one hand it was argued, \*that the trust ought to follow the use, and that the use was *not* liable to a bond creditor; on the other hand it was said, that the trust since the Statute of Uses had been conducted by the courts on more liberal principles, and, as the legal fee was available to the discharge of specialty debts at law, so a court of equity ought to adopt the same rule in the administration of trusts.

It was determined by Lord Hale, Chief Justice Hyde, and Justice Windham, in the case of *Bennet v. Box*, that a trust in fee should *not* be assets;<sup>(o)</sup> and Lord Keeper Bridgman afterwards felt himself bound by the authority of this decision in respect of a *trust*,<sup>(p)</sup> though he doubted somewhat as to an *equity of redemption*;<sup>(q)</sup> and so the law as to a trust was laid down by Lord Hale in *Attorney-General v. Sands*.<sup>(r)</sup>

The question was renewed before Lord Nottingham in the case of *Grey v. Colville*.<sup>(s)</sup> John Colville gave a bond to Lady Grey for 1500*l.*, and died intestate. The obligor in his lifetime had purchased lands in the names of himself and Wise, to hold to them for their lives, remainder to Sir John and his heirs, and other lands in the names of Morris and Saunders in trust for Sir John in fee. Lady Grey brought an action at law against the heir, who (the case occurring prior to the Statute of Frauds) pleaded *riens per descent in presenti*, but only the reversion of the lands expectant on the decease of Wise. Lady Grey then filed a bill in chancery to have the trust estates declared assets in equity, and Lord

(m) *Roberts v. Dixwell*, 1 Atk. 607; and see *Thorp v. Owen*, 2 Sm. & Giff. 90.

(n) *Attorney-General v. Sands*, Freem. 131; *Barthrop v. West*, 2 Ch. Re. 62; *Duke of Norfolk's case*, 3 Ch. Ca. 10.

(o) 1 Ch. Ca. 12.

(p) *Pratt v. Colt*, 1 Ch. Ca. 128; S. C. Freem. 139.

(q) *Trevor v. Perryor*, 1 Ch. Ca. 148.

(r) Hard. 490; S. C. Freem. 131; S. C. Nels. 134.

(s) 2 Ch. Re. 143. This case has been the most unfortunately reported of any perhaps in the books. In p. 143, for "the defendant's wife," read "the defendant Wise;" and a few lines after, for "wife," read "Wise." In page 144, for "Colville and his wife," read "Colville and Wise;" for "of one lease," read "of one Leke," and correct the passage thus: "The said Josia also insists, that the premises are incumbered by a former judgment of one Leke for 800*l.*, and that the plaintiff's creditors, and other the creditors, &c., insist they are creditors," &c. In page 145, for "the defendant's wife," read "the defendant Wise."



Nottingham, acting on the broad rule of analogy to law, decreed the debt to be paid. The case was afterwards reheard before Lord Guildford, and is reported by Vernon under the title of *Creed v. Covile*.<sup>(t)</sup> \*The plaintiff argued that *Bennet v. Box* was a precedent of the judges' making, who were for restraining the court of chancery [\*683] to the strict rules of law; that the trust of a term was assets, and why not the trust of a fee-simple; an equity of redemption was assets, and why not a trust? But Lord Guildford said, "I know the case of *Bennet v. Box* has had hard words given it, and been much railed at, but the decree in that cause was made upon great advice, and I do not know how I could be better advised now." And he said, "There was a difference between the case of an heir and the case of an executor, and therefore the trust of a term and the trust of an inheritance were not the same in this point; for whatever money came to the hands of an executor, either by sale of the term, or if money was decreed to him in a court of equity, would be assets; but if an heir before action brought, sold and aliened the assets, the money was not liable in his hands,<sup>(u)</sup> unless the sale were with fraud and collusion; as, if an heir sold and bought again, there the new-purchased lands would be assets. And as to an equity of redemption, if a man had a mortgage and a bond, before the mortgage should be redeemed by the heir the bond ought to be satisfied, but he did not know that an equity of redemption *should* be assets in equity to all creditors." And his lordship said, he "should be much governed by the case of *Bennet v. Box*, unless they could show that the latter precedents had been otherwise," and directed them to attend him with precedents towards the latter end of the term. The cause was brought on again the December following, and the court ordered that the parties should attend the two Chief Justices and the Lord Chief Baron, who were desired to certify their opinion on the question.<sup>(v)</sup> In Michaelmas term the next year, upon the motion of the defendants, it was ordered, that, unless plaintiffs, the creditors, procured the certificate of the Lord Chief Justices' and Lord Chief Baron's opinion by the first day of the next term, \*the bill should be dismissed without further motion.<sup>(w)</sup> [No further proceedings appear in the cause; and, therefore, it [\*684] must be concluded, Lord Nottingham's decision was reversed.<sup>(x)</sup>

Thus stood the law before the Statute of Frauds.<sup>(y)</sup> By the 10th section of that act it was declared, that "if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, then and in every such case such trust should be deemed and taken, and was thereby declared to be, assets by descent, and the heir should be liable to and chargeable with the obligation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended."

This enactment must be taken to embrace *simple* trusts only, and not

(t) 1 Vern. 172.

(u) Since made liable by 3 W. & M. c. 14.

(v) R. L. 1683, A. fol. 166.

(w) R. L. 1684, A. fol. 210.

(x) But see *Goffe v. Whalley*, 1 Vern. 282.

(y) 29 Car. 2, c. 3.

*complicated trusts*, (z) or equities of redemption. (a) But such interests as are without the statute may, upon the *general principles* of equity, be treated as assets by analogy to law.

In *Plucknet v. Kirk* (b) it was expressly decided by Lord Jeffries, that [\*685] an *equity of redemption* of a mortgage in fee \*should be assets in equity to the payment of bond debts, and so it was held in an anonymous case reported by Freeman; (c) and the same law was recognized in *Acton v. Peirce* by Lord Keeper Wright, (d) and was admitted by Lord Hardwicke without observation in *Plunket v. Penson*. (e)

The doctrine established by these authorities with respect to *equities of redemption* is directly at variance with the decision in *Grey v. Colville*, relating to *trusts*. But the maxim is generally admitted, that, as between the trustee and *cestui que trust* and all claiming by or under them, the equitable ought to imitate the legal estate, and therefore, upon principle, the rule that governs equities of redemption ought equally to be applied to every other equitable interest. It would be a strong position to advance, that until the act of 3 & 4 W. 4, a trust was not assets unless the debtor had merely a plain and simple trust; but such would be the result, were trusts only liable as assets by virtue of the Statute of Frauds.

The question, as regards debtors who have died since the 29th of August, 1833, has now been rendered unimportant by the 3 & 4 W. 4, c. 104, which enacts, that all a person's "*estate or interest* (which must include a trust) in lands, tenements or hereditaments, corporeal, or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold," shall be assets for the payment of debts as well on simple contract as on specialty.

There remains to be considered the question, whether a trust shall be administered as *legal* or *equitable* assets; and upon this subject we shall first advert to the case of trusts of chattel interests, that is, to equitable assets in the hands of the executor.

It may be remarked *in limine*, that if an executor recover money in that character upon a trust or other equitable right, the proceeds, *when actually come to his hands*, will be legal assets, even in a court of

(z) The former part of the clause, which enables the sheriff to take a trust in execution, was construed not to include a *complicated* trust, and therefore it is presumed the latter part of the clause could not be differently interpreted.

(a) *Plunket v. Penson*, 2 Atk. 293, per Lord Hardwicke; *Sawley v. Gower*, 2 Vern. 61, per Lord Jeffries.

(b) 1 Vern. 411; and see Lord Jeffries's opinion in *Sawley v. Gower*, 2 Vern. 61. *Plucknet v. Kirk*, as stated in Reg. Lib., was this:—Kirk, seised of an estate in fee, mortgaged it to Sutton in fee for securing 1300*l.* and interest, and afterwards confessed a judgment to Plucknet for securing a loan, and two judgments to Rogers for securing other loans, and became indebted to Wood and Dakins by bond. The two judgment creditors joined with the two bond creditors and others who were simple-contract creditors in filing a bill, by which they prayed that, in default of personal assets, they might redeem the mortgage, and Lord Jeffries decreed that the plaintiffs, the judgment and bond creditors, might redeem; and as to the plaintiffs, the simple-contract creditors, his lordship said, "he would advise with the lords and the judges thereon, and after he had so advised would give such directions touching the said debts, whether they should be let into the redemption of the premises, as should be agreeable to equity." 1686, B. fol. 181, 844.

(c) P. 115.

(d) 2 Vern. 480.

(e) 2 Atk. 290.

law: (f) is it not, then, an inconsistency to say, that if the property has been reduced into \*possession, a court of equity shall administer it as legal assets, but if it be still outstanding, it shall be administered [\*686] as equitable assets? Upon what principle can the court vary the rights of parties from an accidental circumstance arising out of the conduct of the executor?

In *Morgan v. Sherrard* (g) a person had mortgaged a term of years, and afterwards acknowledged a statute to Lord Sherrard, and then confessed a judgment to Morgan. The latter filed his bill against the executor to have the equity of redemption made legal assets (a judgment at law taking precedence of a statute,) and so Lord Guildford decreed it.

*Wilson v. Fielding* (h) not only confirms this decision, but sets the principle in a clear light. An executor had exhausted the personal assets by part payment of a debt secured by a mortgage and the testator's bond, and the simple-contract creditors filed a bill against the heir to oblige him to refund what had been discharged of the mortgage debt out of the personal estate. The heir was decreed to make good the money, and the dispute was, whether the fund, which was called equitable assets because it could only be recovered in a court of equity, should be distributed among the creditors *pari passu*, or, one of the creditors having obtained a judgment against the executor, should be administered according to the legal priority. Lord Macclesfield said, "The doctrine that seems to be laid down by the counsel for the simple-contract creditors, that there is this standing difference between assets in law and assets in equity, that, though the former shall go according to the course of administration prescribed by law, yet the latter shall, without any regard to this, go among the creditors equally however different the nature of their debts, is a doctrine without any reason or foundation, and would establish a rule in equity directly contrary to the known rules of law as to the order in which debts are to be paid. Indeed, as to the case put of land devised by a testator to be sold for the payment of his debts, it is so, and this court does always decree the profits arising from the sale equally among all the creditors; but then \*this [\*687] land may be considered as a gift of the testator among all his creditors, and as the testator, the donor, has not thought fit to make any distinction between his creditors, so this court, which is in nature of a trustee for the testator, will make none either. But, generally speaking, there is no difference between assets in law and assets in equity, but both must be distributed by the executor in a course of administration."

The next case is that of the creditors of Sir Charles Cox, (i) in which the property in question was the equity of redemption of a term. Sir J. Jekyll was of opinion it should be equitable assets, "it being," he said, "precarious and doubtful whether the mortgage would prove worth redeeming, and all debts being in a conscientious regard equal, and equality the highest equity;" but at the same time it was resolved

(f) *Hawkins v. Lawse*, 1 Leon. 155, per Periam, J.; *Anon. case*, 1 Roll. Rep. 56; *Harwood v. Wrayman*, cited *ib.*; S. C. reported Mo. 858.

(g) 1 Vern. 293.

(h) 10 Mod. 426; S. C. 2 Vern. 763.

(i) 3 P. W. 341.



by the court, that where a bond was due to A., but taken in the name of B., and A. died, *that should be paid in a course of administration*, for in such a case there could hardly be any dispute touching the *quantum* of the debt, seeing the principal, interest, and also the costs, must be paid to the obligee in the bond; whereas, in the other case, the costs must be paid by the party coming to redeem: for the same reason, if a term of years were taken in the name of B. in trust for A., this on the death of A. would be legal assets, for here the right to the thing was plain; and if the trustee contested it, he must *prima facie* do it on the peril of paying costs.

Hartwell v. Chitters,<sup>(k)</sup> before Lord Hardwicke, was also the case of the equity of redemption of a term, and (the point apparently not undergoing much discussion,) was determined in conformity with Sir J. Jekyll's decision, and subsequently, in a case before the Queen's Bench, we find Mr. Justice Bayley referring to both Hartwell v. Chitters and the case of Sir Charles Cox's creditors with apparent approval.<sup>(l)</sup>

Mr. Cox, in his note to Peere Williams, disapproves of the doctrine held by Sir Joseph Jekyll, that an equity of redemption should be accounted *equitable* assets; and observes, that, upon looking into the master's report made in pursuance of \*the decree in Cox's case, it appeared [\*688] the two only creditors were in equal degree, and the master therefore declined to distinguish which were legal and which were equitable assets, so that the point in question was not in fact determined; and he adds, that Hartwell v. Chitters rested entirely on the authority of Sir Charles Cox's case. At all events it must be remarked, that Sir Joseph Jekyll expressly approved the doctrine, that a *plain trust* should be *legal assets*, though he followed his bent of taking subtle and refined distinctions, by holding that a *doubtful* and *precarious* equity should be administered as *equitable* assets. A precarious trust ought upon principle to be governed by the same rules as a plain trust; and therefore his honor's distinction could scarcely be relied upon;<sup>(m)</sup> and it was said long since by Mitford, afterwards Lord Redesdale, *arguendo*, that Cox's case, and Hartwell v. Chitters, had been considered as overruled.<sup>(n)</sup>

In a late case before Vice-Chancellor Kindersley, the distinction between legal and equitable assets is thus laid down: Legal assets are such as are available to the creditor in a court of law, equitable assets such as the creditor can only reach through a court of equity. Whether the assets are such that the *executor* can recover them in a court of law or in a court of equity only, is immaterial. The true test is, whether he recovers them "*virtute officii*." If the assets come to his hands *as executor*, a court of law would treat them as assets, and they are to be administered as legal assets.<sup>(o)</sup> The cases of Cox's Creditors and Hartwell v. Chitters must now be treated as overruled.

A trust in *fee* stands in a very different light from the trust of a chat-

(k) Amb. 308.

(l) Clay v. Willis, 1 Barn. & Cres. 372.

(m) See Sharpe v. Earl of Scarborough, 4 Ves. 541; but see Clay v. Willis, 1 B. & C. 372; Barker v. May, 9 B. & C. 493.

(n) Sharpe v. Earl of Scarborough, 4 Ves. 541.

(o) Cook v. Gregson, 3 Drew. 547; and see Lovegrove v. Cooper, 2 Sm. & Gif. 271; French v. French, 3 Jur. N. S. 423.

tel in the hands of the executor. As regards the inheritance, until a late act<sup>(p)</sup> it was only in respect of creditors by specialty in which the heirs were bound, that the question of legal or equitable assets could in fact have arisen, \*for specialties in which the heirs were not bound, and simple-contract debts, were not payable out of real [\*689] estate, and statutes and judgments were *liens*, to a partial extent, upon the equitable fee, and were payable not as debts, but as incumbrances. In respect, then, of specialties in which the heirs were bound, a plain and simple trust was made assets in a court of law in the hands of the *heir*, by the Statute of Frauds, and therefore was legal assets in equity;<sup>(q)</sup> but complicated trusts, and equities of redemption, were not touched by the statute; and it would seem, upon principle, that as equity subjected the trust to specialty creditors by analogy only to law, the court ought, by observing the analogy throughout, to have adopted the legal course of administration.

Lord Nottingham, than whom no chancellor had a more just conception of the true nature of trusts, determined to this effect in the case of *Grey v. Colville*.<sup>(r)</sup> The bond-creditors had, since the ancestor's decease, entered up judgments against the heir; and Lord Nottingham, following the analogy of law, decided that the creditors should be paid *according to the priority of their judgments* out of a trust in fee, thus treating the trust estate as legal assets in the hands of the *heir*.<sup>(s)</sup>

Similarly, in the case of a devise of a trust in fee, the analogy presented by the case of the devise of a legal fee ought, it is conceived, to be pursued. It must be borne in mind, that until the 3 & 4 W. & M. c. 14, a devise of the real estate absolutely deprived the specialty creditors of all remedy against either heir or devisee, and that by this statute a remedy was first given against the heir and devisee jointly, in respect of the property so devised. The statute, however, expressly excepted from its operation those cases of devises for payment of debts, &c., in which, according to the doctrine of the courts of equity, real estate devised was administered as equitable assets, and it is conceived that the true test whether a trust in fee devised should be \*ad-  
ministered as legal or equitable assets, was whether, if the estate [\*690] devised had been a legal estate it would have constituted legal or equitable assets.

The decision in *Plunket v. Penson*, though the observations of Lord Hardwicke are somewhat sweeping, is not opposed to this view. In that case a testator, seised of the *equity of redemption of a trust estate in fee*, devised it to his son, who was also his heir, subject to the testator's debts and some annuities and legacies, and died indebted by bond and simple contract. The point at issue was, whether both species of creditors should be paid *pari passu*, or the legal priority should be observed.

(p) 3 & 4 Will. 4, c. 104, which will be noticed presently.

(q) *Plunket v. Penson*, 2 Atk. 293, per Lord Hardwicke; *King v. Ballett*, 2 Vern. 243.

(r) 2 Ch. Re. 143.

(s) See *Morrice v. Bank of England*, 3 Sw. 585; *Dollond v. Johnson*, 2 Sm. & Gif. 391.

The case of *Massam v. Harding* was cited by counsel; and it was said that Lord Chief Baron Comyns had there taken the distinction, that, if it was a mortgage for years, then the equity of redemption would be *legal* assets, because the whole interest was not gone from the mortgagor, the reversion in fee being left in him; otherwise where it was a mortgage in fee; <sup>(t)</sup> and Lord Hardwicke said, he thought the distinction was right; and in the principal case his lordship said, "I agree, that if a mere trust estate descends upon an heir-at-law, it will be considered as legal, and not as equitable assets; and this is founded upon the third clause of the statute, <sup>(u)</sup> which gives a specialty creditor his remedy at law by an action of debt against the heir of the obligor; but it has not made a mortgage in fee of a trust estate subject to the same thing; for if the specialty creditor should bring an action against the heir of the mortgagor, he might plead *riens per descent*. Therefore, if the plaintiff be under the necessity of coming here, this court will act according to its known rule of doing equal justice to all creditors without any distinction as to priority." But whatever force may be attributed to these observations, it certainly was not *decided* by this case, that an equity of redemption in fee should be administered as equitable assets. Had the ancestor been seised of the *legal* fee, Lord Hardwicke held, that, as the *legal* descent [\*691] would not \*have been broken by the equitable charge, the bond creditor might *at law* have recovered his debt against the heir; and thus, having a claim *dehors* the will, would have been preferred to the simple-contract creditors, who had only a title *under* the will. But the ancestor was seised, not of the *legal* fee, but of an *equity of redemption*; and against the heir of such an interest the bond creditor had no action at law, but only a remedy in chancery. Now the *equitable* right was to be made strictly analogous to the *legal* right; and as at law the bond creditor could only have sued the *heir*, and not the *devisee for payment of debts*, the question for consideration was, whether the equitable interest had descended or been devised. The testator, by charging the land with his debts had certainly not broken the descent as to the surplus interest that might come to the heir; but, as the debts exceeded the value of the estate, he had disposed of the *whole* beneficial interest, and the bond creditor could have no remedy against the heir, for there was *riens per descent*: he could only come into equity with the other creditors under the *equitable charge*; and as an estate devised for payment of debts must be administered as equitable assets, the bond creditor had no claim to priority. The decision viewed in this light is not at variance with Lord Nottingham's decree in *Grey v. Colville*.

In *Sharpe v. The Earl of Scarborough* <sup>(v)</sup> a testator died seised of an equity of redemption in fee, and the dispute was between the creditors who had obtained judgments in the lifetime of the testator, and the simple-contract creditors, who claimed under a charge in the will. Lord Loughborough held, that, as the judgment creditors might

(t) This does not appear in the short note of the case in Bunb. 339.

(u) Viz. of Fraudulent Devises, 3 W. & M. c. 14. But *quære*, if the 10th section of the Statute of Frauds, 29 Car. 2, c. 3, was not meant.

(v) 4 Ves. 538.



have redeemed according to their priorities, they had *liens* upon the estate, and were therefore entitled to preference. This was the single point determined, though the case has often been cited in support of the doctrine just advocated that an equity of redemption in fee shall be administered as legal assets.

Before concluding the subject under discussion, we must advert to the late statute for the more effectual payment of debts.<sup>(w)</sup>

\*The act is entitled "An act to render freehold and copyhold estates assets for the payment of simple contract debts;" and it [\*692] is thereby declared that "when any person shall die seised of or entitled to *any estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with, or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons, who died seised of freehold estates, was or were before the passing of that act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets *under and by virtue of this act* all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands."

Upon the construction of this statute the following observations occur:—

1. It has been decided that the words "assets to be administered in equity" mean only that the creditor shall have his remedy in chancery, and not at law, and do not imply that the estate shall be taken as *equitable* assets. The estate therefore is to be distributed as legal assets.<sup>(x)</sup>

2. The express terms of the act giving priority to creditors by specialty in which the heirs are bound, over creditors by specialty in which the heirs are not bound, have, as a matter of course, had full effect given to them.<sup>(y)</sup>

(w) 3 & 4 W. 4, c. 104.

(x) Foster v. Handley, 1 Sim. N. S. 200; see the judgment more fully reported, 15 Jur. 73.

(y) Richardson v. Jenkins, 1 Drewry, 477.

[\*693]

## \*CHAPTER XXIV.

## RELIEF OF THE CESTUI QUE TRUST AGAINST THE FAILURE OF THE TRUSTEE.

WE have now pointed out in what the estate of the *cestui que trust* primarily consists. We have also examined what are the incidents and properties of it by analogy to estates at law. It follows next that we speak of certain *collateral or subsidiary rights* by which the *cestui que trust* is supported in the enjoyment of his equitable interest against the various accidents to which an estate, not direct, but transmitted through the instrumentality of another, must necessarily be exposed. In the present chapter we shall consider the force of the maxim, "A trust shall not fail for want of a trustee."

It is a general rule that, wherever the intention of the settlor can be clearly collected, and there is no want of consideration, the court will follow the estate into the hands of the *legal* owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurances.

Thus, if a deviser or settlor appoint a trustee, who either dies in the testator's lifetime,<sup>(v)</sup> or disclaims,<sup>(w)</sup> or is incapable of taking the estate,<sup>(x)</sup> or if the trustee otherwise fail,<sup>(y)</sup> the trust is not defeated, but fastens on the conscience of the person upon whom the legal estate has descended. "I take it," said Lord Chief Justice Wilmot, "to be a first [\*694] and fundamental \*principle in equity, that *the trust follows the legal estate wheresoever it goes, except it come into the hands of a purchaser for valuable consideration without notice*. I never heard any distinction made, nor has any case been cited to prove, that a trust, fit and proper to be executed against a trustee, should be suffered to fall to the ground, and remain unexecuted against an heir at law, where there was no trustee. The lapse of the legal estate never has the least influence upon the trusts to which it is subject. Trust estates do not depend upon the legal estate for an existence. A court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate or of one another: and the legal estate is nothing but the shadow, which always follows the trust estate in the eye of a court of equity."<sup>(z)</sup>

So, if a testator direct a sale of his lands for certain purposes, but omit to name a person to sell, the trust attaches upon the conscience of the heir, and he is as strictly bound to carry the intention into effect, as if he were a trustee regularly appointed.<sup>(a)</sup>

(v) *Moggridge v. Thackwell*, 3 B. C. C. 528; S. C. 1 Ves. jun. 475, per Lord Thurlow; *Attorney-General v. Downing*, Amb. 552, admitted.

(w) *Backhouse v. Backhouse*, V. C. of Eng. 20 Dec. 1844.

(x) *Sonley v. Clockmakers' Company*, 1 B. C. C. 81; *Anon. case*, 2 Vent. 349; *White v. Baylor*, 10 Ir. Eq. Re. 53, 54.

(y) *Attorney-General v. Stephens*, 3 M. & K. 347.

(z) *Attorney-General v. Lady Downing*, Wilm. 21, 22.

(a) First clearly settled in *Pitt v. Pelham*, Freem. 134.

So, if lands be devised,<sup>(b)</sup> or a sum of money be bequeathed,<sup>(c)</sup> to a *feme covert* for her sole and separate use, but without the interposition of a trustee, the property vests at *law* in the husband, but in *equity* he holds upon trust for the separate use of the wife.

We have seen, in a former chapter, that powers are distributable into *arbitrary* and *imperative*, and that powers *imperative* do in reality partake of the nature of trusts. Upon this ground the court protects a *cestui que trust* from the failure of the donee of a power imperative, as it would do from the failure of any other trustee. "If," said Lord Eldon, "the \*power be one which it is the duty of the party to execute—made his duty by the requisition of the will—put upon [\*695] him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstance to disappoint the interests of those for whose benefit he is called upon to execute it."<sup>(d)</sup> "As to the objection," said Lord Chief Justice Wilmot, "that these powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers*, but *trusts*, and there is a very essential difference between them. *Powers* are never imperative—they leave the act to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. This court supplies the *defective execution* of powers, but never the *non-execution* of them, for they are meant to be optional. But the person who creates a trust means it should at all events be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this court assumes the office in the first instance, and in the event which hath happened it is the same as if no trustees had been appointed at all. There is some personality in every choice of trustees; but this personality is *res unius atatis*, and, if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in its place. A college was to be founded under the eye of five trustees: that cannot be: the death of the trustees frustrates that *medium*. What then? Must the end be lost because the means are by the act of God become impossible? Suppose the question had been asked the testator, 'If the trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate?' No: I \*trust them to execute my intention: I do not put it into their power whether my intention shall ever take place at all."<sup>(e)</sup> [\*696]

(b) Bennet v. Davis, 2 P. W. 316; Major v. Lansley, 2 R. & M. 355.

(c) Rollfe v. Budder, Bunb. 187; Tappenden v. Walsh, 1 Phillim. 352; Pritchard v. Ames, 1 Turn. & Russ. 222; Parker v. Brooke, 9 Ves. 583; and see Roberts v. Spicer, 5 Mad. 491; Wills v. Sayers, 4 Mad. 409; Rich v. Cockell, 9 Ves. 375. At first there was some doubt: Harvey v. Harvey, 1 P. W. 125; Burton v. Pierpoint, 2 P. W. 78.

(d) Brown v. Higgs, 8 Ves. 574.

(e) Attorney-General v. Lady Downing, Wilm. 23.



If trustees, then, have such a *discretion* committed to them, and they either die in the testator's lifetime, (f) or decline the office, (g) or disagree among themselves as to the mode of execution, (h) or do not declare themselves before their death, (i) or if from any other circumstance, (k) the exercise of the power by the party intrusted with it become impossible, the court will substitute itself in the place of the trustees, and will exercise the power by the most reasonable rule. And the court will take up the trust, whatever difficulties or impracticabilities may stand in the way; (l) for as Lord Kenyon laid down the rule strongly, if the trust can *by any possibility* be exercised by the court, the non-execution by the trustee shall not prejudice the *cestuis que trust*. (m)

In what mode the court will execute the power will vary according to the circumstances of the case.

Where the discretion of the trustee is to be *governed by some rule*, or to be *measured by a state of facts, which the court can inquire into as effectually as a private person*, then the court can "look with the eyes of trustees," and will substitute its own judgment for that of the individual.

Thus, in *Hewett v. Hewett*, (n) a power was given to the successive tenants for life "to cut such trees and wood growing upon the premises as A., B., C., and D., or the survivors or survivor of them, should assign, allow, or direct by any writing under their hand." All the trustees died, and the difficulty was, whether the power to cut timber had not thus [\*697] become *\*extinguished*; but Lord Northington said, "The trustees were interposed as supervisors only: it is absurd to suppose the testator meant his trustees should have an arbitrary volition, whether the several tenants for life should have any benefit of the fall of timber. If a bill had been brought against the trustees to assign, allow, or direct timber, mature, and fit, to be cut, would it have been an answer, We do not think fit to allow it—*stat pro ratione voluntas*? I think the court would not have been satisfied with such an answer. It is the duty of this court, and of all courts, to give devises, as far as their respective jurisdictions admit, their full and specific execution. The office of these trustees is *not confined to any personal qualification, but such as is general and may be substituted*, viz., to see what is fit and proper to be cut." His lordship therefore directed a reference, what timber and wood was mature and fit, and that such should be felled with the approbation of the master.

In another case a power was given to trustees to apply, with the appro-

(f) *Attorney-General v. Lady Downing*, Wilm. 1; S. C. Amb. 550; *Attorney-General v. Hickman*, 2 Eq. Ca. Ab. 193.

(g) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Jude v. Worthington*, 3 De Gex & Sm. 389.

(h) *Moseley v. Moseley*, Rep. t. Finch, 53, and see *Wainwright v. Waterman*, 1 Ves. jun. 311.

(i) *Hewett v. Hewett*, 2 Ed. 332; *Flanders v. Clark*, 1 Ves. 10, per Lord Hardwicke; *Harding v. Glyn*, 1 Atk. 469; *Ray v. Adams*, 3 M. & K. 243, per Lord Langdale; *Grievson v. Kirsopp*, 2 Keen, 653; *Croft v. Adam*, 12 Sim. 639.

(k) *Attorney-General v. Stephens*, 3 M. & K. 347.

(l) *Pierson v. Garnet*, 2 B. C. C. 46, per Lord Kenyon.

(m) *Brown v. Higgs*, 5 Ves. 505.

(n) 2 Ed. 332.

bation of the father and mother, the dividends of certain stock to the maintenance of the children. There was a failure of trustees. Lord Eldon said, "the intention was that, *if it should be proper* the interest should be applied in maintenance, the trustees should have the power. In this instance there were no trustees, at least none who have been acting, and that circumstance imposes upon the court the necessity of examining strictly what the trustees ought to have done. I shall, therefore direct a reference to the master, whether it would have been reasonable and proper for any trustee or trustees, acting in the execution of the will, to apply the interest towards the maintenance of the children.(o)

But the principal authority upon this subject is the case of *Gower v. Mainwaring*.(p) John Mainwaring executed a trust deed, by which the trustees were to give the residue of the real and personal estate among the settlor's relations *where they should see most necessity, and as they should think most equitable and just*. Two of the trustees died, and the third refusing to act, it was discussed, how far the discretion [\*698] of the trustees could be vicariously exercised by the court. Lord Hardwicke said, "what differs it from the cases mentioned is this, that *here is a rule laid down for the trust*. Wherever there is a trust or power—for this is a mixture of both—I do not know the court can put itself in the place of those trustees, and exercise that discretion. Where trustees have power to distribute *generally* according to their discretion *without any object pointed out or rule laid down*, the court interposes not; unless in case of a charity, which is different, the court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down: the trustees are to judge on the necessity and occasions of the family: the court can*(q) *judge of such necessity: that is a judgment to be made of facts existing, so that the court can make the judgment as well as the trustees, and when informed by evidence of the necessity, can judge what is equitable and just on this necessity.*" And his lordship decreed a division among the relations (such relations to be restricted to those within the Statute of Distributions) according to their necessities and circumstances, which the master should inquire into, and consider how it might be most equitably and justly divided.(r)(1)

(o) *Maberley v. Turton*, 14 Ves. 499.

(p) 2 Ves. 87.

(q) In Mr. Belt's edition of *Vesey* there is the strange misprint of "*cannot* judge."

(r) 2 Ves. 110; and see *Liley v. Hey*, 1 Hare, 580.

(1) The execution of the power in this case in favor of the settlor's relations within the Statute of Distributions, according to their necessities, leads us to observe upon the construction of a *direct bequest* to a person's "poor or necessitous relations." It is commonly thought that the epithet "poor," "necessitous," or the like, is merely nugatory; but on consideration there will appear to be a preponderating weight of authority in favour of the contrary doctrine. It is perfectly settled, notwithstanding a case in which Lord Hardwicke is said to have held otherwise, (*Attorney-General v. Buckland*, cited 1 Ves. 231, Amb. 71,) that "relations," though accompanied with the words "poor," "necessitous," or the like, will be restricted to those within the Statute of Distributions. The only question, therefore, is whether *as among those within the statute* expressions of this kind will not be allowed their effect. In a case reported by Peere Williams (*Anon* case, 1 P. W. 327,) the bequest was to "*poor* relations," and the Countess of Winchelsea, one of the next of kin, was allowed a share, in regard the word "poor" was fre-

[\*699] \*Where the settlor has given *no rule or measure* by which the discretion is to be governed, the court cannot in that case act upon mere caprice, but will execute the power by the most reasonable and intelligible rule that the circumstances of the case will admit.

[\*700] Upon ordinary occasions the court proceeds upon the \*maxim, that *equality* is equity. Thus in *Doyley v. Attorney-General(s)* a testator gave his real and personal estate to trustees upon trust to dispose thereof to such of his relations of his mother's side who were most deserving, and in such manner as they should think fit, *and* for such charitable uses and purposes as they should also think most proper and convenient; and the power having devolved upon the court, Sir J. Jekyll directed, that *one moiety* of the personal estate should go to the relations of the testator on the mother's side, and the *other moiety* to

(s) 2 Eq. Ca. Ab. 195. See *Down v. Worrall*, 1 M. & K. 561; but the two sets of objects were connected not by "*and*," but by "*or*." It will be observed that *Doyley v. Attorney-General*, was not cited.

quently used as a term of endearment and compassion, rather than to signify indigence. It is evident that this case can have no application where the word "poor" is not of *doubtful* meaning, but is *clearly* to be taken in the sense of poverty and necessity. In *Widmore v. Woodroffe*, Amb. 636, the testator had given a third of the residue to be distributed "amongst the most necessitous of his relations." There was *only one relation within the Statute of Distributions*, and it was held that such relation was exclusively entitled. The only point decided, therefore, was, that the addition of the term "necessitous" would not extend the construction of the word "relations" to those *out* of the statute, and to this single question were the observations of Lord Camden addressed. "Several cases," he said, "have been cited, all proceeding upon the same ground, making the Statute of Distributions the rule to prevent an inquiry which would be infinite, and would extend to relations *ad infinitum*: the court cannot stop at any other line. Thus it would clearly stand on the word 'relations,' and the word 'poor' being added makes no difference. There is no distinguishing between the degrees of poverty, and therefore the court has, as was unanswerably argued,\* construed the will as if the word 'poor' were not in it." Thus there appears to be no authority for holding the words to be nugatory *as among the relations within the statute*, while on the contrary side of the question there are, as we shall see, two direct decisions. In *Brunsdon v. Woolledge*, Amb. 507, a testator gave 500*l.* to be distributed amongst his mother's *poor* relations, and Sir T. Sewell directed the fund to be distributed amongst the poor relations of the mother within the statute *who were objects of charity*. In *Mahon v. Savage*, 1 Sch. & Lef. 111, we have the authority of Lord Redesdale equally in point. A testator gave 1000*l.* to be distributed amongst his *poor* relations, or such other objects of charity as should be mentioned in his private instructions to his executors. No instructions were left, and Lord Redesdale held, that Lynam, *one of the next of kin within the statute*, was not entitled to a share, unless he was a poor person at the time of the payment of the legacy. We may also add the *dictum* of Lord Thurlow in *Green v. Howard*, 1 B. C. C. 33:—"The word 'relations,'" he said, "must be confined to the statute, but not always in the proportions of the statute: where the testator has said, to relations *according to their greater need*, the court has shown particular favour to one." The argument that the court cannot distinguish between the degrees of poverty as amongst the relations within the statute is also answered by the case of *Gower v. Mainwaring*, cited in the text, in which a direction for such a distinction was actually made.

\* By referring to the arguments of the counsel, it will clearly appear in what sense his lordship meant to employ the words "there is no distinguishing between the degrees of poverty," viz. as among the relations *ad infinitum*, not as among the relations within the statute.



charitable uses, the known rule that equality is equity being, he said, the best rule to go by. He said he had no rule of judging of the merits of the testator's relations, and could not enter into spirits, and therefore could not prefer the one to the other, but all should come in without distinction.

With respect to the subject under consideration, the cases in which the donor's intention is expressed in the words of a *gift*, may admit of distinction from those in which it is expressed in the words of a *power*.

If a fund be limited "upon trust for the children of A. as B. shall appoint," the construction appears to be, that the children of A. take a vested interest by the *gift*, subject to be divested by the exercise of the *power*. Therefore, on failure of the power, the children, who were the objects of the power, become absolutely entitled, just as if the discretion had never been annexed.<sup>(t)</sup> But if the power given to B. be testamentary only, that circumstance affords a ground for construing the gift to the children as a gift to those only who might be living at B.'s death.<sup>(u)</sup>

Where, however, an estate is vested in trustees "upon trust to dispose thereof among the children of A.," in this case the children take nothing by way of *gift*, but the transmission of their interest must be through the *medium* of the *power*. \*If the trust be to distribute [\*701] *equally* among the objects, the bequest, though in the form of a *power*, must be tantamount to a simple gift;<sup>(v)</sup> and if the trustees be at liberty to distribute *unequally*, and make no distribution, the court, though this was long doubted, itself executes the power, and divides the fund equally amongst the objects of it.<sup>(w)</sup>

But further, a discretion may be given to the trustee, not only in respect of the *proportions* to be appointed, but also in respects of the *objects* to whom the appointment is to be made; as where a fund is bequeathed to trustees with a discretionary power of distribution to *such* of a class as the trustees shall think fit.

In cases of this description the question first to be resolved is, Did the settlor intend to communicate a *mere power* or to create a *trust*?

In *Harding v. Glyn*(*x*) a testator gave to Elizabeth his wife a house and certain goods and chattels, but "desired her at or before her death to give the same unto and amongst *such* of the testator's relations as she should think most deserving and approve of." The wife died without having executed the appointment, and the court considered the discretion as imperative, and divided the estate equally amongst the testator's relations living at the time of the wife's death.

In *The Duke of Marlborough v. Lord Godolphin*(*y*) a testator by his

(t) *Davy v. Hooper*, 2 Vern. 665; *Fenwick v. Greenwell*, 10 Beav. 412; *Madoc v. Jackson*, 2 B. C. C. 588; *Hockley v. Mawbey*, 1 Ves. jun. 143, see 149, 150; *Jones v. Torin*, 6 Sim. 255, &c.; *Falkner v. Lord Wynford*, 9 Jur. 1006.

(u) *Woodcock v. Renneck*, 4 Beav. 196; 1 Phil. 72.

(v) *Phillips v. Garth*, 3 B. C. C. 64; *Rayner v. Mowbray*, Ib. 234.

(w) *Hands v. Hands*, cited *Swift v. Gregson*, 1 T. R. 437, note; *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sug. Powers, 650, 6th ed.; *Walsh v. Wallinger*, 2 R. & M. 78; *S. C. Taml.* 425; *Grieverson v. Kirsopp*, 2 Keen, 653; *Brown v. Pocock*, 6 Sim. 257; *Finch v. Hollingsworth*, 21 Beav. 112.

(x) 1 Atk. 469, stated from Reg. Lib.; *Brown v. Higgs*, 5 Ves. 501.

(y) 2 Ves. 61.

*will* gave 30,000*l.* to his wife, but by a *codicil* (without date) gave it to her for life only, and after her decease to be divided and distributed to and amongst *such* of his children, and in such manner and proportions, as she by deed or will should direct or appoint. The wife by will appointed 17,000*l.* between two of the children who died in her lifetime. The sum appointed having failed by lapse, it was questioned whether it should sink into the testator's estate, or belong to the children as *cestuis* [702] *que trust*. Lord \*Hardwicke considered, that as the gift in the *will* was an absolute legacy to the wife, the intention of the *codicil* was not to provide for the children, but to secure their respect and duty to the wife by investing her with a power: that no interest vested in the children independently of any appointment, and therefore the sum that lapsed should fall into the residue.

These two cases were the subject of much discussion in *Brown v. Higgs*,<sup>(z)</sup> in which a testator gave certain leaseholds to John Brown upon trust, (after payment of certain charges thereon,) "to employ the rents to *such* of the children of the testator's nephew Samuel Brown as the said John Brown should think most deserving, and that would make the best use of it, *or* to the children of the testator's nephew William Augustus Brown, if any such there were or might be." John Brown died in the testator's lifetime. Lord Alvanley said, "The question is, whether the surplus rents are a gift to *all* the children, or to *such* of them only as the testator's nephew John Brown, who died in his lifetime, should appoint. If the former can be collected as his intention, the death of the trustee will make no difference: if that intention cannot be collected, the selection not having taken place, whatever the reason of its failing may be, the bequest must fail with it. Upon the true construction of this will, I am of opinion it is equivalent to saying he gives it to the children of Samuel Brown or of William Augustus Brown, with a power to John Brown to select any he thinks fit and to exclude the others." His lordship, therefore, declared the fund to have been well bequeathed in trust for *all* the children of Samuel Brown and William Augustus Brown. The cause was reheard before his lordship, who, after grave consideration of the subject, decreed as before.<sup>(a)</sup> The decree was afterwards affirmed on appeal by Lord Eldon,<sup>(b)</sup> and again affirmed in the house of lords.<sup>(c)</sup>

"The Duke of Marlborough v. Lord Godolphin," said Lord Eldon, [703] "is certainly very difficult to reconcile with *Harding v. Glyn* or *Brown v. Higgs*; but the question is not, whether one case is to be reconciled with others, but whether all the cases have gone upon a principle which professes to save whole *Harding v. Glyn*. Lord Hardwicke, in *The Duke of Marlborough v. Lord Godolphin* does not say, that where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case this court would not act, but he collected from the scope and object of the disposition taken altogether that it was a case, in which the person having a power to dispose of the sum of 30,000*l.* had a mere power, not clothed with any duty

(z) 4 Ves. 708.

(a) 5 Ves. 495.

(b) 8 Ves. 561.

(c) 18 Ves. 192.

requiring her to execute it, and therefore, as to what was not disposed of, the court could not interfere.”(d) The doctrine of *Harding v. Glyn*, which has since been confirmed by other authorities,(e) may now be considered as indisputably established. The rule, as laid down by Lord Cottenham, was thus expressed, that “when there appears a general intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class.”(f)

The question in favour of what objects a power *imperative*, whether of *distribution* merely, or of *selection*, will be executed by the court, remains to be considered; and it is conceived that, in reference to this question, each kind of power stands generally upon the same footing. The following results may be deduced from the authorities:

First. Where a testator bequeaths property with a power *imperative* in favour of a class, whether of children, relations, or others, and it appears to be the intention that the distribution or selection should take place as soon as conveniently may be after the testator's death then the court will execute the power in favour of the class as existing at the date of the testator's death.(g)

\*Secondly. Where the *frame* of the will does not of necessity [\*704] point to an immediate exercise of the power, as where the donee of the power takes a life estate expressly, or by implication, the nature of the power given to the donee has to be taken into consideration.

1. If the power is to be exercised by will only, then, inasmuch as the objects of the power are necessarily those only living at the death of the donee, the court executes the power in favour of those members of the class only who are *in esse* at the *death of the donee*.(h)

2. Where, however, the power given to the tenant for life is not merely testamentary, the question, whether the class to take is to be ascertained at the death of the testator or of the donee of the power, is involved in considerable difficulty. The decisions which support an execution of the power in favour of the class of objects as existing at the death of the donee,(i) and those which support an execution in favour of the class as existing at the death of the original testator,(k) are almost evenly balanced: but the apparent absence of any full consideration of the

(d) *Brown v. Higgs*, 8 Ves. 576.

(e) *Birch v. Wade*, 3 V. & B. 198; *Burrough v. Philcox*, 5 M. & Cr. 72; *Penny v. Turner*, 2 Phill. 493; *Walsh v. Wallinger*, 2 R. & M. 78.

(f) 5 M. & Cr. 92.

(g) *Brown v. Higgs*, 4 Ves. 708, &c.; *Longman v. Broom*, 7 Ves. 124. The result will, of course, be the same where a life estate being given to the donee of the power, the donee dies in the testator's lifetime. See *Penny v. Turner*, 2 Phill. 493; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Re. 332.

(h) *Cruwys v. Colman*, 9 Vesey, 319; *Birch v. Wade*, 3 V. & B. 198; *Walsh v. Wallinger*, 2 R. & M. 78; *Brown v. Pocock*, 6 Sim. 257; *Burrough v. Philcox*, 5 M. & Cr. 72; and see the analogous cases of *Woodcock v. Renneck*, 4 Beav. 190, 1 Phill. 72; *Finch v. Hollingsworth*, 21 Beav. 112.

(i) *Doyley v. Attorney-General*, 2 Eq. Ca. Abr. 195; *Harding v. Glyn*, 1 Atk. 469; *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Pow. 650. 6th edit.

(k) *Hands v. Hands*, cited 1 T. R. 437, note; *Grievson v. Kirsopp*, 2 Keen, 653.



question, and the circumstance that in some of the cases the power, though not expressly limited to an exercise by will, did not in terms authorize an execution by deed or writing, and may perhaps have been viewed by the court as testamentary, detracts from their value as authorities upon this point.

Upon principle, too, as well as upon authority, the question is a difficult one. It may be said, in support of ascertaining the class at the death of the original testator, that the donee of the power may exercise it in [\*705] favour of the class existing at \*the time of exercise, to the exclusion of those who have died before, and also, where the power is one of selection, to the exclusion of those who may come into *esse* subsequently, but that the court cannot act arbitrarily, and cannot show any favour, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it, that is, those living at the death of the testator, and those who come into being during the continuance of the life estate; otherwise, should all the class predecease the tenant for life (an event not improbable, where *children* or some limited class of relations are the objects,) there would be a power imperative which is construed as a trust, and no *cestui que trust*, a result which, it is conceived, the court would be somewhat unwilling to adopt. On the other hand, it is to be observed that the power may properly be exercised by the donee at any time before death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power, having an undoubted right to postpone the execution of it until the last moment of his life, the only default which the court has to supply, is the nonexercise *just before the death*, and that default must, therefore, be supplied in favour of those who were objects at the date of the death of the donee.

3. It is clear that where the donee tenant for life may exercise the power by deed or will, the members of the class in existence at the date of the death of the donee will alone take, if, upon the purview of the original instrument, they alone appear to be the objects of the power.<sup>(l)</sup>

It may be useful to inquire more particularly in connection with this subject, in what manner the court will execute a power in favour of "relations."

The donee of the discretion, if he have a power of *selection*, may ap-  
[\*706] point to relations in any degree,<sup>(m)</sup> and it is only in \*those cases where he has a mere power of *distribution* that he must

(l) *Winn v. Fenwick*, 11 Beav. 438; and see *Tiffin v. Longman*, 15 Beav. 275.

(m) *Supple v. Lowson*, Amb. 729; *Grant v. Lynam*, 4 Russ. 292; *Harding v. Glyn*, 1 Atk. 469; S. C. stated from Reg. Lib., *Brown v. Higgs*, 5 Ves. 501; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Cruwys v. Colman*, 9 Ves. 324, per Sir W. Grant; *Spring v. Biles*, cited *Swift v. Gregson*, 1 T. R. 435, note (f). In *Brunsdon v. Woolredge*, Amb. 507, Sir T. Sewell seems to have confined the trustees to relations within the statute, but his opinion was otherwise in *Supple v. Lowson*, ubi supra.

confine himself to the relations within the Statute of Distribution of intestates' estates.<sup>(n)</sup> But the court, except where the bequest is for the benefit of poor relations by way of founding a charity,<sup>(o)</sup> or the testator has furnished some intelligible rule by which the relations out of the statute may be easily ascertained,<sup>(p)</sup> must in all cases appoint to the relations within the statute; for as on the one hand the court cannot act arbitrarily by selecting particular objects, so on the other it cannot execute the power in favour of relations in general, for this would lead *ad infinitum*.<sup>(q)</sup>

The point still open to discussion is, in what *shares* such relations shall take—whether those who in case of intestacy would have claimed by representation shall under the execution of the power by the court take *per stirpes* or *per capita*.

Now, the rule that those should be deemed relations who would take a distributive share under the statute was adopted, on the ground, that unless some line were drawn for restricting the meaning of the word, a bequest to relations would be void \*for uncertainty. As this [\*707] was the sole foundation for appealing to the statute at all, it is evident the single inquiry for the court is, *who* would take a distributive share: *in what proportions* they would take is wholly beside the question, and in fact beyond the court's jurisdiction; for, when the class has been ascertained, the testator himself has determined the proportions by devising to the objects in words creating a joint tenancy.<sup>(r)</sup> No distinction can be taken between real and personal estate; yet it could scarcely be held, that if *lands* were devised to the testators "relations," the kindred within the statute would take in unequal proportions.

The result of the authorities would seem to accord with what is correct upon principle, viz., that *in a gift to "relations," (whether the testator has added the words "equally to be divided," or not,) the distribution among the relations within the statute must be made per capita, and not per stirpes.*<sup>(s)</sup> The question with respect to "*next of kin*" can no longer

(n) *Isaac v. De Friez*, Amb. 595; but see the case stated from Reg. Lib., Attorney-General v. Price, 17 Ves. 373, note (a); *Carr v. Bedford*, 2 Ch. Re. 146; *Pope v. Whitcombe*, 3 Mer. 689. The last case, and *Forbes v. Ball*, 3 Mer. 437, were both decided by Sir W. Grant, but appear to be contradictory; however, in the latter case the question raised was, not whether the donee had exceeded her power, but whether the discretion was a *power* or a *trust*; for if a power, and it had not been executed by the will, the fund would have sunk into the residue, and the plaintiff have been entitled as residuary legatee. Note, a power of selection will be implied in the case of "relations," where it would not have been implied in the case of "children." *Spring v. Biles*, and *Mahon v. Savage*, *supra*. In the latter case the words were "*amongst the relations*," but see *Pope v. Whitcombe*, 3 Mer. 689, where the expression was similar.

(o) See *White v. White*, 7 Ves. 423; Attorney-General v. Price, 17 Ves. 371; *Isaac v. De Friez*, *Ib.* 373, note (a); and see *Mahon v. Savage*, 1 Sch. & Lef. 111.

(p) *Bennett v. Honeywood*, Amb. 708.

(q) Thus in *Bennett v. Honeywood*, *ubi supra*, 456 persons applied as relations within two years.

(r) See *Walter v. Maunde*, 19 Ves. 427, 428.

(s) See *Thomas v. Hole*, Cas. t. Talb. 251; *Stamp v. Cooke*, 1 Cox, 236; *Phillips v. Garth*, 3 B. C. C. 64; *Green v. Howard*, 1 B. C. C. 33; *Rayner v. Mowbray*, 3 B. C. C. 234, Reg. Lib. B. 1791, fol. 183; *Pope v. Whitcombe*, 3 Mer. 689, Reg. Lib. B. 1809, fol. 1535; *Hinckley v. Maclarens*, 1 M. & K. 27; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215. The above cases will be found discussed in Appendix. No. IX.

arise : for by the decision of *Elmsley v. Young*, upon appeal from Sir J. Leach to the late lords commissioners,<sup>(t)</sup> the words "next of kin" must be construed to mean "nearest of kin," to the exclusion of those who would take under the statute by representation.

We have stated that, as a general principle, the court will execute the power among the objects *equally* ; but it sometimes happens that the subject of the gift is incapable of division, or the settlor has expressly directed the whole to be bestowed on *one* object to be selected by the trustee. In such cases the court still acts upon the maxim, that, if *by any possibility* the power can be executed, the court will do it.

In *Moseley v. Moseley*,<sup>(u)</sup> a very early case, an estate was devised to [\*708] trustees upon trust to settle on *such* of the sons of \*N. as the trustees should think fit. The trustees having neglected to comply with the direction, the sons of N. filed a bill to have the benefit of the trust, and the court decreed the trustees, within a fortnight next after the entry of the order, to nominate such one of the plaintiffs as they should think fit, upon whom to settle the lands of the testator ; and if the trustees should fail to nominate within that time, or there should be any difference between them concerning such nomination, then the court would nominate one of the plaintiffs, it being the testator's intent that his estate should not be divided, but settled upon one person.

In *Richardson v. Chapman*<sup>(v)</sup> Dr. Potter, Archbishop of Canterbury, gave all his options to trustees upon trust, that in disposing thereof "regard should be had according to their discretions to his eldest son, his sons in law, his present and former chaplains, and others his domestics, particularly Dr. T., his chaplain, and Dr. H., his librarian ; also to his worthy friends and acquaintances, particularly to Dr. Richardson." The trustee tried first to give the option in question to himself. He then fixed upon a person, with whom he appeared to have made an underhand bargain. When this failed, he, in breach of his duty, presented a Mr. Venner. On a bill filed to set aside the presentation, Lord Northington considered the trust to be of a kind that the court could not execute, and dismissed the bill. Dr. Richardson appealed against this decision to the house of lords, and the other person, who stood prior to him, not appearing, the house reversed the decree, and ordered the presentation to be made to the appellant. "This case," says Lord Alvanley, "shows, that however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled from executing, or shows by his conduct any intention not to execute it as the testator intended he should. When one reads the nature of this trust, how difficult it was to make the [\*709] selection, it is decisive to show \*the court must do it, though the trust is in its nature so discretionary."<sup>(w)</sup>

(t) 2 M. & K. 780 ; and see *Withy v. Mangles*, 4 Beav. 358 ; 10 Cl. & Fin. 215.

(u) Rep. t. Finch, 53 ; S. C. cited *Clarke v. Turner*, Freem. 199.

(v) 7 B. P. C. 318 ; S. C. cited *Brown v. Higgs*, 5 Ves. 504, 505.

(w) *Brown v. Higgs*, 5 Ves. 504.



In *Brown v. Higgs*(*x*) an estate was devised “to one of the sons of Samuel Brown, as John Brown should direct by a conveyance in his life-time, or by his last will and testament;” and, John Brown not having executed the power, Lord Alvanley was inclined to think, though he would not decide the point, that the children of Samuel Brown could not establish a claim : but the ground of this opinion was not that a *trust* had been created which the court could not execute, but that the intention of the testator as collected from the will was to communicate a *mere power*.

## \*CHAPTER XXV.

[\*710]

## THE RIGHTS OF THE CESTUI QUE TRUST IN PREVENTION OF A BREACH OF TRUST.

As the estate of the *cestui que trust* depends for its continuance upon the faith and integrity of the trustee, it is reasonable that the *cestui que trust*, whose interest is thus materially concerned, should be allowed by all practicable means to secure himself against the occurrence of any act of misconduct. We shall, therefore next consider the rights of the *cestui que trust* that have a tendency to secure to him this protection.

I. The *cestui que trust* is entitled to have the custody and administration of the estate confided to the care both of *proper persons* and of a *proper number* of such persons.

Thus if the trustee originally appointed by a will happen to die in the testator's lifetime, the *cestui que trust*, where such a course would be for his interest, may have the property better secured by a conveyance to an express trustee for himself.

So, where the original number of trustees has become reduced by deaths, the *cestui que trust* may restore the property to its original security by calling for the appointment of new trustees in the place of the trustees deceased ;(*a*) and even a *cestui que trust* in remainder may file a bill to have the number of trustees filled up.(*b*)

If a trustee refuse to act(*c*) or become so circumstanced that he cannot effectually execute the office (as where a trustee goes abroad to reside permanently),(*d*) or a *\*feme* trustee marries,(*e*) or the trustees of a chapel entertain opinions contrary to the founder's intention,(*f*) [\*711]

(*x*) 4 Ves. 708, see 718, 719 ; 5 Ves. 495, see 508.

(*a*) *Buchanan v. Hamilton*, 5 Ves. 722 ; *Hibbard v. Lambe*, Amb. 309.

(*b*) *Finlay v. Howard*, 2 Dru. & War. 490.

(*c*) *Maggeridge v. Grey*, Nels. 42 ; *Travell v. Danvers*, Finch, 380 ; *Wood v. Stane*, 8 Price, 613. Anon. 4 Ir. Eq. Rep. 700.

(*d*) *O'Reilly v. Alderson*, 8 Hare, 101 ; *Re Ledwich*, 6 Ir. Eq. Rep. 561 ; *Commissioners of Charitable Donations v. Archbold*, 11 Ir. Eq. Rep. 187.

(*e*) *Lake v. De Lambert*, 4 Ves. 592.

(*f*) *Attorney-General v. Pearson*, 7 Sim. 290, see 309 ; *Attorney-General v. Shore*, Ib. 309, see 317.

or if the trustee become bankrupt, *(g)* or misconduct himself in any manner, *(h)* (as by dealing with the trust property for his own personal advancement, *(i)* by suffering a co-trustee to commit a breach of trust, *(k)* or by absconding on a charge of forgery; *(l)* in these and the like cases the *cestui que trust* may have the old trustee removed, and a new trustee appointed in his room. And in such a suit it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute to him any corrupt or improper motive in the execution of the trust, or to allege that his behaviour is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it will be impertinent, and may be scandalous, to state circumstances of *general* malice or personal hostility. *(m)* And if the old trustee be removed on the ground of misconduct, he must bear the expense of the conveyance to the new trustee, as an act necessitated by himself. *(n)*

If the settlement require the trustees of a charity to be inhabitants of a particular place, it is improper to appoint persons trustees who do not answer that description, provided at the time of the election there were any inhabitants proper to be trustees. *(o)* But where it has been the custom to appoint trustees not being inhabitants, the court will not remove the existing trustees, though it will take care that the founder's directions are better observed for the future; *(p)* and generally, though [\*712] trustees may have been appointed irregularly in the <sup>\*</sup>first instance, the *cestui que trust* cannot come for their removal after an acquiescence in the nomination for a great number of years. *(q)*

The court will not dismiss a trustee for the mere *caprice* of the *cestui que trust* without any reasonable cause shown, *(r)* or because the trustee has refused from honest motives to invest the trust fund in a purchase of leasehold estate, where a power for the purpose was given to him with the consent of the tenant for life, and the tenant for life thought the purchase desirable, *(s)* nor even if the trustee have transgressed the strict line of his duty, provided there was no wilful default, but merely a misunderstanding. *(t)* Where, however, a trustee pertinaciously insisted on being continued in the office, though his co-trustees were unwilling to act with him, Lord Nottingham said, "He liked not that a man should

*(g)* Bainbrigge v. Blair, 1 Beav. 495; In re Roche, 1 Conn. & Laws. 306; Commissioners of Charitable Donations v. Archbold, 11 Ir. Eq. Rep. 187; and if the trustee compound with his creditors, it is presumed that he may equally be removed, for the *cestuis que trust* have a right to have the administration of the trust estate committed to responsible persons.

*(h)* Mayor of Coventry v. Attorney-General, 7 B. P. C. 235; Buckridge v. Glasse. Cr. & Ph. 126, see 131.

*(i)* Ex parte Phelps, 9 Mod. 357.

*(k)* Ex parte Reynolds, 5 Ves. 707.

*(l)* Millard v. Eyre, 2 Ves. jun. 94.

*(m)* Earl of Portsmouth v. Fellows, 5 Mad. 450.

*(n)* Ex parte Greenhouse, 1 Mad. 92.

*(o)* Attorney-General v. Cowper, 1 B. C. C. 439.

*(p)* Attorney-General v. Stamford, 1 Phill. 737.

*(q)* Attorney-General v. Cuming, 2 Y. & C. Ch. Ca. 139, see 150.

*(r)* O'Keeffe v. Calthorpe, 1 Atk. 18; and see Pippin v. Tucking, 2 Jones and Lat. 95.

*(s)* Lee v. Young, 2 Y. & C. Ch. Ca. 532.

*(t)* See Attorney-General v. Coopers' Company, 19 Ves. 192; Attorney-General v. Caius College, 2 Keen, 150.

be ambitious of a trust when he could get nothing but trouble by it," and, without any reflection on the conduct of the trustee, declared he should meddle no further in the trust.<sup>(u)</sup>

If there be an *arbitrary power*, with which the original trustee was invested, it is not exercisable by the new trustee appointed by the court.<sup>(v)</sup> And of course, a trustee appointed by the court cannot exercise a legal power which the original trustee could not have assigned; as if a power of sale be given to trustees to preserve contingent remainders, and to the survivors of them, and the executors or administrators of the survivors, new trustees appointed by the court cannot execute the power.<sup>(w)</sup>

As the substitution of a trustee by the court proceeds upon a full consideration of the case, and is never made unless the court is satisfied as to the fitness of the person proposed, it \*cannot be expected [713] that the court should authorize the insertion of a power in the conveyance to the new trustees, enabling them to nominate other trustees in their stead as often as occasion may require: this would plainly be an abandonment by the court of its own jurisdiction—a delegation of it to the care and judgment of individuals. Accordingly, notwithstanding some previous fluctuation in the practice,<sup>(x)</sup> it is now settled that, except in charity cases,<sup>(y)</sup> the court will not authorize the insertion of such a power in the deed of conveyance.<sup>(z)</sup>

It was commonly, but erroneously, supposed, that by a clause in Sir Edward Sugden's Trustee Act,<sup>(a)</sup> (now repealed,) a new trustee might in *all cases* have been appointed by the summary process of a *petition*. However, the words of the enactment did not authorize a petition for the mere purpose of appointment of new trustees, but only *where application was made under the act for a conveyance or transfer which could not otherwise be obtained*,<sup>(b)</sup> and the recent creation of the trust or other circumstances rendered it safe.<sup>(c)</sup> The court had authority to appoint new trustees by way of secondary or collateral only, and not of original jurisdiction.

The court might have appointed a new trustee, although the settle-

(u) Uvedale v. Ettrick, 2 Ch. Ca. 130.

(v) Doyley v. Attorney-General, 2 Eq. Ca. Ab. 194; Hibbard v. Lambe, Amb. 309; Fordyce v. Bridges, 2 Phill. 497; and see Cole v. Wade, 16 Ves. 44, 47; Drayson v. Pocock, 4 Sim. 283; Lord v. Bunn, 2 Y. & C. Ch. Ca. 98.

(w) Newman v. Warner, 1 Sim. N. S. 457.

(x) Joyce v. Joyce, 2 Moll. 276; White v. White, 5 Beav. 221.

(y) Attorney-General v. Hurst, M. R., Dec. 2, 1791, Reg. Lib. A. 1791, f. 487; see the decree, stated Seton's Dec. 130; In the matter of 52 G. 3, c. 101, 12 Sim. 262; Re Lovett's Exhibition, Sidn. Suss. Coll. Camb., cor. V. C. Knight Bruce, Dec. 20, 1849.

(z) Bayley v. Mansell, 4 Madd. 226; Brown v. Brown, 3 Y. & C. 395; Southwell v. Ward, Taml. 314; Bowles v. Weeks, 14 Sim. 591; Oglander v. Oglander, 2 De Gex & Sm. 381; Holder v. Durbin, 11 Beav. 594; in which last case Lord Langdale, M. R., in deference to the views of the other judges, declined to follow his own previous decision in White v. White.

(a) 11 G. 4, & 1 W. 4, c. 60, s. 22.

(b) In re Fitzgerald, Ll. & G. t. Sugd. 20; Ex parte Whitley, id. 23; In re Anderson, id. 27; Re Byrne, 1 Jones & Lat. 535; In re Pennefather, In re Hartford, Harte v. French, 2 Drur. & War. 292; but see Ex parte Plunket, 8 Ir. Eq. Rep. 523.

(c) In re Nicholls, Ll. & G. t. Sugd. 17; Ex parte Whitley, id. 23.



ment contained a *power* of appointing new trustees, if under the circumstances the power could not be exercised,<sup>(d)</sup> \*but if the power [\*714] was exercisable the donees of the power should have nominated a new trustee, and then a petition should have been presented, praying the necessary conveyance or transfer.<sup>(e)</sup> If the person in whom the legal estate was vested could make the transfer without an order, there was no case for the jurisdiction of the court.

By the larger provisions of the act now in force (13 & 14 Vict. c. 60, s. 32,) it is enacted that whenever it shall be *expedient* to appoint a new trustee or new trustees, and it shall be found *inexpedient, difficult, or impracticable* so to do without the assistance of the court, the court may appoint a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees.

The *Bankruptcy Act* <sup>(f)</sup> has also authorized the appointment of a new trustee on *petition* in the case of the trustee's bankruptcy. It declares that "if any bankrupt shall, as trustee, be seised of or entitled to any real or personal estate, it shall be lawful for the lord chancellor<sup>(g)</sup> on the petition of the person entitled *in possession* to the receipt of the rent, issues, and profits, dividends, interest and produce thereof,<sup>(h)</sup> on due notice given to all other persons, if any, interested therein, to order the assignees and all persons, whose act or consent thereto is necessary, to convey, assign, or transfer the said estate to such person or persons as the lord chancellor shall think fit upon the same trusts as the said estate was subject to before the bankruptcy."

Upon this enactment the following points have been determined:—

1. The act requires that notice should be given to *all persons interested*. In one case where a conveyance was made \*by A. to B. [\*715] upon trust by sale or other disposition to secure a mortgage sum advanced by C., and B. became bankrupt, the court refused to make an order on the petition of A. without notice to C.<sup>(i)</sup> But afterwards in a similar case notice to the mortgagor was dispensed with.<sup>(k)</sup> Where any doubt exists who are the *cestuïs que trust* all must be served, for it was not meant that the court should decide upon the right.<sup>(l)</sup> If the bankrupt himself be served with the petition he will be allowed his costs.<sup>(m)</sup>
2. The act directs the *assignees* and others to convey; but where the trust is clear, the legal estate does not pass to the assignees, and there-

(d) In re Fauntleroy, 10 Sim. 252; In re Foxall, 2 Phill. 281; and see In re Roche, 1 Conn. & Laws. 306.

(e) In re Laffan, 1 Conn. & Laws. 395.

(f) 12 & 13 Vict. c. 106, s. 130, re-enacting 6 G. 4, c. 16, s. 79.

(g) The petition, though it may be heard by a V. C., should be addressed to the Lord Chancellor. Ex parte Cartwright, 3 De Gex & Sm. 648. In the matter of Heath, 9 Hare, 616, the objection that the petition should be heard by the Court of Appeal to whom the jurisdiction in bankruptcy had been committed by the 14 & 15 V. c. 83, was overruled, s. 7.

(h) These words, prescribing the person by whom the petition is to be presented, limit the jurisdiction somewhat inconveniently. See Ex parte Cousen, 1 De Gex, 451.

(i) Ex parte Orgill, 2 D. & C. 413; and see Ex parte Hardman, 3 Mont. Deac. & De Gex, 559.

(k) Ex parte Marshall, 3 De Gex & Sm. 670.

(l) Ex parte Congreve, 1 De Gex, 267. (m) Ex parte Whitley, 1 Deac. 478.

fore in such a case they need not be parties to the conveyance, but the words of the act are regarded as *surplusage*.<sup>(n)</sup>

3. The court is to order the conveyance, assignment, or transfer to be made to such *person or persons* as the court shall think fit, and therefore it has been held that if A. and B. be trustees, and A. die, and B. become bankrupt, the court can order the conveyance, assignment, or transfer to two new trustees.<sup>(o)</sup>

If there be a power of appointment of new trustees, and the power be exercised, the court will direct the conveyance, assignment, or transfer to be made to the person so appointed,<sup>(p)</sup> or if all parties interested who are *sui juris* concur in the selection of a person as new trustee, the court will order accordingly:<sup>(q)</sup> or the court, on an affidavit of the fitness of the person proposed, will in common cases make the appointment at once without the expense of a reference.<sup>(r)</sup>

4. \*The act directs the conveyance, assignment, or transfer to be made *upon the same trusts* as the property was subject to [\*716] before the bankruptcy; but if the trust has since been executed, and a petition be presented by the person solely interested, the court will order the conveyance, assignment, or transfer to be made to the petitioner.<sup>(s)</sup>

5. The costs of all parties, including the bankrupt himself,<sup>(t)</sup> will be paid out of the trust fund,<sup>(u)</sup> or by the petitioner in the first instance, who will recover them over from the trust fund.<sup>(v)</sup>

There exists in the case of charitable trusts, the same right to have a proper number of trustees appointed in the case of an ordinary trust, and a mode less expensive than by suit asserting the right has been similarly provided by statutory enactment. Thus by the 1 Wm. 4, c. 60, s. 23, and 2 Wm. 4, c. 57, s. 3, it was in substance enacted that when the person in whom any real property might have been vested in trust for any *charity* should be *dead*, the court of chancery might on petition direct advertisements to issue for the representative of the person or last survivor of the persons in whom such real property might have been vested to appear or give notice of his title, and prove his pedigree or other title as trustee, and if no person appeared to give such notice, or the person giving it should fail to prove his title, the court might appoint any new trustees for such charity, in case no trustees for such charity duly appointed should then be existing, and such real property might be

(n) Ex parte Painter, 2 D. & Ch. 584; see Ex parte Walton, 2 Mont. & Ayr. 242.

(o) Ex parte Wilkinson, 2 Deac. 151; S. C. 3 Mont. & Ayr. 145; Ex parte Saunders, 2 G. & J. 132; Ex parte Inkersole, ib. 230.

(p) Ex parte —, In re Remington, 3 D. & C. 24; and see Williams v. Bird, 1 V. & B. 3.

(q) See Ex parte Whish, 2 Mont. & Ayr. 214; Ex parte Stubbs, 2 Mont. Deac. & De G. 570.

(r) Ex parte Beveridge, 4 D. & C. 455; Ex parte Inkersole, 2 G. & J. 230; Ex parte Palmer, Deac. 177; Ex parte Walton, 2 M. & A. 242; Ex parte Page, 1 D. & C. 321; Ex parte Buffery, 2 D. & C. 576; Ex parte Cartwright, 3 De Gex & Sm. 648.

(s) Ex parte Hancox, Mont. 247.

(t) Ex parte Whitley, 1 Deac. 478; and see Cartwright, 3 De Gex & Sm. 648.

(u) Ex parte Buffery, 2 D. & C. 576.

(v) Ex parte Saunders, 2 G. & J. 132; Ex parte Painter, 2 D. & C. 584.

conveyed to such new trustees when so appointed, or to the existing trustees previously appointed, as the case might be, by any person whom the said court might direct without the necessity of any decree.

Again by 5 & 6 Wm. 4, c. 76, s. 71, the act depriving the municipal corporations of the administration of charities, it was enacted that in [\*717] every borough in which the body corporate or \*any one or more of the members of such body corporate *in his or their corporate capacity* then stood solely or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, *seised or possessed for any estate or interest whatsoever* of any hereditaments or personal estate whatsoever, in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate or of such member thereof, should from and after the 1st day of August, 1836, utterly cease. Provided also, that if parliament should not otherwise direct, on or before the said 1st day of August, 1836, (*which was not done*), the lord high chancellor or lords commissioners of the great seal should make such orders as he or they should see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates.

Under the authority "to make orders," the court of chancery has from time to time, for the due management of the charity property, appointed trustees in the place of the corporation. The jurisdiction of the court, however, has been held not to apply to a case only where no *estate* was vested in the *old corporation*, the charity property being vested in trustees and the *corporation* being merely visitors with powers of nomination.<sup>(w)</sup> But where there was a charity corporation *substantially*, though not *identically*, the same in its component parts as the municipal corporation, the case was held to be within the spirit if not the letter of the section above referred to.<sup>(x)</sup>

The appointment of trustees by the court under the act, though it made them the custodiers of the property, could not of course transfer to them the legal estate, which, notwithstanding the strong negative words used in the statute, it was decided, remained in the corporation.<sup>(y)</sup> But [\*718] now by 16 & 17 Vict. c. 137, s. 65, the legal estate is vested without \*any actual conveyance in the trustees appointed by the lord chancellor, and upon the death, resignation, or removal of any of the trustees, and the appointment of any new trustee or trustees, the legal estate is transferred to the trustees for the time being without any conveyance.

Petitions for filling up vacancies in the number of trustees of charities, whether in substitution for a corporation or otherwise, ought under the old practice to have been presented under Sir S. Romilly's Act (52 Geo. 3, c. 101,) as well as the municipal corporation act, and the

(w) Attorney-General v. Newbury Corporation, C. P. Coop. Rep. 837-38, 72; Christ's Hospital v. Grainger, 16 Sim. 102.

(x) Attorney-General v. Mayor, &c., of Exeter, 2 De Gex, Mac. & Gor. 507.

(y) Doe v. Norton, 11 Mees. & W. 913.



attorney's-general fiat must have been obtained to such a petition,(z) though this rule does not appear to have been uniformly adhered to.(a)

Now under the charitable trusts act (16 & 17 Vict. c. 137,) s. 28, new trustees of any charity the gross annual income whereof exceeds 30l.(b) may be appointed by one of the equity judges in chambers, and the court has power at the same time to make an order under the trustee act, *without petition*, vesting the estates in the new trustees.(c) But the sanction of the charity commissioners under the 17th section, must be obtained.

II. The *cestui que trust* is entitled to file a bill against his trustee, and compel him to the execution of any particular act of duty.

Thus, if the legal estate in the hands of the trustee be assailed by a stranger, the *cestui que trust* may not institute proceedings in the name of the trustee without his authority,(d) but may oblige the trustee on giving him a proper indemnity to assert the legal right;(e) and so if the trustee of a covenant, even a voluntary one, will not sue upon it, the *cestui que trust*, \*may compel the trustee on a proper indemnity [\*719] to lend his name to the *cestui que trust*, to enable him to sue.(f) Otherwise, should the trust property be lost, and the trustee himself become insolvent, the *cestui's que trust* equitable interest would be absolutely destroyed.

But if A. allege in himself a title which he does not possess, and sells to B. for valuable consideration without notice of a prior settlement under which C. is the real *cestui que trust*, the court will not, in a suit by C. against A. and B., compel the trustee of the settlement to convey the legal estate to C., or to lend his name to C. for the purpose of trying an ejectment against B. the *bona fide* purchaser for value without notice.(g)

Sir Joseph Jekyll laid down the rule, that "the forbearance of the trustees in not doing what it was their office to have done should in no sort prejudice the *cestuis que trust*;"(h) and hence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the *cestui que trust*; but the principle was evidently intended to apply as between the *privies to the trust only*, and not as between the *privies to the trust* and a stranger.

"The rule, that the statute of limitations does not bar a trust estate," said Lord Hardwicke, "holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on the one side, and strangers on the other, for that would make the statute of no force at all,

(z) Re Warwick Charities, 1 Phill. 559; Re Rolle's Charity, 3 De Gex, Mac. & Gor. 153; Re London, Brighton, &c. Railway Co., 18 Beav. 608.

(a) Nightingale's Charity, 3 Hare, 336; Belke's Charity, 13 Jur. 317.

(b) By s. 32, where the income is below 30l., the district courts of bankruptcy and county courts have jurisdiction.

(c) Re Davenport's Charity, 4 De Gex, Mac. & Gor. 839; In Lincoln Primitive Methodist Chapel, 1 Jur. N. S. 1011, V. C. Stuart does not appear to have been aware of the decision in Davenport's Charity.

(d) See Crossley v. Crowther, 9 Hare, 386.

(e) Foley v. Burnell, 1 B. C. C. 277, per Lord Thurlow; Cary, 14; and see Kirby v. Mash, 3 Y. & C. 295; Malone v. Geraghty, 2 Conn. and Laws. 251.

(f) See Fletcher v. Fletcher, 4 Hare, 78.

(g) Turner v. Buck, 22 Vin. Ab. 21.

(h) Lechmere v. Earl of Carlisle, 3 P. W. 215.

because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both.”(i) “A *cestui que trust*,” said Lord Redesdale, “is always barred by length of time operating against the trustee. If the trustee does not enter, and the *cestui que trust* does not compel him to enter, as to the person claiming paramount, the *cestui que trust* is barred.”(k) And Lord Manners observed, [\*720] \*a “The opinion of Sir J. Jekyll, if intended to apply to third persons, which I do not conceive it was, has often been denied, and is contrary to many decisions. If the trustees who are so appointed neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the Statute of Limitations is a bar to the *cestui que trust*.”(l)

In *Allen v. Sayer*,(m) as corrected from the Registrar’s Book, a testator gave his real estate *after his mother’s and wife’s decease* to Allen, an infant, his heirs and assigns, and by the same will gave his *real estate to A. B. and C. D. upon trust*, if occasion should be, to sell the same in aid of the personal estate for payment of debts, and appointed his wife and mother the executrixes of his will. The wife renounced, and the mother only proved. Shortly after the testator’s decease, which happened about 1678, the trustees of the will not offering to interfere, and Allen being of the age of ten years, and the testator’s mother of great age, and therefore averse to any dispute, one Sayer, who was connected with the family by marriage, and pretended a claim to the lands, prevailed with Curtis, the tenant in possession under a lease for years, to attorn and pay rent to himself, and gave him a bond of indemnity. Sayer then *levied a fine of the lands with proclamations, and five years passed and no entry was made. In 1688, the testator’s mother died, and the right of Allen, the infant, to the possession, then accrued. About 1689, the infant attained his age of twenty-one years, and in 1690 brought an ejectment at law, but failed. Upon this he instituted a suit in equity, and Lord Somers decreed, that “the fine and non-claim should not incur against the plaintiff, who was then an infant;” and his lordship is reported by Vernon to have said, that “although the fine and non-claim was a good bar at law, the legal estate being in the trustees, who were of full age and ought to have entered, yet the plaintiff ought not to suffer for their laches, being an infant, and who, so soon as of age, made entry, [\*721] \*and brought his ejectment, and likewise his bill in that court, before five years had incurred after he had attained his age.” But this must not be taken as a decision by Lord Somers, that the right of an infant *cestui que trust* to a legal estate cannot be barred by the laches of his trustee; for it must be remarked, 1. That the legal fee was*

(i) *Lewellin v. Mackworth*, 2 Eq. Ca. Ab. 579.

(k) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.

(l) *Pentland v. Stokes*, 2 B. & B. 75. In this case the *cestui que trust* was part of the time an infant, and as Lord Manners expressed a general opinion, it would seem be concurred in the doctrine, that an infant is bound as well as an adult.

(m) 2 Vern. 368. See the case stated from Reg. Lib., Appendix, No. X.

in the trustees, both by force of the word "estate," and also from the trust to sell, and therefore the infant could not have maintained an action at law independently of the fine and non-claim. 2. It is not clear that the conusor, when he levied the fine, was seised of the freehold; for he had merely the attornment of the tenant, and this of itself would not work a disseisin.<sup>(n)</sup> 3. The interest of the infant was subject to the prior life estate in the same lands of the testator's mother, and it is not said, however *probable*, that this estate was taken under the *will*: if it was an estate prior to the testator's interest, then, as the mother did not die till 1688, the right of entry of the infant, or rather of the devisees in trust for him, was not barred until five years after the reversion had fallen into possession, within which period of time the suit in equity was instituted. 4. The conusor of the fine had full notice of the trust, and contrived to get into possession of the land through the *fraud and collusion of the tenant*, to whom he had given a bond of indemnity, and it cannot be disputed, that, where the conusor's estate was originally infected with fraud, the fine and non-claim can have no effect in removing the blot.<sup>(o)</sup>

In *The Earl v. The Countess of Huntingdon*,<sup>(p)</sup> Lord Macclesfield was of opinion, that a fine and five years' non-claim would, in favour of a purchaser, bar a trust term, though the *cestui que trust* was an infant.

In *Wych v. The East India Company*,<sup>(q)</sup> A. had agreed with the company for an allowance of two per cent., and afterwards died intestate, leaving an infant son. B. took out administration *durante minoritate*, but instituted no suit upon the contract. \*The son, within six years after he had attained his age, but not within six years after [\*722] the cause of action accrued, brought his bill against the company for an account, and they pleaded the Statute of Limitations. Lord Talbot said, "The administrator, during the infancy of the plaintiff, had a right to sue; and though the *cestui que trust* was an infant, yet he must be bound by the trustees not suing in time; for I cannot take away the benefit of the Statute of Limitations from the company, who are in no default, and are entitled to take advantage thereof as well as private persons, since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the company."

It must be observed, however, that the principles involved in the foregoing authorities seem to be impliedly contradicted by the recent Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 24, which, while creating an absolute bar to equitable as well as legal estates, appears to assume that the trustee and *cestui que trust* have distinct rights of suing; and further, that although the 25th section of the act, providing that the right of the *cestui que trust* shall be deemed to have accrued *at* and not before the time of conveyance by the trustee to a purchaser for value,

(n) See Co. Lit. 322 b, 325 a.

(o) See *Kennedy v. Daly*, 1 Sch. & Lef. 379, 381; *Salsbury v. Bagott*, 2 Sw. 612; *Bell v. Bell*, Ll. & G. t. Plunket, 44; *Reece v. Trye*, 1 De Gex & Sm. 273; *Langley v. Fisher*, 9 Beav. 90.

(p) Cited *Wych v. East India Company*, 3 P. W. 310, note (G).

(q) 3 P. W. 309.



might seem at first sight to give a statutory recognition to those principles alluded to, yet, according to the tenor of the late decisions, that section is to be viewed merely as a special exception in favour of the *cestui que trust*, and not as abridging the rights to sue of a *cestui que trust* in remainder or under disability.(r)

If a tenant for life of leaseholds, who is regarded as a trustee for the remainderman, be bound to renew, and by his threats or acts manifest an intention not to renew, the remainderman may file a bill, and have a receiver appointed for the purpose of providing the renewal fine out of the rents and profits of the estate; and if the period of renewal has already expired, a receiver may be appointed on proof of the tenant's for life default.(s)

[\*723] \*In one case, where a suspicion was entertained that the trustee would not fairly execute his trust, the court required of him, if he continued in the office, to enter into securities for his good faith.(t)

And generally a *cestui que trust*, though entitled to a mere contingent benefit, may, upon reasonable cause shown, apply to the court to have his interest properly secured.(u)

III. As the *cestui que trust* may compel the trustee to the observance of his duty, so, on the other hand, if the *cestui que trust* have reason to suppose, and can satisfy the court, that the trustee is about to proceed to an act not authorized by the true scope of the trust, he may obtain an injunction from the court to restrain the trustee from such a wanton exercise of his legal power.(v)

It is clear the *cestui que trust* would be entitled to an injunction where the act in contemplation would, if done, be irremediable;(w) but in *Pechel v. Fowler*,(x) a case in the exchequer, it is said to have been held, that a *cestui que trust* could not restrain an improvident sale by the trustee, because the *cestui que trust* might proceed against the trustee for the consequential damage to the estate, and so the injury was not irreparable; but Sir J. Leach, under similar circumstances, granted an injunction;(y) and other authorities are not wanting in support of so just and reasonable a right.(z)

(r) *Thompson v. Simpson*, 1 Dru. & War. 489; *Commissioners of Charitable Donations v. Wybrants*, 1 Jon. & Lat. 182; *Attorney-General v. Magdalen College*, (reversed in D. P., on the 13th of June, 1857,) 18 Beav. 223, see 239, 250. N. B. In none of these cases had there been an actual conveyance by a trustee.

(s) See *Bennett v. Colley*, 5 Sim. 192; S. C. 2 M. & K. 233.

(t) *Keeling v. Child*, Rep. t. Finch, 360.

(u) *Cole v. Moore*, Mo. 806.

(v) *Balls v. Strutt*, 1 Hare, 146.

(w) See *Corporation of Ludlow v. Greenhouse*, 1 Bl. N. R. 57; *In re Chertsey Market*, 6 Price, 279, 281; *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 42.

(x) 2 Anst. 549.

(y) *Anon. case*, 6 Mad. 10.

(z) See *Webb v. Earl of Shaftesbury*, 7 Ves. 487, 488; *Reeve v. Parkins*, 2 J. & W. 390; *Milligan v. Mitchell*, 1 M. & K. 446; *Attorney-General v. Mayor of Liverpool*, 1 M. & C. 210; *Vann v. Barnett*, 2 B. C. C. 157.

## \*CHAPTER XXVI.

[\*724]

THE REMEDIES OF THE CESTUI QUE TRUST IN THE EVENT OF A  
BREACH OF TRUST.

UPON the subject of the *cestui's que trust* remedies for a breach of trust, we shall consider, 1. The right of the *cestui que trust* to follow the estate into the hands of a stranger, to whom it has been tortiously conveyed; 2. The right of attaching the property into which the trust estate has been wrongfully converted; 3. The remedy against the trustee personally, by way of compensation for the mischievous consequences of the act; and, 4. The *mode* and *extent* of redress in breaches of trust committed by trustees of charities.

## SECTION I.

## OF FOLLOWING THE ESTATE INTO THE HANDS OF A STRANGER.

The questions that suggest themselves upon this subject are, First, Into whose hands the estate may be followed; Secondly, Within what limits of time; Thirdly, What account the court will direct of the mesne rents and profits.

I. If the alienee be a *volunteer*, then the estate may be followed into his hands, whether he had notice of the trust,<sup>(a)</sup> or not;<sup>(b)</sup> for, though he had no actual notice, yet the court \*will imply it against him where he paid no consideration. But, if the alienee be a *purchaser* of the estate, at its full value, then, if he take with *notice* of the trust, he is (subject to the protection afforded by the Statutes of Limitations) bound to the same extent and in the same manner as the person of whom he purchased,<sup>(c)</sup> even though the conveyance was made to him by fine with non-claim;<sup>(d)</sup> for, knowing another's right to the property, he throws away his money voluntarily, and of his own free will;<sup>(e)</sup> and

(a) *Mansell v. Mansell*, 2 P. W. 678; *Saunders v. Dehew*, 2 Vern. 271; S. C. 2 Freem. 123; *Langton v. Astrey*, 2 Ch. Re. 30; S. C. Nels. 126.

(b) *Mansell v. Mansell*, 2 P. W. 681, per Cur.; *Bell v. Bell*, 1 Rep. t. Plunkett, 58; *Pye v. George*, 2 Salk. 680, per Lord Harcourt; and see 1 Re. 122 b; *Burgess v. Wheate*, 1 ed. 219; *Spurgeon v. Collier*, 1 ed. 55; *Cole v. Moore*, Mo. 806.

(c) *Dunbar v. Tredennick*, 2 B. & B. 319, per Lord Manners; *Pawlett v. Attorney-General*, Hard. 469, per Lord Hale; *Burgess v. Wheate*, 1 Ed. 195, per Sir T. Clarke; *Bovey v. Smith*, 1 Vern. 149; *Phayre v. Peree*, 3 Dow. 129; *Adair v. Shaw*, 1 Sch. & Lef. 262, per Lord Redesdale; *Wigg v. Wigg*, 1 Atk. 382; *Mead v. Lord Orrery*, 3 Atk. 238, per Lord Hardwicke; *Mackreth v. Symons*, 15 Ves. 350, per Lord Eldon; *Mansell v. Mansell*, 2 P. W. 681, per Cur.; *Willoughby v. Willoughby*, 1 T. R. 771, per Lord Hardwicke; *Verney v. Carding*, cited Joy v. Campbell, 1 Sch. & Lef. 345; *Flemming v. Page*, Rep. t. Finch, 320; *Powell v. Price*, 2 P. W. 539, admitted; *Backhouse v. Middleton*, 1 Ch. Ca. 173; S. C. id. 208; *Walley v. Whalley*, 1 Vern. 484; *Pearce v. Newlyn*, 3 Mad. 186.

(d) *Kennedy v. Daly*, 1 Sch. & Lef. 355; and see *Bell v. Bell*, 1 Rep. t. Plunket, 44.

(e) *Mead v. Lord Orrery*, 3 Atk. 238, per Lord Hardwicke.

the rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate, *(f)* or a *lien* for purchase-money. *(g)* But, if a *bona fide* purchaser have *not* notice, he then merits the full protection of the court, and his title, even in equity, cannot be impeached. *(h)*

\*If the purchaser have no notice of the trust at the time of the [\*726] purchase, but afterwards discover the trust and obtain a conveyance from the trustee, it seems he cannot protect himself by taking shelter under the legal estate; for notice of the trust converts him into a trustee, and he must not, to get a plank to save himself, be guilty of a breach of trust. *(i)* A purchaser without notice from a purchaser with notice is not liable, for his own *bona fides* is a good defence in itself, and the *mala fides* of the vendor ought not to invalidate it. *(k)* But the rule does not apply to the case of a charitable use, for it has been ruled that a purchaser without notice from a purchaser with notice shall be bound by the claim of the charity. *(l)* In other respects the principles of equity as to the doctrine of notice are applicable to charities in the same manner as between private persons. *(m)*

A purchaser with notice from a purchaser without notice is exempt from the trust, not from the merits of the second purchaser, but of the first; for if an innocent purchaser were prevented from disposing of the beneficial interest, the necessary result would be a stagnation of property. *(n)* But, if the trustee sell the lands to a *bona fide* purchaser without notice, and afterwards *himself* become the owner of the lands, though for a good and valuable consideration, the trust as to him revives again, and he shall restore the land to the trust: *(o)* and in this respect equity

*(f)* Daniels v. Davison, 16 Ves. 249; Earl Brook v. Bulkeley, 2 Ves. 498; Taylor v. Stibbert, 2 Ves. jun. 437; Winged v. Lefebury, 2 Eq. Ca. Ab. 32; Ferrars v. Cherry, 2 Vern. 384; Jackson's case, Lane, 60; Crofton v. Ormsby, 2 Sch. & Lef. 583; Kennedy v. Daly, 1 Sch. & Lef. 355.

*(g)* Mackreth v. Symmons, 15 Ves. 329; Walker v. Preswick, 2 Ves. 622, per Lord Hardwicke; Kator v. Pembroke, 1 B. C. C. 302, per Lord Loughborough; Gibbons v. Baddall, 2 Eq. Ca. Ab. 682, note *(b)*; Elliot v. Edwards, 3 B. & P. 181; and see Grant v. Mills, 2 V. & B. 306; Dunbar v. Tredennick, 2 B. & B. 320.

*(h)* Burgess v. Wheate, 1 Ed. 195, per Sir T. Clarke; Id. 246, per Lord Henley; Millard's case, 2 Freem. 43; Mansell v. Mansell, 2 P. W. 681, per Cur.; Willoughby v. Willoughby, 1 T. R. 771, per Lord Hardwicke; Dunbar v. Tredennick, 2 B. & B. 318, per Lord Manners; Trevor v. Trevor, 1 P. W. 633; Harding v. Hardrett, Rep. t. Finch, 9; Cole v. Moore, Mo. 806, per Cur.; Jones v. Powles, 3 M. & K. 581; Payne v. Compton, 2 Y. & C. 457.

*(i)* Saunders v. Dehew, 2 Vern. 271; S. C. 2 Freem. 123; Langton v. Astrey, 2 Ch. Re. 30; S. C. Nels. 126.

*(k)* Mertins v. Jolliffe, Amb. 313, per Lord Hardwicke; Ferrars v. Cherry, 2 Vern. 384; see Pitts v. Edelph, Tothill, 164; Salisbury v. Bagott, 2 Sw. 608.

*(l)* East Greenstead's case, Duke, 65, Sutton Colefield case, id. 68; and see id. 94, 173; see Commissioners of Charitable Donations v. Wybrants, 2 Jones & Lat. 194.

*(m)* See 3 Vend. and Pur. 944, 13th ed.

*(n)* Harrison v. Forth, Pr. Ch. 51; Bradwell v. Catchpole, stated Walker v. Symonds, 3 Sw. 78, note *(a)*; Mertins v. Jolliffe, Amb. 313, per Lord Hardwicke; Brandlyn v. Ord, 1 Atk. 571, per *eundem*; Sweet v. Southcote, 2 B. C. C. 66; McQueen v. Farquhar, 11 Ves. 478, per Lord Eldon; Lowther v. Carlton, 2 Atk. 242; S. C. 3 Barn. 358; S. C. For. 187; Andrew v. Wrigley, 4 B. C. C. 136, per Cur.; Salisbury v. Bagott, 2 Sw. 608, per Cur.

*(o)* Bovy v. Smith, 2 Ch. Ca. 124; S. C. 1 Vern. 60, 84, 144; Kennedy v. Daly, 1 Sch. & Lef. 379, per Lord Redesdale.



follows the law ; for, if a trespasser of goods \*sell them in market overt, the owner's title is barred ; but if they come to the trespasser again, the owner may seize them.(p) [\*727]

Upon the question, how far a purchaser will be bound by notice of a *doubtful equity*, Lord Northington said, in *Cordwell v. Mackrill*,(q) "A man must take notice of a deed on which *an equity, supported by precedents the justice of which every one acknowledges, arises, but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends on their locality.*" And Sir W. Grant observed, "There may be such a *doubtful equity* that a purchaser is not to be taken to know what will be the decision, and that is all Lord Camden(r) means ; but in this case the equity is *clear.*"(s)

The rule, that "heirs of the body" in articles shall be construed "first and other sons," does not appear to have been fully established till about the year 1720 :(t) Lord Hardwicke therefore said, that notice of *ancient* articles, that is, of articles before the doctrine was well settled, should not bind a *bona fide* purchaser.(u) And afterwards, in a case of both articles and settlement before marriage, the settlement reciting the articles, Lord Hardwicke thought that, as the equity in this instance rested upon a single authority,(v) and that one in which the question arose between the parties and their representatives and mere volunteers, the purchaser ought not to be bound by the claim of the issue.(w) But notice of *modern* articles, that is, of articles entered into since the clear establishment of the rule, will affect a purchaser ;(x) but, even then, the articles themselves must be produced, that the court may judge [\*728] \*from the whole instrument ; for the true construction depends upon the words, and other parts of the deed may be material to find out their meaning.(y)

Lord St. Leonards however, observed, that *Cordwell v. Mackrill* was of no great authority, though decided by a great judge ; and conceived the true rule to be that, where upon the whole articles it was plain what construction the court would put upon them had it been called upon to execute them at the time they were made, they should be enforced *however difficult the construction might be*, even as against a *purchaser* with notice, but not after a lapse of time where there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated.(z)

In a case where a residuary legatee had enjoyed for nineteen years a copyhold estate, which had been mortgaged to the testator in fee, and then the heir of the testator recovered the land by ejectment and mort-

(p) See *Bovy v. Smith*, 2 Ch. Ca. 126.

(q) *Cordwell v. Mackrill*, 2 Ed. 347 ; S. C. Amb. 516.

(r) Sir W. Grant appears to have supposed the decision was by Lord Camden.

(s) *Parker v. Brooke*, 9 Ves. 588.

(t) By *Trevor v. Trevor*, 1 P. W. 622.

(u) *Senhouse v. Earle*, Amb. 288 ; accordingly relief not asked against purchasers in *West v. Errissey*, 2 P. W. 349.

(v) *West v. Errissey*, 2 P. W. 349.

(w) *Warrick v. Warrick*, 3 Atk. 291.

(x) *Senhouse v. Earle*, Amb. 288, per Lord Hardwicke ; *Davies v. Davies*, 4 Beav. 54 ; and see *Parker v. Brooke*, 9 Ves. 587.

(y) *Cordwell v. Mackrill*, Amb. 515 ; S. C. 2 Ed. 344.

(z) *Thompson v. Simpson*, 1 Dru. & War. 491.

gaged it, and the residuary legatee, having neglected to assert his title to the possession for nine years, at the end of that period filed a bill in chancery, and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee; for it was not that "*clear broad plain equity*" which should affect a purchaser.(a)

A testator had given a leasehold estate to his daughter to her sole and separate use, but *without the interposition of a trustee*,(b) and the husband, supposing himself absolutely entitled, entered into possession, and afterwards mortgaged the premises; and it was held the mortgagee was bound to notice the equitable construction of the will, as a doctrine well understood;(c) and, the husband having obtained a reversionary lease and mortgaged it, the mortgagee was of course held cognizant of the rule, that leases obtained under cover of the tenant right would be subject to the equity of the original term.(d)

[\*729] \*Where the trust estate to be followed is an equitable interest only, then, *prima facie*, the title of the *cestui que trust* must prevail against the alienee; since, as between parties entitled to equities only, the general rule is, *qui prior est tempore potior est jure*; that is, as between persons having only equitable interests, if their merits are in all other respects equal, priority of time gives the better equity.(e) Thus a party taking an equitable mortgage, with notice of a prior equitable mortgage, cannot, by assignment to another without notice, give him a better title.(f)

And as to *choses in action* of which the legal interest is not transferable at law, a purchaser, whatever amount may have been paid by him, cannot stand on a better footing than the trustee of whom he purchased, but must (in conformity with the established rule governing assignments, of *choses in action*) hold it subject to precisely the same equities as the trustee.(g)

II. Within what limits of time the suit must be instituted.

It is a well-known rule, that, as between *cestui que trust* and trustee in the case of a *direct trust*, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title.(h) It has hence been

(a) Hardy v. Reeves, 4 Ves. 466; S. C. 5 Ves. 426.

(b) See *supra*, p. 121.

(c) Parker v. Brooke, 9 Ves. 583.

(d) And see Coppin v. Fernyhough, 2 B. C. C. 291.

(e) See Rice v. Rice, 2 Drewry, 73.

(f) Ford v. White, 16 Beav. 120.

(g) Ord v. White, 3 Beav. 357; Cockell v. Taylor, 15 Beav. 103; Clack v. Holland, 19 Beav. 262; Barnard v. Hunter, 2 Jur. N. S. 1213; Mangles v. Dixon, 3 H. of L. Ca. 702.

(h) See Chalmer v. Bradley, 1 J. & W. 67; Bennett v. Colley, 2 M. & K. 232; Llevellyn v. Mackworth, Barn. 449; Wilson v. Moore, 1 M. & K. 146; Townshend v. Townshend, 1 B. C. C. 554; Hammond v. Hicks, 1 Vern. 432; Norton v. Turvill, 2 P. W. 144; Bell v. Bell, Rep. t. Plunket, 66; Attorney-General v. Mayor of Exeter, Jac. 448; Heath v. Henly, 1 Ch. Ca. 20; Sheldon v. Weldman, 1 Ch. Ca. 26; Wedderburn v. Wedderburn, 2 Keen, 749; 4 M. & C. 41; Lord Hollis's case, 2 Vent. 345, Earl of Pomfret v. Windsor, 2 Ves. 484; Hargreaves v. Mitchell, 6 Mad. 326; Nevarre v. Rutton, 1 Vin. Ab. 185; Shields v. Atkins, 3 Atk. 563; Phillipo v. Munnings, 2 M. & C. 309; Ward v. Arch, 12 Sim. 472; Young v. Waterpark, 13 Sim. 204; Gough v. Bult, 16 Sim. 323.

argued, that, as the person into whose hands the estate is followed is also, by construction of law, a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from \*establishing his claim. But the authorities to the contrary are [\*730] clear and express, and cannot leave a doubt.(i)

"It is certainly true," said Sir W. Grant, "that no time bars a *direct trust*; but if it is meant to be asserted that a court of equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but *where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence comes into a court of equity to seek that relief.*"(k) And Lord Redesdale observed, "The position that *trust and fraud* are not within the statute must be thus qualified: that if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because *his possession is according to his title*: but the question of *fraud* is of a very different description; that is a case where a person who is in possession by virtue of the fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity founded on the fraud; and his possession in the mean time is adverse to the title of the person who impeaches the transaction on the ground of fraud."(l)

\*As the remedy of the *cestui que trust* is considered, therefore, [\*731] on the footing of any other equitable right, it may be proper to examine briefly how the lapse of time operates generally upon suits for equitable relief.

To claims in equity there appear to be but three bars:—1. A statute of limitation; 2. The presumption of something done which, if done, is subversive of the plaintiff's right; 3. The ground of public policy or the inconvenience of the relief.

1. Where there is a statutable bar at law, the same period was always by analogy, or rather in obedience to the statute, adopted as a bar in equity.(m)

(i) *Townshend v. Townshend*, 1 B. C. C. 550, see 554; *Bonney v. Ridgard*, 1 Cox, 145; *Andrew v. Wrigley*, 4 B. C. C. 125; *Lockey v. Lockey*, Pr. Ch. 518; *Collard v. Hare*, 2 R. & M. 675; and see *Cholmondeley v. Clinton*, 2 J. & W. 190; S. C. affirmed, 4 Bligh, 4; *Bell v. Bell*, Rep. t. Plunket, 66; *Attorney-General v. Fishmongers' Company*, 2 Beav. 588; affirmed 5 M. & Cr. 16; *Portlock v. Gardner*, 1 Hare, 594; *Ex parte Hasell*, 3 Y. & C. 622; *Wedderburn v. Wedderburn*, 4 M. & Cr. 53; but see *Attorney-General v. Christ's Hospital*, 3 M. & K. 344 (the case of a charity).

(k) *Beckford v. Wade*, 17 Ves. 97.

(l) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633.

(m) See *Ex parte Dewdney*, 15 Ves. 496; *Bonney v. Ridgard*, 1 Cox. 149; *Beckford v. Wade*, 17 Ves. 97; *Townshend v. Townshend*, 1 B. C. C. 554; *Aggas v.*



The language of Lord Camden upon this subject has been admired as peculiarly energetic. "A court of equity," he said, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but *conscience, good faith, and reasonable diligence*. Where these are wanting, the court is passive, and does nothing. *Laches* and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits. But as the court had no legislative authority, it could not properly define the time of bar by a *positive rule* to an hour, a minute, or a year: it was governed by circumstances. But *as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity*; for when the legislature had fixed the time at law, it would have been preposterous for equity, which, by its own proper authority, [\*732] always maintained a limitation, to *\*countenance laches* beyond the period that law had been confined to by parliament; and therefore in all cases, *where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar.*"(n)

Lord Redesdale, in a case before him, said, that "if the *equitable* title be not sued upon within the time that a *legal* title of the same nature ought to be sued upon, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such *laches* in prosecuting his *equitable*, as would bar him if his title were solely at law, he shall be barred in equity."(o) And in a subsequent case his lordship observed, "it is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by *analogy* to the statutes: they act in *obedience* to them."(p) And again, "I think the statute must be taken *virtually* to include courts of equity; for when the legislature has by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed law; and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also."(q) And the same doctrines have been repeatedly recognized by the highest autho-

Pickerell, 3 Atk. 225; Belch v. Harvey, Appendix to Vend. and Purch. No. xiv. 13th ed.; White v. Ewer, 2 Vent. 340; Knowles v. Spence, 1 Eq. Ca. Ab. 315; Pearson v. Pully, 1 Ch. Ca. 102; Johnson v. Smith, 2 Burr. 961; Attorney-General v. Mayor of Exeter, Jac. 448; Salter v. Cavanagh, 1 Dru. & Walsh, 668; Kingston v. Lorton, 2 Hog. 166; Foley v. Hill, 1 Phill. 399; Hamilton v. Grant, 3 Dow. 44.

(n) Smith v. Clay, cited in note to Deloraine v. Browne, 3 B. C. C. 639.

(o) Bond v. Hopkins, 1 Sch. & Lef. 429.

(p) Hovenden v. Lord Annesley, 2 Sch. & Lef. 630.

(q) Ib. 631; and see Marquis of Cholmondeley v. Lord Clinton, 2 J. & W. 192.

rities, amongst whom may be numbered Lord Manners,<sup>(r)</sup> Sir T. Plumer,<sup>(s)</sup> and Lord Lyndhurst.<sup>(t)</sup>

Upon these principles, then, an *equitable* claim to *lands* could never have been preferred after a lapse of twenty years; \*for though to *writs of right* and to *formedons* much longer periods were allowed [\*733] at law, yet equity always looked upon these as peculiar and excepted cases, and guided itself rather by analogy to the statute of James, which fixed the limitation to the prosecution of *rights of entry*.<sup>(u)</sup> And it may be observed, that although at *law* the remainderman's right always ran only from the determination of the particular estate, yet, in the case of a bill to redeem filed by the person entitled in remainder to the equity of redemption, twenty years' possession by the mortgagee without account or admission of title, though partly or wholly during the lifetime of the tenant for life, barred the remainderman; the ground for the distinction apparently being, that the remainderman might file bill to redeem during the continuance of the life estate.<sup>(v)</sup> But where the mortgagee is also tenant for life of the equity of redemption, the time does not run against the remainderman of the equity of redemption, until his death;<sup>(w)</sup> and the same rule applies where the mortgagee is tenant in common with others of the equity of redemption.<sup>(x)</sup>

Where a fine, with proclamations, was levied by a person claiming adversely, though a volunteer, without actual notice or other imputation of fraud, a constructive trust was held to be barred after a lapse of *five* years.<sup>(y)</sup>

In the case of a statutory bar the limited period affords a substantive insuperable obstacle to the plaintiff's claim, and no plea of poverty, ignorance, or mistake, can be of any avail. However clear and indisputable the title, could the merits be inquired into, the limited time has elapsed, and the door of justice is closed.<sup>(z)</sup> If the court could relieve after twenty years on the ground of distress, or any similar plea, so might \*it after thirty, forty, or fifty; there would be no limitation, and [\*734] property would be thrown into confusion.<sup>(a)</sup>

But no time will cover a *fraud so long as it remains concealed*: for, until discovery (or at all events until the fraud might with reasonable diligence be discovered,) the title to avoid the transaction does not properly arise.<sup>(b)</sup> But, *after discovery*, the defendant may avail himself of

(r) *Medlicott v. O'Donel*, 1 B. & B. 166.

(s) *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 151.

(t) *Foley v. Hill*, 1 Phil. 405.

(u) *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 192.

(v) See *Gifford v. Hort*, 1 Sch. & Lef. 407 note; *Blake v. Foster*, 4 Bligh, N. S. 140; *Corbett v. Barker*, 1 Anstr. and 3 Anstr. 755; *Harrison v. Hollins*, 1 Sim. & Stu. 471.

(w) *Raffery v. King*, 1 Keen, 601, and cases there cited; *Burrell v. Lord Egremont*, 7 Beav. 205.

(x) *Wynne v. Styan*, 2 Phil. 303.

(y) *Bell v. Bell*, Rep. t. Plunket, 44.

(z) *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 139, per Sir T. Plumer; *Byrne v. Frere*, 2 Moll. 171, 178, per Sir A. Hart. But as to mistake, see *Brooks-bank v. Smith*, 2 Y. & C. 58.

(a) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 640.

(b) *Blair v. Bromley*, 2 Phil. 354; *Cotterell v. Purchase*, Cas. t. Talbot, 63, per Lord Talbot; *Medlicott v. O'Donel*, 1 B. & B. 166, per Lord Manners; *Arran v.*

the statute, for he has a right to say, "You shall not bring this matter under discussion at this distance of time; it is entirely your own neglect that you did not do so within the period limited by the statute."(*c*)

The defendant may avail himself of the Statute of Limitations, when the bar to the claim appears on the face of the bill, by demurrer :(*d*) when it does not appear on the bill, by plea ;(*e*) or the defendant may pray in [*\*735*] his answer to have \*the same benefit at the hearing as if he had pleaded the statute ;(*f*) but, if he neither demur, nor plead, nor pray to have the same benefit as if he had pleaded, he cannot shelter himself under the statute at the time of the hearing ;(*g*) though it seems the court itself may still, in its own discretion, refuse to grant relief after the limited period. (*h*)

Even when the bill charges *fraud*, the defendant may demur, (*i*) or plead, (*k*) according to the circumstances of the case. If the plaintiff allege that he only discovered the fraud within the period limited by the statute, the defendant must by plea either deny the fraud, or prove that the plaintiff had knowledge of it. (*l*)

2. The court, after great length of time, will *presume* some act to have been done, which, if done, is a bar to the demand. (*m*)

The period at which the court raises the presumption depends upon the circumstances of the case. As a general rule, the court presumes,

Tyrawly, cited *Ib.* 170; Alden v. Gregory, 2 Ed. 280; Morse v. Royal, 12 Ves. 374, per Lord Erskine; Bicknell v. Gough, 3 Atk. 558; South Sea Company v. Wymondsell, 3 P. W. 143; Booth v. Warrington, 4 B. P. C. 163; Pickering v. Lord Stamford, 2 Ves. jun. 280, per Lord Alvanley; Hovenden v. Lord Annesley, 2 Sch. & Lef. 634; Roche v. O'Brien, 1 B. & B. 330; Blennerhassett v. Day, 2 B. & B. 118, per Lord Manners; Whetton v. Toone, 5 Mad. 54; and see Whalley v. Whalley, 1 Mer. 436; Western v. Cartwright, Sel. Cas. Ch. 34. But Sir A. Hart thought time would run against fraud from the date of it, though undiscovered, provided the person entitled had knowledge of the fraud a reasonable time before the expiration of the period. Byrne v. Frere, 2 Moll. 137.

(*c*) Hovenden v. Lord Annesley, 2 Sch. & Lef. 634, per Lord Redesdale; Western v. Cartwright, Sel. Ch. Ca. 34; and see Mulcahy v. Kennedy, 1 Ridg. 337.

(*d*) Foster v. Hodgson, 19 Ves. 180; Hoare v. Peck, 6 Sim. 51; Beckford v. Close, cited *Ib.* 184; Ferguson v. Livingston, 9 Ir. Eq. Rep. 202; Hardy v. Reeves, 4 Ves. 479, per Lord Alvanley; Hodle v. Healey, 1 V. & B. 539; Hovenden v. Lord Annesley, 2 Sch. & Lef. 637, 638; Fyson v. Pole, 3 Y. & C. 266; Jenner v. Tracey, cited Cook v. Arnham, 3 P. W. 287, note (B); Pearson v. Pulley, 1 Ch. Ca. 102; Frazer v. Moor, Bunb. 54. But Deloraine v. Browne, 3 B. C. C. 633, and Lord Hardwicke in Aggas v. Pickerell, 3 Atk. 225, contra; and see O'Kelly v. Glenny, 9 Ir. Eq. Rep. 25.

(*e*) Aggas v. Pickerell, 3 Atk. 225, and the cases there cited; Wych v. E. I. Company, 3 P. W. 309; Lacon v. Lacon, 2 Atk. 395; Welford v. Liddel, 2 Ves. 400; Blewitt v. Thomas, 2 Ves. jun. 669; &c.

(*f*) Barber v. Barber, 18 Ves. 286; &c.

(*g*) Earl of Pomfret v. Lord Windsor, 2 Ves. 483, per Lord Hardwicke; Harrison v. Borwell, 10 Sim. 382; Prince v. Heylin, 1 Atk. 494, *per eundem*; and see Attorney-General v. Christ's Hospital, 3 M. & K. 344.

(*h*) Prince v. Heylin, *ubi supra*.

(*i*) See Hovenden v. Lord Annesley, 2 Sch. & Lef. 637, disapproving Lord Deloraine v. Browne, 3 B. C. C. 633; Hoare v. Peck, 6 Sim. 51.

(*k*) South Sea Company v. Wymondsell, 3 P. W. 143.

(*l*) See Mitford on Pleading, 269, 4th ed.

(*m*) Pattison v. Hawkesworth, 10 Beav. 375; and see Attorney-General v. Moor, 20 Beav. 119.



after a lapse of twenty years,<sup>(1)</sup> but where there is a statutable bar at law, and of a different period, the court will not entertain a presumption within a less time than the period fixed by the statute. Thus, in a case at law, where an action was brought for the recovery of a quit-rent, no demand of payment having been made for the preceding thirty-seven years, Baron Eyre was of opinion, that \*although the claim was [\*736] not barred by the statute, yet after non-payment and acquiescence of that length of time a release might be presumed, and directed the jury to find the quit-rent extinguished. A new trial was granted, and Lord Mansfield said, "There was no instance of setting up any length of time short of the period fixed by the statute as a bar to the demand, and in cases of quit-rents like the present the reason of carrying back the limitation to the period fixed by the statute, viz. fifty years, was the stronger, because the consideration was so trifling, though, if a real ground for supposing a release or extinguishment appeared, the smallness of the claim would have no weight; but in this case there was mere length of time, which, barely as such, ought not to be received as a bar."<sup>(n)</sup>

Presumptions are made, not necessarily because the court really believes what is presumed, but, in the absence of evidence, for the purpose and from a principle of quieting the possession.<sup>(o)</sup> Lord Erskine observed, "It is said you cannot *presume* unless you *believe*. It is because there are no means of creating belief or disbelief, that such general presumptions are raised: upon the weakness and infirmity of all human tribunals in judging of matters of antiquity, instead of belief, which must be the foundation of this judgment upon a recent transaction, where the circumstances are incapable of forming anything like belief, the legal presumption holds the place of particular and individual belief."<sup>(p)</sup> Where *positive* evidence can be presented to the court, the fact may be presumed after a period much shorter than the usual one. And, on the other hand, though the distance of time may be far greater than the ordinary limit for presumption, yet if there appear any positive evidence to negative the fact, the legal inference cannot be sustained, for the rule is *stabit præsumptio donec probetur in contrarium*. But the court has judged it better for the ends of justice, that presumptions should be *favoured* in law, and should not be rebutted by very slight evidence in contradiction.<sup>(q)</sup>

\*Under the head of presumption, we may notice the subject of [\*737] *waiver*. "As to *waiver*," said Sir W. Grant, "it is difficult to

(n) Eldridge v. Knott, Cowp. 214.

(o) Eldridge v. Knott, Cowp. 215, per Lord Mansfield; and see Grenfell v. Girdlestone, 2 Y. & C. 682.

(p) Hillary v. Waller, 12 Ves. 266.

(q) Jones v. Turberville, 2 Ves. jun. 13, per Lord Commissioner Eyre; and see Grenfell v. Girdlestone, 2 Y. & C. 662.

(1) In Harmood v. Oglander, 6 Ves. 199, 8 Ves. 106, the bill was filed after a lapse of *thirty-two years*, yet neither Lord Alvanley nor Lord Eldon considered the length of time to bar the plaintiff's demand; but in this case the parties were *equitable tenants in common*, and as between them the presumption of *ouster* did not arise, or not in an equal degree.

say precisely what is meant by that term. With reference to the legal effect, a *waiver* is nothing, unless it amount to a release. It is by a release, or something equivalent only, that an equitable demand can be given away. A mere *waiver* signifies nothing more than an expression of intention not to insist upon the right, which in *equity* will not without consideration bar the right any more than at *law* an accord without satisfaction would be a plea. If there be a consideration however slight, I do not know that the court would not consider it a sufficient foundation for a release, or what is equivalent to a release.”(r) And Lord Cottenham appears to have entertained similar views.(s)

Waiver must not be confounded with acquiescence. Acquiescence, properly so called, is of two kinds:—First, direct, where the act complained of was done with a full knowledge and express approbation of another, in which case a court of equity will not allow that other to seek relief against the very transaction to which he was himself a party.(t) Secondly, indirect, where a person having a right to set aside a transaction, stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection; in this case, also, a court of equity will not relieve.(u)

The court cannot *presume* a person to have abandoned his right so long as he remains in *ignorance* of it, or labours under a *mistake*;(v) and the *distress* of a person, so far as it accounts for his *laches*, will [\*738] *pro tanto* weaken the foundation of the \*presumption.(w) So a release of right cannot with the same force be presumed against a class of persons, as against an individual; for it is not likely that a person having only an aliquot share in the property, should pursue his remedy with the same spirit, as if he were the exclusive proprietor.(x)

A bar by analogy to a statute may, as we have seen, be taken advantage of by demurrer, or plea, or answer; but a presumption, being the inference of a fact, cannot be made available as a defence by demurrer.

Thus, in *Deloraine v. Browne*,(y) the defendant put in for general demurrer, that it appeared by the bill the last transaction sought to be impeached thereby happened twenty-eight years before the filing of the bill, and the plaintiff had shown no cause why he had not sooner insti-

(r) *Stackhouse v. Barnston*, 10 Ves. 466.

(s) *Duke of Leeds v. Earl of Amherst*, 2 Phill. p. 123; but see *Roberts v. Tunstall*, 4 Hare, 266, per Vice-Chancellor Wigram.

(t) See *Kent v. Jackson*, 14 Beav. 384; *Styles v. Guy*, 1 Mac. & Gor. 427; *Ex parte Morgan*, 1 Hall & Twells, 328; *Graham v. Birkenhead, &c. Railway Company*, 2 Mac. & Gor. 146.

(u) *Duke of Leeds v. Amherst*, 2 Phill. 123; *Phillipson v. Gatty*, 7 Hare, 523.

(v) See *Marquis of Cholmondeley v. Lord Clinton*, 2 Mer. 362; *Randall v. Errington*, 10 Ves. 427; *Roche v. O'Brien*, 1 B. & B. 330, see 342; *Pickering v. Stamford*, 2 Ves. jun. 280, and following pages; *S. C. ib.* 585; *Cholmer v. Bradley*, 1 J. & W. 65, and following pages; *Bennett v. Colley*, 2 M. & K. 232; *Stone v. Godfrey*, 5 De Gex, Mac. & Gord. 76.

(w) See *Roche v. O'Brien*, 1 B. & B. 342; *Hillary v. Waller*, 12 Ves. 266; *Gowland v. De Faria*, 17 Ves. 25; *Byrne v. Frere*, 2 Moll. 171, 178.

(x) See *Whichcote v. Lawrence*, 3 Ves. 752; *Anon. case*, cited *Lister v. Lister*, 6 Ves. 632; *Kidney v. Coussmaker*, 12 Ves. 158; *Hardwick v. Mynd*, 1 Anst. 109; *Attorney-General v. Lord Dudley*, Coop. 146; but see *Elliot v. Merriman*, 2 Atk. 42; *Hercy v. Dinwoody*, 2 Ves. jun. 87.

(y) 3 B. C. C. 633.

tuted the suit. "The argument," said Lord Thurlow, "must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that from long *acquiescence*(z) it should be presumed that the frauds charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction, or had released, or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law; and the demurrer must be overruled, because the defendant has no right to avail himself by demurrer of an inference of fact upon matter on which a jury in a court of law would collect matter of fact to decide their verdict if submitted to them, or a court would proceed in the same manner in equity. What limitation of time will bar a suit where there is no positive limitation or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact, \*and not an inference of law, and therefore cannot be made on [739] demurrer."(a)(1)

3. Though the plaintiff's demand cannot be met by an *absolute bar*, and no release of right can be *presumed*; yet, thirdly, relief will not be granted where, if administered, *it would lead to great public or private inconvenience*.(b)

Thus in a bill for an account against an executor or administrator, who is in equity a trustee, and not reached by any statute of limitation, though the *presumption* of a final settlement may be rebutted by positive evidence, the court will not open the account at any distance of time, when it is probable most of the parties are dead and the vouchers and receipts are lost.(c)

Where a suit was prosecuted after a delay of threescore and two years, Lord Keeper Wright said, that "the cause being now within one year of the grand climacteric, it was fit it should be at rest."(d) But bills have been dismissed at the end of twenty-seven years,(e) and a much shorter period would be a sufficient bar, should the court see a difficulty in granting the relief: every case must be determined with reference to its own particular circumstances.(f)

(z) Lord Thurlow evidently means here by this word, mere abstinence from suing, as to which see *infra*, p. 741.

(a) See the argument stated in Mitford on Pleading, 212, 4th edit.

(b) See Attorney-General v. Mayor of Exeter, Jac. 448.

(c) Hunton v. Davies, 2 Ch. Re. 44; Huet v. Fletcher, 1 Atk. 467; Pearson v. Belchier, 4 Ves. 627; Hercy v. Dinwoody, 2 Ves. jun. 87.

(d) St. John v. Turner, 2 Vern. 418.

(e) Campbell v. Graham, 1 R. & M. 453.

(f) See Hercy v. Dinwoody, 2 Ves. jun. 93; Earl of Pomfret v. Lord Windsor, 2 Ves. 483.

(1) Lord Thurlow considered the demurrer in this case to turn on presumption, and, on that supposition, it was rightly overruled; but Lord Redesdale, whose profound knowledge of equity pleading cannot be disputed, afterwards declared his opinion that the defendant's demurrer was good, as stating not matter of fact, but what is matter of law, viz: the bar to the plaintiff's demand by analogy, or in obedience to the Statute of Limitations. Hovenden v. Lord Annesley, 2 Sch. & Lef. 637; and see O'Kelly v. Glenny, 9 Ir. Eq. Rep. 25.



In *Pickering v. Lord Stamford* <sup>(g)</sup> a testator gave the residue of his personal estate to a charity, and thirty-five years after his decease, the next of kin filed their bill for an account, \*and prayed that such [\*740] part as consisted of money upon mortgage or other real securities, might be declared a void bequest, and distributable, subject to debts, &c., among the testator's next of kin. Lord Alvanley said: "I should be happy to dismiss the bill, if I were authorized by law to say this court would not entertain one after twenty years, every disability to sue being removed. I heartily wish it was so, and see no reason why it should not. It is a grievous thing that the defendants should be disturbed after so long a lapse. At the same time, *I know no rule that has established that mere length of time will bar.* Therefore, that being the case, I am to say whether, under the circumstances, a bar can be presumed." <sup>(h)</sup> And for facilitating the question of presumption, his lordship directed certain previous inquiries by the master; and it appearing from the report, that no release or assignment of their interest by the next of kin for the purposes of the charity could, under the circumstances, be presumed, his lordship then had recourse to the ground of inconvenience. "It does not follow," he said, "that the bill may not be dismissed, though it cannot be pleaded to. The question in all these cases is, whether there are motives of public policy or private inconvenience, to induce the court to say, under all the circumstances, the suit ought not to be entertained; and if great public inconvenience would arise, and the stale demand would involve the parties in endless difficulties in clearing the accounts—difficulties arising from the negligence of the other parties in lying by, I very much concur with the principle Lord Cowper lays down in *Pooley v. Ray*, <sup>(i)</sup> that a person, who willingly stands by while the executor pays away money, shall not oblige him to refund, for this would be drawing the executor into a snare. If from the plaintiff's lying by it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer; or the court will oppose, what I think the best ground, *public convenience*. It might have happened, that the trustees, taking possession of the personal estate and not aware of the law, might in the course of so many years have conducted \*themselves so as not to be able to [\*741] prove of what the personal estate consisted at the death of the testator. They might have kept such accounts that it would have been impossible to determine whether the plaintiffs could have made any specific demand upon any part of the personal estate. If so, I should have dismissed the bill. If the executors had lost the accounts, I should not have punished them; for executors are not bound to keep accounts for thirty years. The plaintiffs are so conscious of this, that they do not call on the trustees to account for what has been disbursed before any demand made; and therefore it is insisted no such inconvenience will arise, as they only desire such an account as can be given, and are willing to take that part of the personal estate that appears to have consisted of real securities, and demand no account of interest farther than

(g) 2 Ves. jun. 272.

(h) 2 Ves. jun. 283.

(i) 1 P. W. 355.

from the time of filing the bill. It appears that the trustees, who by their conduct have done themselves great credit, have kept such accounts that there is no difficulty in finding the personal estate at the death of the testator. Then, the only inconvenience will be, that the charity will now cease to have so much. That is certainly to be lamented, but it will not involve any person in difficulties to be attributed to the neglect of the plaintiffs. Therefore, desiring to be understood by no means to give any countenance to these stale demands, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favour of the plaintiffs.”(k)

The doctrine laid down by Lord Alvanley in the case referred to, that *mere length of time* will not bar, requires some qualification. Lapse of time or delay in suing, unaccounted for by disability or other circumstances, constitutes in the eye of a court of equity, *laches* disentitling the plaintiff, in certain classes of cases at least, to relief from the court. Thus where a plaintiff *cestui que trust* seeks to impeach a purchase by a trustee, a delay of less than twenty years will bar his title to relief.(l) So where a plaintiff seeks to set aside a purchase \*from him of a reversionary interest,(m) or to fix a defendant with a constructive [\*742] trust,(n) or comes to a court of equity alleging a case of fraud as a ground for avoiding the operation of the Statute of Limitations.(o) So where an account is sought by a surviving partner against the estate of a deceased partner, the court, even assuming such case to fall within the exception as to merchants’ accounts in the Statute of Limitations, will not assist after a delay of thirteen years.(p) And where the assistance of the court is sought in a suit for specific performance,(q) or in one partaking of that character,(r) the rule is extremely strict. It is difficult to refer the refusal of relief by the court in the instances mentioned, to any one general principle. In the cases of purchases by trustees, or of claims founded upon constructive trust the probability of alteration of circumstances in regard to the property, and the unfairness of the plaintiff lying by, have weighed with the court. Perhaps, the nearest approach to general principle will be found under the head of “Public Convenience:” “*Expedit Republicæ ut sit finis litium.*”

It has been pointed out that in certain cases a delay of less than twenty years operates as a bar; and the court in these instances departs still further from the analogy offered by the Statute of Limitations, by taking into account partly time which may have elapsed while the plaintiff’s interest was reversionary.(s) The question remains, whether *laches* can

(k) 2 Ves. jun. 582, and following pages.

(l) See the cases collected, pp. 470, 471, *supra*.

(m) *Roberts v. Tunstall*, 4 Hare, 257.

(n) *Clegg v. Edmondson*, 3 Jur. N. S. 299; and see *Pennell v. Home*, 3 Drewry, 337.

(o) *Blair v. Ormond*, 1 De Gex & Sm. 428.

(p) *Tatam v. Williams*, 3 Hare, 347.

(q) *Southcomb v. Bishop of Exeter*, 6 Hare, 213.

(r) *Hope v. Corporation of Gloucester*, 1 Jur. N. S. 320.

(s) *Roberts v. Tunstall*, 4 Hare, 266; and see *Browne v. Cross*, 14 Beav. 105.

in general be relied upon as a bar to a mere dry equitable demand falling within the purview of some or one or the Statutes of Limitations; and if, as suggested, public convenience be the true ground for holding *laches* to be a bar, then it would seem that the legislature itself having prescribed a term of limitation which it deems sufficiently short, the court ought not further to abridge that term. Accordingly, we find the [\*743] \*present lord chancellor expressing himself to the effect, "that the simple abstaining from legal proceeding is unimportant, unless the party aggrieved continues inactive so long as to bring the case within the purview of the Statute of Limitations;"<sup>(t)</sup> and Lord Langdale,<sup>(u)</sup> and Lord Cottenham,<sup>(v)</sup> appear to have entertained the same views.

We may now introduce the late act for the limitation of actions and suits.<sup>(w)</sup>

By the 24th section it is declared, that "no person claiming any *land or rent in equity* shall bring any suit to recover the same, but within the period during which by virtue of the provisions thereinbefore contained he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at *law* to such estate, interest, or right in or to the same as he shall claim therein in equity."

The 25th section declares, that, "when any land or rent shall be vested in a trustee upon *any express trust*, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the act, *at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration*, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him."

The 26th section declares, that "in every case of a *concealed fraud* the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered."

By the 27th section it is provided, that "nothing in the act contained [\*744] shall be deemed to interfere with any rule or jurisdiction \*of courts of equity in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit might not be barred by virtue of that act."

The 40th section declares that no action or suit or other proceeding shall be brought to recover any *sum of money charged* upon land at law or in equity or any *legacy*,<sup>(x)</sup> but within twenty years from the accruer of the right, unless there has been part payment of principal or interest, or some acknowledgment.

(t) Rochdale Canal Company v. King, 2 Sim. N. S. 89.

(u) Mehrtens v. Andrews, 3 Beav. 76.

(v) Duke of Leeds v. Earl of Amherst, 2 Phil. 126.

(w) 3 & 4 W. 4, c. 27.

(x) The word *legacy* includes a residue or share of residue; Prior v. Horniblow, 2 Y. & C. 201; Christian v. Devereux, 12 Sim. 264.



And the 42nd section enacts, that no *arrears* of *rent* or of *interest* in respect of any sum of money *charged upon*, or payable out of, any land or rent, shall be recovered by any action or suit, but within six years next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same is payable or his agent.

Thus twenty years' possession is now a statutory bar to suits in equity in respect of equitable interest, as well as to actions at law upon legal rights; but in case of disability a term of ten years is allowed by the 16th section next after the cesser of the disability, but by the 17th section no suit can be brought after the lapse of forty years from the accruer of the right to sue, whatever disabilities may have existed.

As it is the nature of a trust that the legal estate should be in one person and the equitable interest (which may or may not carry the right of possession) in another, it is obvious that mere possession would not be a fair criterion by which to regulate the equitable estate. On the one hand, the possession of the trustee may be according to the title and should not prejudice the *cestui que trust*; and on the other hand, the *cestui que trust*, when let into possession, is tenant at will to the trustee, who ought not, therefore, to be ousted by an act in the due execution of the trust. The statute, therefore, has declared by the 25th section that, as between the trustee and any person claiming through him, and the *cestui que trust* \*and any person claiming through him, time shall not run until there has been a conveyance to a purchaser for [\*745] valuable consideration. The trust estate may, therefore, be followed by the *cestui que trust*, not only as against the trustee, but as against all volunteers claiming under him;(y) but so soon as the estate is conveyed to a purchaser for valuable consideration, as if it be made the subject of a marriage settlement, the time begins to run.(z) No possession by a purchaser for valuable consideration, short of twenty years, will be a bar.(a) And if the *cestui que trust* be a remainderman, the time it seems will not run until the remainder falls into possession.(b)

The 25th section applies only to *express trusts*; it is, therefore, necessary to ascertain with precision what is meant by the phrase. Trusts, as regards the provisions of the statute, may be considered as divided into express trusts and constructive trusts; the former arising upon the language of some written instrument, and the latter such as are elicited by the principles of a court of equity from the acts of parties.

It is not necessary to use the word trust in order to create an express trust,(c) but any language that would in equity raise or imply a trust will be deemed an express trust. If, therefore, land be devised to a person

(y) *Heenan v. Berry*, 2 Jon. & Lat. 303; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Blair v. Nugent*, 3 Jon. & Lat. 658; 9 Ir. Eq. Rep. 400; *Ravenscroft v. Frisby*, 2 Coll. 16; and see *Dixon v. Gayfere*, 17 Beav. 421; *Hawksbee v. Hawksbee*, 11 Hare, 230.

(z) *Petre v. Petre*, 1 Drewry, 371. (a) *Attorney-General v. Flint*, 4 Hare, 147.

(b) *Thompson v. Simpson*, 1 Dru. & War. 489; *Attorney-General v. Magdalen College*, 18 Beav. pp. 239, 250.

(c) *Charitable Donations v. Wybrants*, 2 Jon. & Lat. 197.

upon trust to receive the rents and thereout to pay certain arrears, the surplus rents result to the heir-at-law upon the face of the instrument, and this being an express trust, the heir-at-law is not barred by twenty years' possession by the trustee (*d*)

[\*746] \*But trusts arising by the construction of a court of equity from the act of parties, will not be saved by the clause relating to express trusts, as if the devisee for life of a leasehold estate renew in his own name, the statute will begin to run from the time of the renewal. (*e*)

Mere charges might have been held to fall under the description of express trusts, but that they are dealt with by the statute under a separate section, viz., the 40th; a circumstance which shows that they were meant to be distinguished from express trusts. If, therefore, an estate be devised to A., charged with 1000*l.* in favour of B., or "A. paying 1000*l.* to B., although a bill will lie in equity to have the sum raised on the footing of a trust, yet it is not an express trust within the meaning of the statute, and would, therefore, be barred at the end of twenty years. (*f*)

But a charge in form may be an express trust in fact, if the grantee or devisee be invested with any fiduciary character, as if an estate in Ireland be devised to A., subject to a rent-charge for the maintenance of a schoolmaster to be appointed; here no trustee is interposed between the devisee and the intended recipient, and the trust, therefore, fastens itself on the conscience of the devisee. (*g*) So, if an estate be devised to trustees and their heirs, upon trust to convey to J. W. for life charged with annuities to certain corporations for charitable purposes. Here, although the corporations are interposed as trustees, yet, as the devisees are bound to execute a settlement, so as to secure the annuities and retain the legal estate in the meantime they are, until the settlement has been executed, trustees for the charity. (*h*) So, though a simple charge of the testator's debts falls within the 40th section, and the creditor is barred after twenty years, (*i*) yet, if the will be so worded as to impose on the devisees subject to \*the charge the personal obligation of exert-  
[\*747] ing themselves actively in paying the debts, it becomes an express trust and falls within the exception of the 25th section. (*k*)

A charge upon an estate may at the same time be a mere charge within the 40th section, as between some parties, while it is an express trust within the 25th section, as between other parties. If, for instance, an

(*d*) *Salter v. Cavanagh*, 1 Dru. & Walsh. 668: and see *Charitable Donations v. Wybrants*, 2 Jon. & Lat. 196, 7 Ir. Eq. Rep. 580. In *Lord St. John v. Boughton*, 9 Sim. 223, where was an express trust to sell and pay debts, the V. C. of England held that as no part of the produce of the sale had been set apart for debts, the case was not within the exception of the 25th sect., but fell under the 40th sect. This, it is conceived, cannot be maintained.

(*e*) *Petre v. Petre*, 1 Drewry, 371.

(*f*) *Knox v. Kelly*, 6 Ir. Eq. Rep. 279; *Toft v. Stephenson*, 7 Hare, 1; *Hodge v. Churchward*, 16 Sim. 71; *Francis v. Grover*, 5 Hare, 39; *Hughes v. Kelly*, 3 Dru. & War. 482; and see *Harrison v. Duignan*, 2 Drur. & War. 295.

(*g*) *Attorney-General v. Persse*, 2 Dru. & War. 67.

(*h*) *Charitable Donations v. Wybrants*, 2 Jon. & Lat. 182, 7 Ir. Eq. Rep. 580.

(*i*) *Dundas v. Blake*, 11 Ir. Eq. Rep. 138, and cases there cited.

(*k*) *Hunt v. Bateman*, 10 Ir. Eq. Rep. 360, and cases there cited.

estate be devised to A. and his heirs, subject to a charge of 500*l.* to B. and C. upon certain trusts, here, as between A. and the two trustees, it is a mere charge and will be barred in twenty years, but, as between the two trustees and their *cestui que trust*, it is an express trust and the time of the bar as to them will be extended accordingly. And if a term be limited to trustees for the purpose of securing the charge, the rights of the *cestui que trust* will not be barred so long as the term vested in their trustees remains unbarred.<sup>(l)</sup>

To make the 40th section operate as a bar there must be a hand to receive, and capable of signing a receipt, as if 400*l.* be charged on an estate, and by the same deed it is assigned to trustees upon trust for A. and B. for their lives, and after the death of the survivor for their children, but no power of signing receipts is given to the trustees, and, on the contrary the court collects the intention that the trustees were not to raise the money till after the death of the surviving tenant for life, the statute will not begin to run until the latter period.<sup>(m)</sup>

It will be observed that, by the 25th section, the *cestui que trust* and any person claiming through him may enforce the trust against the trustee and *any person claiming through him*, but both trustee and *cestui que trust* may be ousted by the intrusion of a third title, and if so, the statute will begin to run from the dispossession of the trustee and *cestui que trust*. Thus, in 1810, a legal estate was vested in trustees upon trust for five tenants in common, but from that time till the filing of the bill in 1842, four of the tenants in common received the rents to the \*exclusion of their co-tenant and of the trustees who never executed their duty; and it was held that there had been an ouster [\*748] of both trustees and *cestui que trust*, and that the right of such *cestui que trust* was barred by the statute.<sup>(n)</sup>

But possession by one *cestui que trust*, where it is according to the title (even where a trustee might at any time, and in the strict discharge of his duty ought to, have taken possession,) will not give a title to the *cestui que trust* in possession to the ouster of the trustee and the other *cestui que trust* who claim under him, otherwise the most mischievous consequences would follow from the statute.<sup>(o)</sup> In these cases the *cestui que trust* in possession is the tenant at will of the trustees, and until that will is determined, the possession of the *cestui que trust* is the possession of the trustee.<sup>(p)</sup> But the doctrine that a *cestui que trust*, who is in possession with the consent or acquiescence of the trustee, must be

(l) *Young v. Lord Waterpark*, 13 Sim. 202, on appeal, 15 L. J. N. S. Ch. 63; and see *Ward v. Arch*, 12 Sim. 472.

(m) *McCarthy v. Daunt*, 11 Ir. Eq. Rep. 29. Assuming that the trustees could not sign a receipt, the decision was right; but it was a bold step to say that the trustees had not such a power.

(n) *Burroughs v. McCreight*, 1 Jon. & Lat. 290, 7 Ir. Eq. Rep. 49; *Charitable Donations v. Wybrants*, 2 Jon. & Lat. 198; 7 Ir. Eq. Rep. 580; *Law v. Bagwell*, 4 Dru. & War. 409.

(o) *Young v. Lord Waterpark*, 13 Sim. 202. On appeal, 15 L. J. N. S. Ch. 63; *Cox v. Dolman*, 2 De G. M. & G. 592.

(p) *Garrard v. Tuck*, 8 Com. B. Rep. 231; 13 Jur. 871; and see *Doe v. Phillips*, 10 Q. B. Rep. 130, which is not at variance with *Garrard v. Tuck*, as in the former case the tenancy at will had not been determined.



regarded as his tenant at will, does not prevent a third party who obtains possession from the *cestui que trust*, and holds for twenty years without payment of rent or acknowledgment of title to either *cestui que trust* or trustee, from setting up the statute as a bar; or at all events, the third party may plead the statute where the *cestui que trust* was never in actual occupation.(q)

The 42nd section of the act, limiting the recovery of arrears of rent or interest to the last six years only, has no application to cases of express trusts within the 25th section, but the *cestui que trust* may recover from his trustee the whole arrearages from the commencement of the title.(r) And under the 42nd section, as under the 40th, where there [\*749] is a subsisting term not \*barred, upon which the trustee may obtain possession, the whole arrearages may be recovered.(s)

Thus, in *Cox v. Dolman*,(t) a testator devised his lands to the use of trustees for ninety-nine years upon trust to pay certain annuities, and subject thereto to the use of J. Cox for life, with remainder over; and after the death of S. Cox, one of the annuitants filed a bill to have the arrears of the annuity raised out of the estate. The executors of S. Cox pleaded the statute as a bar to more than six years' arrears, but the court held that it was the case of an express trust, and that the tenant for life had taken possession subject to the trust, and that the term was a subsisting one, upon which the trustees might at any time have recovered, and the plaintiff was declared entitled to the whole arrears, which were to be paid out of the assets of the tenant for life up to the day of his death, and since his death by the remainderman. The direct remedy was, no doubt, to have the whole arrears raised by sale or mortgage of the term, but as the remainderman would be entitled to recover the arrears that accrued in the lifetime of the tenant for life from his estate, the court, to avoid circuity, decreed payment at once out of the tenant for life's assets.

The case of charities requires a separate consideration. It was at first doubted whether they were at all affected by the statute;(u) but it was afterwards held that they were within the operation of the act, though they would generally be protected by the 25th section, relating to express trusts.(v) If, however, the principles for the first time laid down by the master of the rolls in *Attorney-General v. Magdalen College*,(w) be recognized by the other courts, it will be difficult to find a case in which the rights of the charity can be barred.

The rents of certain premises in Southwark had been applied for more than a year by the rector and churchwardens of St. Olave for the benefit [\*750] of the poor of that parish. In 1790, the \*rector and churchwardens, and two inhabitants, by a feoffment with livery of seisin

(q) *Melling v. Leak*, 16 Com. B. Rep. 652.

(r) *Playfair v. Cooper*, 17 Beav. 187; *Gough v. Bult*, 16 Sim. 323.

(s) *Cox v. Dolman*, 2 De Gex, Mac. & Gord. 592; *Snow v. Booth*, 2 K. & J. 132; *Earl of Mansfield v. Ogle*, 1 Jur. N. S. 414. (t) 2 De G. M. & G. 592.

(u) *Incorporated Society v. Richards*, 1 Dru. & War. 287, 288.

(v) *Charitable Donations v. Wybrants*, 2 Jones and Lat. 182; 7 Ir. Eq. Rep. 580.

(w) 18 Beav. 223; *Attorney-General v. Magdalen College*, has been reversed in D. P.

and a fine, conveyed the premises to Morden College, in consideration of a rent-charge reserved. In 1852, an information was filed by the attorney-general to set aside the conveyance, and the questions eventually resolved themselves into the effect of the Statute of Limitations. Under these circumstances it was ruled by the master of the rolls: 1st, that as no legal estate appeared to have been vested in the rector and churchwardens and two inhabitants, the conveyance of 1790 was a disseisin, and not a conveyance by the trustees within the 25th section; 2nd, that trustees of a charity who make a conveyance are barred after twenty years, but that the *cestuis que trust* have an independent right to sue, as to which, time does not begin to run until there is some *cestui que trust* who is capable of suing; (x) 3rdly, that the attorney-general, as he had no legal or beneficial interest in the property, was not such a person as could sue, within the meaning of the 25th section; 4thly, that the rector and churchwardens, who in this case had no legal or beneficial interest, were not such persons within the meaning of the act; 5thly, that the poor of the parish were not such persons, inasmuch as they could not institute a suit on their own behalf, but an information must be filed in the name of the attorney-general; and, under these circumstances, the court set aside the conveyance, and directed it to be cancelled. The *cestuis que trust* of a charity are, from the nature of the case, not in a position to litigate with their wealthy neighbours, and as an information in the name of the attorney-general, who alone can sue, must in general be at the relation of other parties, who should be liable for costs, there can be no doubt that charities would greatly suffer if they were bound by the same lapse of time as in the case of private persons. It is not unlikely, therefore, that the doctrines thus broadly laid down by the master of the rolls may be followed by other judges.

III. We shall briefly notice to what extent a court of equity, upon recovery of the estate, will direct an account against the defendant of the *mesne rents and profits*.

\*The general rule is, that a *cestui que trust*, by establishing [\*751] his claim to the land, has thereby established a right to the *mesne* rents and profits from the very commencement of his title; for if the *corpus* of the estate was his, the rents and profits, which ought to follow the *corpus*, were tortiously intercepted by the wrongful possessor.(y)

But to the above rule several exceptions must be made: for,—

1. It would seem the *cestui que trust* cannot enforce an account beyond the period of the preceding six years; provided, at least, the defendant has pleaded the Statute of Limitations in bar.(z)

(x) Attorney-General v. Pearce, 2 Dru. & War. 57.

(y) *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke, 183; S. C. 3 Atk. 130, per Lord Hardwicke; *Hobson v. Trevor*, 2 P. W. 191; *Coventry v. Hall*, 2 Ch. Ca. 134; *Attorney-General v. Floyer*, 2 Vern. 748; *Duke of Norfolk's case*, 3 Ch. Ca. 52; *Stackpole v. Davoren*, 1 B. P. C. 9; and see *Turner v. Buck*, 22 Vin. Ab. 21. In *Thomas v. Thomas*, 2 K. & J. 70, Vice-Chancellor Wood appears to have considered the rule to be to give an account from the date only of filing the bill.

(z) *Love v. Eade*, Rep. t. Finch, 269; *Reade v. Reade*, 5 Ves. 749, 750; *Harmood v. Oglander*, 6 Ves. 215; *Drummond v. Duke of St. Albans*, 5 Ves. 439; *Hercy v. Ballard*, 4 B. C. C. 468; *Stackhouse v. Barnston*, 10 Ves. 470; *Money-penny v. Bristow*, 2 R. & M. 125.

2. If the defendant was a *bona fide* possessor, that is, if he had no notice of the plaintiff's title expressly given him, and had no deeds or writings in his custody which showed the title of the plaintiff or any stranger, in such case the account of the *mesne* rents and profits will be restricted to the time of filing the bill; (a) and no further account will be granted, though the plaintiff was an infant, and the defendant an express trustee, but ignorant of his own true character. (b) However, such rents and profits as accrued before the filing of the bill, but never came to the hands of the defendant, as money paid into court, will follow the right to the land, and be decreed to the plaintiff. (c)

3. If the *cestui que trust* be guilty of *laches*, the account will not be [\*752] carried further back than to the filing of the bill, for it was the plaintiff's own fault that he did not institute his suit at an earlier period; (d) and if it be a case of *great laches*, the court will show its displeasure by not directing an account beyond the date of the decree. (e)

In an old case, a *cestui que trust* had filed his bill for an estate upon the ground of an equitable title, and charged the defendant with the receipt of the *mesne* rents and profits, but prayed only for a conveyance of the lands, omitting to pray specially for any account of the rents. A conveyance was decreed, and no account ordered; but afterwards the *cestui que trust* filed a second bill for the exclusive purpose of obtaining an account of the *mesne* rents and profits, and the court so decreed it. (f)

The order to account for *mesne* rents and profits will not, except in a case of gross fraud, (g) contain the words, "which, without neglect or default, the defendant might have received," and a direction to make all just allowances in taking the account will be inserted. (h)

The assignee who has had the perception of the rents and profits, will, in the first instance, account for them, not, however, with interest. (i) But if the assignee be insolvent, the trustee who tortiously assigned will then be answerable for the *mesne* rents and profits personally. (k) (1)

(a) *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke, 183; S. C. 3 Atk. 134, per Lord Hardwicke; *Pulteney v. Warren*, 6 Ves. 93, per Lord Eldon; *Edwards v. Morgan, McClell.* 541, see 554, 555; *Forder v. Wade*, 4 B. C. C. 521.

(b) *Drummond v. Duke of St. Albans*, 5 Ves. 433, see 439. (c) S. C.

(d) *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke, 183; S. C. 3 Atk. 130, per Lord Hardwicke; *Cook v. Arnham*, 2 Eq. Ca. Ab. 235; *Pettward v. Prescott*, 7 Ves. 541; *Bowes v. East London Waterworks' Company*, 3 Mad. 375; and see *Pickett v. Loggon*, 14 Ves. 215; *Kidney v. Coussmaker*, 12 Ves; 158; *Schroder v. Schroder, Kay*, 591.

(e) *Acherley v. Roe*, 5 Ves. 565. (f) *Hall v. Coventry*, 2 Ch. Ca. 134.

(g) *Stackpole v. Davoren*, 1 B. P. C. 9. (h) *Howell v. Howell*, 2 M. & C. 478.

(i) *Macartney v. Blackwood*, Ridg. Lapp. & Sch. 602.

(k) *Vandebende v. Livingston*, 3 Sw. 625.

(1) As the subject of accounting for *mesne* rents and profits in equity is nowhere to be found in any systematic form, the following remarks may perhaps be found useful.

An account of rents and profits may be sought, either independently of relief respecting the *corpus* of the land, or as incident or collateral to it.

I. Where the account is sought independently of other relief, if it be directed against a person who is an *express trustee*, then, as the statutes of limitation do not run between trustee and *cestui que trust*, an account will be directed from the time



## \*SECTION II.

[\*753]

## THE RIGHT OF ATTACHING THE PROPERTY INTO WHICH THE TRUST ESTATE HAS WRONGFULLY BEEN CONVERTED.

If the trust estate has been tortiously disposed of by the trustee, the

the rents were withdrawn. See *Attorney-General v. Brewers' Company*, 1 Mer. 498; *Mathew v. Brise*, 14 Beav. 341.

If the claim to the rents rest upon a *legal* title, the plaintiff has then a *legal* remedy, and cannot come into a court of equity at all; *Jesus College v. Bloom*, 3 Atk. 262; and see *Dinwiddie v. Bailey*, 6 Ves. 136; *Taylor v. Crompton*, Bunb. 95; *Lansdowne v. Lansdowne*, 1 Mad. 137; except in cases where, from the complicated nature of the accounts, or other particular circumstances, a court of law would afford very inadequate relief; see *O'Conner v. Spaight*, 1 Sch. & Lef. 309; *Corporation of Carlisle v. Wilson*, 13 Ves. 276. But an *infant* may file a bill for an account upon a legal title; *Gardiner v. Fell*, 1 J. & W. 22; *Roberdeau v. Rous*, 1 Atk. 543; *Yallop v. Holworthy*, 1 Eq. Ca. Ab. 7; *Newburgh v. Bickerstaffe*, 1 Vern. 295; *Curtis v. Curtis*, 2 B. C. C. 631, per Cur.; as every person entering upon an infant's lands is regarded in the light of a bailiff or receiver for the infant; *Dormer v. Fortescue*, 3 Atk. 130, per Lord Hardwicke; *Pulteney v. Warren*, 6 Ves. 89, per Lord Eldon; *Morgan v. Morgan*, 1 Atk. 489; *Lord Falkland v. Bertie*, 2 Vern. 342, per Cur.; *Doe v. Keen*, 7 T. R. 390, per Lord Kenyon; *Hicks v. Sallitt*, 3 De G. M. & G. 782. And the jurisdiction against a person entering during the infant's minority remains, though the bill be not filed until after the infant attains 21; *Blomfield v. Eyre*, 8 Beav. 250; *Hicks v. Sallitt*, *ubi supra*. And generally all persons may have an account upon a legal title in respect of *mines*, which are a species of trade; *Bishop of Winchester v. Knight*, 1 P. W. 406; and see *Pulteney v. Warren*, 6 Ves. 89; *Lansdowne v. Lansdowne*, 1 Mad. 116; *Parrott v. Palmer*, 3 M. & K. 632; or of *tithes*, which when severed are property in trust; *Collins v. Archer*, 1 R. & M. 284, &c.; but not it seems of *timber*, without praying an injunction; *Jesus College v. Bloom*, 3 Atk. 262; and see *Poulteney v. Warren*, 6 Ves. 89; *University of Oxford v. Richardson*, lb. 701; *Grierson v. Eyre*, 9 Ves. 346; but see *Garth v. Cotton*, 1 Dick. 211; *Lee v. Alston*, 1 B. C. C. 194.

Although where a remedy lies at law an account cannot be had in equity against the *pernor* of the profits himself, yet, perhaps, after his decease, if the action survive at law against the executor, the party entitled to the profits may consider himself a creditor, and file a bill in equity for an account of the assets. *Monypenny v. Bristow*, 2 R. & M. 117, (but the bill also prayed delivery of title deeds;) *Gardiner v. Fell*, 1 J. & W. 22, (but the plaintiff was also an infant.)

Where, as in the preceding cases, a court of equity assumes a concurrent jurisdiction with courts of law, the account will not be extended beyond the legal limit of six years, provided the statute be pleaded, *Lockey v. Lockey*, Pr. Ch. 518; but if the defendant do not avail himself of the statute by demurrer, plea, or answer (see *Monypenny v. Bristow*, 2 R. & M. 125,) or if the plaintiff be an infant who is exempted from the Statute of Limitations, *Hicks v. Sallitt*, 3 De G. M. & G. 782, the account will be granted in equity, as at law from the time the title accrued.

It often happens that a legal remedy *did* exist, but has since, by the death of a party, or the determination of the estate, become extinguished. In such a case, as the right *was not*, but only *is*, without a remedy at law, there seems no ground in general for the interference of a court of equity. *Barnwall v. Barnwall*, 3 Ridg. P. C. 71, per Lord Fitzgibbon; *Hutton v. Simpson*, 2 Vern. 722; *Norton v. Frecker*, 1 Atk. 525, 526, per Lord Hardwicke; and see *Pulteney v. Warren*, 6 Ves. 88.

But if the remedy was lost through *mistake*, the court upon that principle will interpose: as where a lease was held for the lives of A. and his two daughters B. and C., and A. afterwards married again, and had another daughter, who was also named B., and the landlord on the expiration of the lease by the death of the real *cestui que vie*, did not enter, B. the daughter by the second marriage being mistaken for B. the life named in the lease, Lord Macclesfield said, "Where one has title of entry, and neglects to enter or to bring his ejectment, but sleeps upon it for several

*cestui que trust* may attach and follow, so long as it can be traced, the property that has been substituted in the place of the trust estate.

years, as he has no remedy at law for the *mesne profits*, so neither has he in equity, for it was his own fault he did not enter, and he shall never come into a court of equity for relief against his own negligence, or to make the tenant in possession who held over his lease to be but his bailiff or steward, whether he will or not; but in the present case, by reason of the circumstance of both daughters being of the same name, and the mistake consequent thereon, the defendant must account for the *mesne profits* from the expiration of the lease." *Duke of Bolton v. Deane*, Pr. Ch. 516. (Note, in this case Lord Hardwicke thought a remedy still existed at law, *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke: but Lord Macclesfield was evidently of a different opinion, and so was Lord Fitzgibbon. *Barnwall v. Barnwall*, 3 Ridg. P. C. 68.)

So equity will relieve where the remedy was prevented by *fraud*: as where A. was entitled to a leasehold estate, but B., concealing the deeds, remained in possession until the term had expired, Lord King directed an account of the rents and profits from the time that A.'s title accrued, on the ground that A. had been kept in ignorance of his just rights through B.'s fraudulent concealment of the deed and counterpart. *Bennet v. Whitehead*, 2 P. W. 644; and see *Duke of Bolton v. Deane*, Pr. Ch. 516, and *Barnwall v. Barnwall*, 3 Ridg. P. C. 66.

And generally the court will in all cases lend its aid where the legal process has been lost, not by any delay on the part of the plaintiff, but through some default of the defendant. *Pulteney v. Warren*, 6 Ves. 73.

II. An account may be sought as incident or collateral to the relief. The doctrines upon this subject have been very distinctly laid down by Lord Fitzgibbon, afterwards Lord Clare, in *Barnwall v. Barnwall*, 3 Ridg. P. C. 66.

1. "The general rule of equity," he said, "is, that if the suit for recovery of possession be properly cognizable in a court of equity, and the plaintiff obtain a decree, the court will direct an account of rents and profits, as incident to such relief."

This rule has been treated of in the text, and requires no further observation.

2. "If a man have a mere legal title to the possession, he has no right to come into equity for the recovery of it; and if he has originally recovered the possession at law, he has no manner of right to proceed by bill for an account of rents and profits: as his title to the possession was at law, he must proceed for the whole there." See also *Dormer v. Fortescue*, 3 Atk. 130; *Tilly v. Bridges*, Pr. Ch. 252; *Owen v. Aprice*, 1 Ch. Re. 32; *Anon. case*, 1 Vern. 105, contradicted 3 Atk. 129.

Upon this rule it must be remarked, that a *dowress*, (*Mundy v. Mundy*, 2 Ves. jun. 122; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Wild v. Wells*, 1 Dick. 3; *Meggot v. Meggot*, 2 Id. 794; *Goodenough v. Goodenough*, 2 Id. 795; *Curtis v. Curtis*, 2 B. C. C. 620; *Moor v. Black*, Rep. t. Talbot, 126; and see *Dormer v. Fortescue*, 3 Atk. 130; *Pulteney v. Warren*, 6 Ves. 89; *Agar v. Fairfax*, 17 Ves. 552;) and *infant* (see *Dormer v. Fortescue*, 3 Atk. 130, 134; *S. C.* Ridg. Rep. t. Hardwicke, 183, 191; *Pulteney v. Warren*, 6 Ves. 89; *Newburgh v. Bickerstaffe*, 1 Vern. 295;) are allowed to proceed in equity upon their legal title, and incidentally to the relief will be decreed an account of the *mesne* rents and profits. But by 3 & 4 W. 4, c. 27, s. 41, the arrears of dower are recoverable for six years only next preceding the commencement of the suit. And the account of an infant will be barred, if he do not bring his bill within six years after he has attained his majority. *Lockey v. Lockey*, Pr. Ch. 518.

3. "If a party be obliged to come into a court of equity for aid to enable him to prosecute his title at law," (as where he cannot recover in a legal action by reason of an outstanding term, or because the title deeds to the estate are in the hands of the defendant,) "after possession recovered at law, there may be cases in which he may come back for an account of rents and profits in the suit depending in equity." And see *Dormer v. Fortescue*, 3 Atk. 124; *S. C.* Ridg. Rep. t. Hardwicke, 176; *Reade v. Reade*, 5 Ves. 744. Or the plaintiff being obliged to resort to equity on one ground, may, to prevent circuity, ask complete relief in the first instance in that court; and if his title be established, either by the determination of the court itself, or by an issue directed at law, an account of the rents and profits will be consequential upon the relief. *Townsend v. Ash*, 3 Atk. 336; *Edwards v. Morgan*, McClel. 541; *Reynolds v. Jones*, 2 Sim. & Stu. 206.

It seems never to have been doubted, that where the \*conversion was *in pursuance of the trust*, the newly acquired property would be bound by the original equity; <sup>(l)</sup> but in the leading case of Taylor v. Plumer, <sup>(m)</sup> it was \*contended, that where the conversion was *tortious*, then as the estate purchased was not in a form consistent with the trust, \*and the *cestui que trust* would be under no obligation to accept it in lieu of the rightful property, the *cestui que trust* should come in as a general creditor, and not be permitted to assert a specific lien. But this distinction was disallowed by the court, and indeed seems to have been viewed as not maintainable in the prior <sup>(n)</sup> as well as in the subsequent <sup>(o)</sup> cases. Lord Ellenborough observed, "Upon a view of the authorities and consideration of the arguments, it should seem, that, if the property in its original state and form was covered with a trust, no change of that form can divest it of such trust, or give the trustee, or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in \*privity with him." <sup>(p)</sup> But where a man borrows money for the purpose of purchasing an estate, and afterwards misapplies a trust fund in discharge of the debt so contracted, the transaction cannot be treated as a purchase made with the trust money. <sup>(q)</sup>

It was said by Lord King that "*money* had no earmark, insomuch that if a receiver of rents should lay out all the money in the purchase

<sup>(l)</sup> Burdett v. Willet, 2 Vern. 638; Ryall v. Rolle, 1 Atk. 172; Ex parte Chion, 3 P. W. 187, note (A); Waite v. Whorwood, 2 Atk. 159; Ex parte Sayers, 5 Ves. 169; Anon. case, Sel. Ch. Ca. 57.

<sup>(m)</sup> 3 Maul. & Sel. 562.

<sup>(n)</sup> Whitecomb v. Jacob, 1 Salk. 160; Lane v. Dighton, Amb. 409; Ryal v. Ryal, Ib. 413; Balgney v. Hamilton, Ib. 414; Wilson v. Foreman, 2 Dick. 593, is misreported; see Lench v. Lench, 10 Ves. 519.

<sup>(o)</sup> Lord Chedworth v. Edwards, 8 Ves. 46; Greatley v. Noble, 3 Mad. 79; Buckeridge v. Glasse, Cr. & Ph. 126; Murray v. Pinkett, 12 Cl. & Fin. 784; Sheridan v. Joyce, 1 Jones & Lat. 401; Trench v. Harrison, 17 Sim. 111; Mayor of Berwick v. Murray, 3 Jur. N. S. 1; Harford v. Lloyd, 20 Beav. 310.

<sup>(p)</sup> Taylor v. Plumer, 3 M. & S. 574. <sup>(q)</sup> Denton v. Davies, 18 Ves. 499.

In these cases the account will clearly be restricted to the period of six years; for the plaintiff recovers upon a *legal* title, and the circumstance of his being obliged to sue in equity does not alter the nature of the action for *mesne* rents and profits. See Reade v. Reade, 5 Ves. 749, 750; Harwood v. Oglander, 6 Ves. 215; Drummond v. Duke of St. Albans, 5 Ves. 439; Hercy v. Ballard, 4 B. C. C. 468; Stackhouse v. Barnston, 10 Ves. 470; Monypenny v. Bristow, 2 R. & M. 125; and see Reynolds v. Jones, 2 Sim. & Stu. 206. In a late case, Thomas v. Thomas, 2 K. & J. 70, Vice-Chancellor Wood considered the rule to be, to give the account from the filing of the bill only.

But if the plaintiff has been kept out of the estate by the *fraud*, *misrepresentation*, or *concealment* of the defendant, the court will suppose that, had the plaintiff known his just rights, he would have commenced his action at law on the first accruer of his title, and will then decree an account of the *mesne* rents and profits against the defendant from that period. Dormer v. Fortescue, Ridg. Rep. t. Hardwicke, 184, 185; S. C. 3 Atk. 130.

On the other hand, if the plaintiff be in fault, as, if he be guilty of *laches*, the account will be restricted to the time of filing the bill. Edwards v. Morgan, McClell. 541, see 557.



of land, or if an executor should realize all his testator's estate, and afterwards die insolvent, yet a court of equity could not charge or follow the land;”(r) and *bank-notes* and *negotiable bills* have been represented as possessing the same quality. But the notion seems to have originated from some misconception, and cannot be supported. “’Tis pity,” said Lord Mansfield, “that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said that the reason why money cannot be followed is because it *has no earmark*, but this is not true. The true reason is upon account of the currency of it—it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank-note—an action may lie against the finder, it is true, but not after it has been paid away in currency. A bank-note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash, and it is necessary for the purposes of commerce, that their currency should be established and secured. No dispute ought to be made with the bearer of a cash-note, in regard to commerce and for the sake of the credit of these notes.”(s) And [\*758] Lord Ellenborough observed, “The product \*of or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of *fact* and not of *law*, and the dictum that *money has no earmark* must be understood in the same way, *i. e.*, as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule which applies to every other description of personal property, whilst it remains in the hands of the factor or his general legal representatives.”(t) The only distinction, then, between *money*, *notes*, and *bills*, and *other chattels*, appears to be this—that the former, for the protection of commerce, cannot be pursued into the hands of a *bona fide* holder, to whom they have passed in circulation, whilst other chattels can be recovered even from a purchaser for valuable consideration, provided he did not buy them in market overt. Money,(u) notes,(v) and bills,(w) may be followed by the rightful owner, where they have not

(r) *Deg v. Deg*, 2 P. W. 414; and so his lordship seems to have decided in *Cox v. Bateman*, 2 Ves. 19; and see *Waite v. Whorwood*, 2 Atk. 159; *Whitecomb v. Jacob*, 1 Salk. 160.

(s) *Miller v. Race*, 1 Burr. 457, 459. (t) *Taylor v. Plumer*, 3 M. & S. 575.

(u) See *Taylor v. Plumer*, 3 M. & S. 575; *Miller v. Race*, 1 Burr. 457; *Howard v. Jemmet*, 3 Burr. 1369; *King v. Egginton*, 1 T. R. 370; *Ryall v. Rolle*, 1 Atk. 172.

(v) *Anon. case*, 1 Salk. 126; *S. C.* 1 Raym. 738; *Miller v. Race*, 1 Burr. 457; *Taylor v. Plumer*, 3 M. & S. 562.

(w) *Bennet v. Mayhew*, cited *Pulteney v. Darlington*, 1 B. C. C. 232, and *Cator*

been circulated or negotiated, or the person to whom they so passed had express notice of the trust.(x) And the only difference to be taken between *money* and *notes*, on the one hand, and *bills* on the other, is that money is not earmarked, and therefore cannot be traced except under particular circumstances, but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty.(y)

\*We may here put the case of trust money mixed in the same heap with the trustee's money. It may be said that the trust money has, like water, run into the general mass, and become amalgamated, and therefore the *cestui que trust* has no *lien*. But clearly this cannot be maintained, for suppose a trustee, partly with his own money and partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate, that it was purchased with the *cestui's que trust* money, and yet the *cestui que trust* has a *lien* upon the whole for the amount that was misemployed.(z) And it follows in the other case, that though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust in the general heap, the *cestui que trust* is entitled to take so much out.

The doctrine of following trust money was carried to a great length in *Ex parte Sayers* : (a)—A. who resided in Dominica, wrote to his agents in London to procure and send him half-joes and dollars, directing them to send to the amount of 5000*l.* at one time, 5000*l.* at another, and 5000*l.* every succeeding opportunity ; and remitted two bills of 10,000*l.* and 6000*l.* to be placed to his credit. The agents discounted the bills, and remitted 5600*l.* to Peter and Co., at Lisbon, with directions to purchase joes, and, if they could not procure them, to return the money in good bills. Another remittance was afterwards made, to the same amount, with similar directions. The answer from Lisbon was, that joes could not be procured, and soon afterwards good bills were sent to near the amount of the remittance. In the interval the London agents had become bankrupts, and the bills got into the hands of the assignees. A. petitioned for the bills as his specific property, and Lord Loughborough made the order, observing, "It is admitted, very properly, that if joes had been returned, the petitioner would have a right to them, as purchased by his order with money remitted by him for that purpose, and it would be a narrow rule to hold, that, the commission being in train to be executed, the property being separated and severed \*property, by the accident that the joes were not bought, should be lost to the owner. [\*760] If the money got into the general fund, it got out again."

Upon a similar principle, if an executor of a deceased partner continue the testator's capital in the trade, though the capital may consist only of the stock and debts of the partnership, and these may undergo a continual course of change and fluctuation, yet the court follows the trust

v. *Earl of Pembroke*, 2 B. C. C. 287 ; and see *Ex parte Sayers*, 5 Ves. 169 ; *Lord Chedworth v. Edwards*, 8 Ves. 46 ; *Ryall v. Rolle*, 1 Atk. 172 ; *Raphael v. Bank of England*, 17 Com. Bench Re. 161.

(x) *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345.

(y) See *Ford v. Hopkins*, 1 Salk. 283.

(z) *Lane v. Dighton*, Amb. 409 ; *Lewis v. Madocks*, 17 Ves. 57, 58 ; *Price v. Blakemore*, 6 Beav. 507.

(a) 5 Ves. 169.

capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed.<sup>(b)</sup>

And so if a trustee pay trust-money into a bank to a simple account with himself, not in any way earmarked with the trust, and also keep private moneys of his own to the same account, the court will disentangle the account, and separate the trust from the private moneys, and award the former specifically to the *cestui que trust*.<sup>(c)</sup> Lord Justice Knight Bruce observed,<sup>(d)</sup> "Let me suppose that the very coins and the very notes received by the trustee on account of the trust, had been placed by him together in a particular repository, such as a chest, mixed confusedly together as among themselves, but in a state of clear and distinct separation from every thing else, and that they had so remained at his death, it is, I apprehend, certain that after his death, the coins and notes thus circumstanced would not have formed part of his general assets, but would have been specifically applicable to the purposes of the trust. Suppose this case to be varied by the fact that in the same chest with these coins and notes the trustee had placed money of his own of a known amount, had never taken it out again, but had so mixed and blended it with the rest of the contents of the chest, that the particular coins or notes of which this money of his own consisted could not be identified. What difference would that make? None, as I apprehend, except—if it be an exception—that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount [\*761] of the money in every sense \*his own, so mixed by himself with the other money; but not in either case, as I conceive, would the blending together of the trust-moneys, however confusedly, be of any moment as between the various *cestuis que trust* on the one hand, and the executors as representing the general creditors on the other. Let it be imagined that in the second case supposed, the trustee after mixing the known amount of money of his own with the trust-moneys, had taken from the repository a sum for his own private purposes, and it could not be ascertained whether in fact the specific coins and notes forming it included or consisted of those or any of those which were in every sense his own specifically, what would be the consequence? I apprehend that in equity, at least, if not at law also, what he so took would be solely or primarily ascribed to those contents of the repository which were in every sense his own; he would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right; and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible." And having laid down these principles, the lord justice proceeded: "When a trustee pays trust-money into a bank to his credit, the account being a simple account of himself not marked or distinguished in any other manner, the debt thus constituted from the bank to him, is one which as long as it remains due belongs specifically to the trust, as much and as effectually as the money so paid would have done had it been specifically placed by the trustees

(b) See *Pennell v. Deffell*, 4 De G. M. & G. 389; and see pp. 319 & 321, *supra*.

(c) *Pennell v. Deffell*, 4 De G. M. & G. 372.

(d) *Ib.* p. 381.



in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestui que trust*, it must be deemed specifically theirs as between the trustee and his executors and the general creditors after his death on the one hand, and the trust on the other. Whether the *cestui que trust* are bound to take to the debt, whether the deposit was a breach of trust, is a different question. This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own." For the mode in which the court dealt with the subsequent items on the debit and credit side of such an account, the reader is referred to the case itself.

\*In tracing money into *land*, the principal difficulty has arisen from the Statute of Frauds,<sup>(e)</sup> the seventh section enacting that [\*762] all declarations of trusts of lands shall be manifested and proved by some writing. It was formerly held that parol evidence, to prove a state of circumstances from which a court of equity would elicit a constructive trust, was inadmissible;<sup>(f)</sup> but Lord Hardwicke, on the ground that constructive trusts were excepted out of the Statute of Frauds<sup>(g)</sup> ruled that parol evidence might be given;<sup>(h)</sup> and Sir T. Clarke, in the leading case of *Lane v. Dighton*,<sup>(i)</sup> (though, had the point been *res integra*, he should have thought the evidence not admissible within the statute,) yet followed the authority of Lord Hardwicke; and Sir W. Grant has since declared that, whatever doubts might formerly have been entertained upon the subject, the law is now settled.<sup>(k)</sup>

If a trustee be under an obligation to lay out money on land, and purchase an estate at a price corresponding with the sum to be invested, the court independently of positive evidence, may presume the trust money to have been so applied.<sup>(l)</sup> But no such presumption can be raised where it can be shown that the trustee, though under such an obligation, was mistaken in the nature of the trust, and acted under a different impression.<sup>(m)</sup> And where a tenant for life with power to sell and invest in the purchase of other land, purchased lands with borrowed moneys, and many years afterwards sold the settled estates, and applied the purchase-money partly in discharge of the debts thus contracted by him, it was held that the purchased lands could not be treated as liable to the trusts of the settled estates.<sup>(n)</sup>

In *Lewis v. Madocks*,<sup>(o)</sup> no evidence to connect any particular fund with the estate was necessary, for a person having covenanted on his marriage to settle *all* the personalty he \*should acquire upon certain trusts, and having afterwards invested parts of his personalty [\*763] on land, it was clear that the money expended upon the estate was bound by the trust, and could therefore be followed into the purchase.

(e) 29 Car. 2, c. 3.

(f) See *supra*, Ch. VIII. s. 2, p. 204.

(g) By the 8th section.

(h) *Ryal v. Ryal*, Amb. 413; and see *Anon. case*, Sel. Ch. Ca. 57.

(i) Amb. 409.

(k) *Lench v. Lench*, 10 Ves. 517.

(l) See *Anon. case*, Sel. Ch. Ca. 57; *Price v. Blakemore*, 6 Beav. 507; *Matthias v. Matthias*, 3 Jur. N. S. 429.

(m) *Perry v. Philips*, 4 Ves. 108, see 116, 117.

(n) *Denton v. Davies*, 18 Ves. 499.

(o) 8 Ves. 150; S. C. 17 Ves. 48.

Where a trust fund is traced into land, and the fund constitutes a part only of the money laid out in the purchase, the court has usually given a lien merely on the land for the trust money and interest ;(*p*) but where the entire land is clearly the fruit of the trust fund, the *cestuis que trust* must, upon principle, have a right to take the land itself, whether the purchase be or not of a description authorized by the trust.(*q*)

### SECTION III.

#### OF THE REMEDY FOR A BREACH OF TRUST AGAINST THE TRUSTEE PERSONALLY.

In the event of a breach of trust, the *cestui que trust* is entitled to file a bill against the trustee (a right which is not affected by the Statute of Limitations,)(*r*) to compel from him personally a compensation for the loss the trust estate has sustained. The same rule applies where a corporation is trustee ; and a corporation, since the Municipal Corporation Act, is liable for a breach of trust committed before the act.(*s*)

If the trustee dispose of the trust estate to a purchaser for valuable consideration without notice, the *cestui que trust* may compel the trustee [\*764] to purchase other lands of equal value to be \*settled upon the like trust,(*t*) or the *cestui que trust* may at his option take the proceeds of the sale, with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements.(*u*)

So where a testator gave a legacy of 1200*l.*, and directed the executor to invest it in the funds, and the estate was wound up, but the executor neglected to invest, and the price of stock rose ; it was held, that retainer by the executor, after accounting for the residuary estate, was equivalent to payment to a trustee ; that if the *cestui que trust* sustained a loss by the trustee neglecting his duty, the *cestui que trust* had a right to charge the trustee with the amount of the loss ; that the executor was therefore bound to purchase so much stock as the legacy would have produced had it been invested at the proper period.(*v*) And, in another case, where a

(*p*) *Lane v. Dighton*, Amb. 409 ; *Lewis v. Madocks*, 8 Ves. 150 ; 17 Ves. 48, see 57 ; *Price v. Blakemore*, 6 Beav. 507.

(*q*) *Trench v. Harrison*, 17 Sim. 111. Lord Manners, in *Savage v. Carroll*, 1 B. & B. 265, see 284, seems to have thought otherwise ; but this was before *Taylor v. Plumer*.

(*r*) *Phillipo v. Munnings*, 2 M. & C. 369 ; *Milnes v. Cowley*, 4 Price, 103 ; *Cator v. Croydon Railway Company*, 4 Y. & C. 405.

(*s*) *Attorney-General v. Corporation of Leicester*, 9 Beav. 546. A solicitor who wilfully advises a breach of trust, is liable to be struck off the roll ; *Goodwin v. Gosnell*, 2 Coll. 457, see p. 462. And so *a fortiori* a solicitor, who, being a trustee himself, commits a wilful breach of trust ; *In re Chandler*, 2 Jur. N. S. 366 ; *In re Hall*, 2 Jur. N. S. 633.

(*t*) See *Mansell v. Mansell*, 2 P. W. 681 ; *Vernon v. Vaudry*, Barn. 303.

(*u*) See *Attorney-General v. East Retford*, 2 M. & K. 35 ; but see *Denton v. Davies*, 18 Ves. 504.

(*v*) *Byrchall v. Bradford*, 6 Mad. 13 ; S. C. Id. 235 ; and see *Pride v. Fooks*, 2 Beav. 430.

testator had directed an investment in the funds and an accumulation of the dividends, the trustee was decreed to purchase the sum of stock which the fund, if regularly invested, would have produced, and to make good the amount due in respect of subsequent accumulation.<sup>(w)</sup> But if the trustee have a discretion of investing *on government or real securities*, the trustee is answerable for the money only with interest, and not in the alternative for the money with interest on the stock with dividends at the option of the *cestui que trust*.<sup>(x)</sup>

So if a trustee suffer a policy of insurance to become forfeited through neglect to pay the premiums, he is bound to make compensation to the *cestui que trust* for the consequential damage to the estate;<sup>(y)</sup> that is, if he have funds in hand for payment of the premiums; but if he have none and can procure none, he would be exempt from liability. He may, however, either advance money himself, or borrow it from another on the security of the policy, and the *lien* on the policy will be allowed.<sup>(z)</sup> So if a settlement contain a covenant for the \*transfer of stock and the trustees neglect to enforce the transfer, they are liable [\*765] for all the consequences.<sup>(a)</sup>

If a trustee has assumed to act as trustee and received money in that character, he is accountable for the proceeds to the *cestui que trust*, and cannot defend himself by showing that in fact he was not legally a trustee.<sup>(b)</sup>

If a bill be filed for an account with an allegation of wilful default and a prayer for consequential relief, and the common accounts only are directed, it is too late to ask relief on further directions against any wilful act that has transpired accidentally from the other inquiries.<sup>(c)</sup>

If the trustee himself be *dead*, the bill may be filed against the representative; and an executor or administrator will be answerable for the damage, though he may have distributed the assets amongst the legatees or next of kin, without previous notice of the breach of trust (except it was done under the sanction of the court,<sup>(d)</sup> or the *cestui que trust* may recover the assets from the legatees or next of kin amongst whom they have been distributed.<sup>(e)</sup>

But the claim of the *cestui que trust* is a simple contract debt only, and therefore, until the late act, making all a person's real and personal estate liable to his simple contract debts, it was recoverable not from the real but only from the personal estate. However, if the trustee signs the trust deed and engages under his hand and seal by words that would

(w) *Pride v. Fooks*, 2 Beav. 430.

(x) See ante, pp. 355, 356.

(y) *Marriott v. Kinnarsley*, Tambl. 470.

(z) *Clack v. Holland*, 19 Beav. 273, 276, per Cur.

(a) *Fenwick v. Greenwell*, 10 Beav. 412.

(b) *Rackham v. Siddall*, 16 Sim. 297; affirmed on appeal to the extent of the interest of the plaintiff, the tenant for life; 1 Mac. & Gor. 607; and see *Derbyshire v. Home*, 3 De Gex, Mac. & Gor. 80; *Hope v. Liddell*, 21 Beav. 183.

(c) *Coope v. Carter*, 2 De Gex, Mac. & Gor. 292.

(d) *Knatchbull v. Fearnhead*, 3 M. & C. 122; *March v. Russell*, 3 M. & C. 31; *Low v. Carter*, 1 Beav. 426; *Hill v. Gomme*, Ib. 540; *Underwood v. Hatton*, 5 Beav. 39.

(e) *March v. Russell*, 3 M. & Cr. 31; *Knatchbull v. Fearnhead*, 3 M. & Cr. 126; *Underwood v. Hatton*, 5 Beav. 38.



amount to a covenant at law, to execute the trust, then the breach of trust becomes a specialty.<sup>(f)</sup>

In awarding compensation to the *cestui que trust* against the trustee, the court pays no regard to the circumstance whether the trustee derived [\*766] any actual advantage or not, but proceeds \*upon the principle, that a trustee, who deviates from the line of his duty, is under an obligation to make good the loss to the *cestui que trust* :<sup>(g)</sup> and if a trustee be guilty of misconduct, and a loss follow, the court does not acquit him, because the loss was more immediately caused by some event wholly beyond the control of the trustee, such as fire, lightning, or other accident.<sup>(h)</sup> "Although," said Lord Cottenham, "a personal representative acting *strictly* within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities, not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."<sup>(i)</sup> And a trustee who has been wilfully the cause of loss to one trust-fund, cannot set off against it an improvement made in another fund held in trust for the same parties.<sup>(k)</sup>

But a trustee will not be charged with *imaginary values* ;<sup>(l)</sup> and, being regarded as a mere stakeholder, he will not be liable for more than he has actually received,<sup>(m)</sup> except in cases of very supine negligence, or wilful default.<sup>(n)</sup>

\*Where *co-trustees* are *jointly* implicated in a breach of trust, [\*767] the *cestui que trust*, though he obtain a decree against the trustees jointly, may have process of execution against any one of them separately ;<sup>(o)</sup> for as regards the remedy of the *cestui que trust* there is no *primary* liability, but each trustee is responsible for the entirety of

(f) See *supra*, pp. 238, 239.

(g) See *Dornford v. Dornford*, 12 Ves. 129 ; *Raphael v. Boehm*, 13 Ves. 411 ; *S. C.* Ib. 490, 491 ; *Moons v. De Bernales*, 1 Russ. 305 ; *Adair v. Shaw*, 1 Sch. & Lef. 272 ; *Lord Montfort v. Lord Cadogan*, 17 Ves. 489 ; *Scurfield v. Howes*, 3 B. C. C. 90, but see *Attorney-General v. Greenhouse*, 1 Bligh, N. R. 57-59.

(h) See *Caffrey v. Darby*, 6 Ves. 496 ; *Cocker v. Quayle*, 1 R. & M. 535 ; *Fyler v. Fyler*, 3 Beav. 568 ; *Kellaway v. Johnson*, 5 Beav. 324 ; *Munch v. Cockerell*, 5 M. & Cr. 212.

(i) *Clough v. Bond*, 3 M. & Cr. 496 ; *Gibbins v. Taylor*, 22 Beav. 344.

(k) *Wiles v. Gresham*, 2 Drewry, 258, see p. 271.

(l) *Palmer v. Jones*, 1 Vern. 144.

(m) *Harnard v. Webster*, Sel. Ch. Ca. 53.

(n) *Pybus v. Smith*, 1 Ves. jun. 193, per Lord Thurlow ; *Palmer v. Jones*, 1 Vern. 144, per Lord Nottingham.

(o) *Ex parte Shakeshaft*, 3 B. C. C. 197 ; *Walker v. Symonds*, 3 Sw. 74, 75 ; *Attorney-General v. Wilson*, 1 Cr. & Phil. 28, per Lord Cottenham ; and see *Ex parte Angle*, Barn. 425 ; but see *In re Chertsey Market*, 6 Price, 278, 279 ; *Taylor v. Tabrum*, 6 Sim. 281.

the loss incurred.(p) However, where a trustee had refused to accept the office unless another should be named with him, and the trust money be divided between them, so that each might be responsible for a moiety only, and this was accordingly done, but the trust deed was drawn in the usual form as if they were joint trustees of the whole sum, it was held, upon the insolvency of one of the trustees, that the co-trustee should not be answerable for more than the moiety paid to himself, the division of the trust money being Sir J. Leach observed, "a term in the creation of the trust."(q) Where several defendants are involved in a breach of trust, the court decrees costs against them jointly for the plaintiff's greater security, and does not distinguish between the relative culpabilities of the defendants.(r) But in an analogous case where one defendant was called upon to pay all the costs, he obtained an order in the same cause upon a motion (which however was not opposed) for contribution by the other defendants.(s)

A corporation filed a bill against five of the corporators who were regarded as its agents and trustees, to make them liable for the consequences of certain acts done by them, with the view of illegally alienating the corporation property, and it was held to be unnecessary to make *all* the corporators parties who in any way had participated in the acts, for the defendants were wrong doers, and the case against each was distinct, depending upon its own evidence.(t)

\*Though, as, respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the [\*768] loss, whether he was the principal in the breach of trust, or was merely a consenting party, yet, as between the trustee, themselves, (unless the transaction was vitiated not only by constructive but actual fraud, when the court will hold itself entirely aloof,(u)) it seems an apportionment, or contribution amongst the trustees, may be compelled on a bill filed for the purpose;(v) and so, as between the trustees and a third person who has reaped the benefit of the breach of trust, though the trustees must make the disbursement in the first instance to the injured party, the loss may eventually be cast on the person who was the gainer by the breach of trust.(w)

(p) See *Wilson v. Moore*, 1 M. & K. 146; *Lyse v. Kingdon*, 1 Coll. 188; *Richardson v. Jenkins*, 1 Drewry, 477; *Alleyne v. Darcy*, 4 Ir. Ch. Re. 206.

(q) *Birls v. Betty*, 6 Mad. 90.

(r) *Lawrence v. Bowle*, 2 Phill. 140; 1 C. P. Coop. temp. Cott. 241.

(s) *Pitt v. Bonner*, 1 Y. & C. Ch. Ca. 670.

(t) *Attorney-General v. Wilson*, 1 Cr. & Phil. 1, see 28; and see *London Gas-Light Company v. Spottiswoode*, 14 Beav. 272, 273.

(u) See *Lingard v. Bromley*, 3 M. & C. 122; *Pitt v. Bonner*, 1 Y. & C. Ch. Ca. 670; 336; *Attorney-General v. Wilson*, 1 Cr. & Phil. 28.

(v) *Ex parte Shakeshaft*, 3 B. C. C. 198, per Lord Thurlow; *Lingard v. Bromley*, 1 V. & B. 114; *Perry v. Knott*, 4 Beav. 180, per Lord Langdale; and see *Knatchbull v. Fearnhead*, 3 M. & C. 122; *Pitt v. Bonner*, 1 Y. & C. Ch. Ca. 670; *Ex parte Burton*, 3 Mont. D. & De Gex, 373; *Baynard v. Wolley*, 20 Beav. 588; and see *Wilson v. Goodman*, 4 Hare, 54.

(w) *Trafford v. Boehm*, 3 Atk. 440; *Greenwood v. Wakeford*, 1 Beav. 576; *Booth v. Booth*, 1 Beav. 125; *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; S. C. 2 Mer. 3; and see *Howe v. Earl of Montfort*, 7 Ves. 150, 151; *Jacob v. Lucas*, 1 Beav. 436; *Lincoln v. Wright*, 4 Beav. 432. But if a tenant for life have a general power of appointment, a person taking under the power

In *Trafford v. Boehm*,<sup>(x)</sup> Henry Heathcote and Charles Boehm were the trustees of Mr. Trafford's marriage settlement, and the fortune of the lady was placed in their hands, to be laid out in a purchase of lands as soon as one could conveniently be found. No suitable purchase offering, the money was invested *by the direction of the husband* in South Sea Stock, and a loss was incurred. Lord Hardwicke said, "There is no doubt this court will endeavour to deliver a trustee from any mischief that may happen from a misapplication of trust money, and in the present instance the \*loss must first come out of the estate of [§769] the husband, because done with his concurrence or subsequent assent, for he has passed the account with the trustees, and constantly received the dividends of the stock. The rule of the court is, that *if a trustee err in the management of the trust with approbation of the cestui que trust, it must be made good first out of the estate of the person who consented to it.*"

And the same principle was acted upon in the case of *Lord Montfort v. Lord Cadogan*.<sup>(y)</sup> By indenture bearing date in 1772, certain leaseholds were vested in trustees upon trust *in the first place to renew the leases out of the rents and profits*, and then upon trust for Lord Montfort for life, remainder to Lady Montfort for life, remainder to the issue. The first period of renewal occurred in 1786, and the second in 1800, and Lord Montfort died in 1799. The trustees, instead of renewing as they should have done, permitted Lord Montfort during his life and Lady Montfort after his decease, to receive the *whole* rents of the estate. Lord Montfort, the son and only issue, renewed the lease at his own expense in 1808, during the lifetime of the Dowager Lady Montfort, and then filed a bill against her, the executors of Lord Montfort his father, and the trustees, to be repaid the money he had advanced for the renewal. Sir W. Grant said, "Though my opinion is that these trustees are answerable, they are not alone answerable. The tenants for life have acquiesced in the breach of trust, and profited by it by receiving the *whole* rents and profits, a *part* of which was applicable to the renewals. *All these parties are answerable to the plaintiff; but as between the tenants for life and the trustees, if Lord Montfort has left assets, they will in the first place be applicable to make good so much of the fine as corresponds with the period of his enjoyment.* Lady Montfort is in like manner answerable for the period of her possession, and the accruing rents during her life are liable to be impounded to make good the demand against her. Whatever can be got from these funds will go in ease of the trustees." And the decree was, that the renewal fine ought to be paid to the plaintiff by the trustees, but that the same ought to be paid to them out of the estates of Lord Montfort deceased, and \*of the Dowager Lady Mont- [§770] fort, *according to the times they had respectively been in posses-*

cannot come upon the estate of the tenant for life, the donee of the power, for a breach of trust by him, for the estate so appointed is part of the tenant for life's assets. *Williams v. Lomas*, 16 Beav. 1. *Secus* where the decree of the power is *a fine covert*, except in a case of actual fraud by her; *Vaughan v. Vanderstegen*, 2 Drewry, 165, 363.

(x) 3 Atk. 449.

(y) 17 Ves. 485.



sion. From this decree some of the parties appealed,<sup>(z)</sup> and Lord Eldon, before whom the case was now argued, said, "One question is, whether Lord Montfort's estate, if sufficient, and that of Lady Montfort should have been resorted to for payment of the plaintiff's demand before the trustees were called upon, and many cases have established, that a *tenant for life joining in a breach of trust shall be answerable in the first instance*; but the *cestui que trust* is not bound to wait while inquiries as to assets, or what proportion Lady Montfort is to pay, are depending. My opinion therefore is, that the master of the rolls was perfectly right in charging the trustees in the *first instance*, and also in deciding, that they have a *remedy over* against those who took the rents and profits which ought to have paid the fine." His lordship then proceeded to consider the proportion in which the estate of Lord Montfort deceased, and the Dowager Lady Montfort, ought to contribute. "It is a little difficult," he said, "to determine the meaning of these terms in which the tenants for life are charged according to the times they have respectively been in possession. In 1799 (when Lord Montfort died,) Lady Montfort was entitled by the settlement to possession of the leasehold estate, under a lease renewed in 1786, for fourteen years, with a fund accumulating for the fine, to be paid on the next renewal in 1800. If therefore the decree is to be understood, that, as Lord Montfort enjoyed from 1772 to 1799, and Lady Montfort from 1799 to 1808, when the fine in question was paid, that sum is to be reimbursed as between his and her estates in this proportion, that his estate is to be charged according to the account of the rents between 1772 and 1799, and she is to pay according to the rents from 1799 to 1808, she appears to me to be charged in a way in which she is not chargeable. My opinion is, that the estate of the late Lord Montfort is to be made answerable to the trustees after they have paid the plaintiff; and Lady Montfort is also answerable, but only for the proportion for which she ought to be called upon, with a due regard to the obligation of the trustees to put \*her in possession of the estate fully renewed in 1786, and with an accumulating fund to be [\*771] applied to another renewal in 1800. Lord Montfort having received the rents from 1772 to 1799, and not having renewed, and a much larger fine of course being required at the end of twenty-eight years than fourteen years, his estate must be answerable for the increase; but if the trustees should not find his estate sufficient to answer that, I cannot, as between them and Lady Montfort, throw any part of the increase upon her. That must therefore fall upon the trustees personally."

If a tenant for life, or other person having a partial interest, be an actor in a breach of trust, all the benefit that would have accrued to him, either from that trust fund, or any other estate comprised in the same settlement<sup>(a)</sup> may be retained as against him, his assignees in bankruptcy,<sup>(b)</sup> or (except where the defence of purchase for value without notice

(z) 19 Ves. 635; S. C. 2 Mer. 3.

(a) Woodyatt v. Gresley, 8 Sim. 180; Ex parte Mitford, 1 B. C. C. 398; see Priddy v. Rose, 3 Mer. 105; Burridge v. Row, 1 Y. & C. Ch. Ca. 183, 583; Lincoln v. Wright, 4 Beav. 432, per Lord Langdale; Fuller v. Knight, 6 Beav. 205; M'Gachen v. Dew, 15 Beav. 84.

(b) Ex parte Turpin, 1 D. & C. 120; Ex parte Smith, 1 Deac. 143; Woodyatt

is applicable) those claiming under him,<sup>(c)</sup> until the amount retained, with the accumulations thereon,<sup>(d)</sup> have compensated the trust estate for the loss it had sustained. It was contended in one case, that on a similar principle, where an estate was devised to a person who was a debtor to the testator, the debt was a lien on the devised estate, but the court not finding any precedent did not allow the claim.<sup>(e)</sup>

If the trustee become *bankrupt*, the loss may be proved against his estate,<sup>(f)</sup> and if interest would have been decreed in equity against the trustee himself, it will constitute part of \*the debt in the proof [<sup>\*772</sup>] against the estate in the hands of the assignees,<sup>(g)</sup> and if the breach of trust was a sale of stock and misemployment of the money, the *cestui que trust* may, at his option, elect to prove for the proceeds of the sale, or for the price of the stock at the date of the commission of bankruptcy.<sup>(h)</sup>

If the bankrupt trustee was one of a firm, and the trust money had been lent to the firm, with notice of the equity attached to it then, inasmuch as a breach of trust creates a joint and several liability, proof may be made either against the joint estate of the partners or the separate estate of the bankrupt trustee, at the option of the *cestui que trust*;<sup>(i)</sup> and if the bankrupt has laid out the trust money on a mortgage, the *cestui que trust* is not put to his election whether he will prove for the debt, and abandon the mortgage, or take the mortgage and abandon the debt, but may prove for the debt, and have the benefit of the mortgage also;<sup>(k)</sup> and if the trust money has been invested, though improperly, the *cestui que trust* has a right to elect to prove for the money and interest, or for the value of the securities and profits.<sup>(l)</sup> But if the bankrupt in whose hands the trust fund was, be one of the trustees, and indebted to the trust estate, and also in part beneficially interested in the trust, proof cannot be made for the whole amount, but only for the balance after setting off the bankrupt's beneficial interest against the debt due from him.<sup>(m)</sup>

The original trust debt itself will be barred by the certificate of the bankrupt, though no proof was made, and the *cestui que trust* did not know of the misapplication of the trust fund.<sup>(n)</sup> But it is the duty of

v. Gresley, 8 Sim. 185, per Cur.; Ex parte King, 2 M. & A. 410; see Smith v. Smith, 1 Y. & C. 338; Burrage v. Row, 1 Y. & C. Ch. Ca. 183, 583; Raby v. Ridehalgh, 1 Jur. N. S. 363.

<sup>(c)</sup> Woodyatt v. Gresley, 8 Sim. 180; Priddy v. Rose, 3 Mer. 86; Cole v. Middle, 10 Hare, 186; and see Morris v. Lavie, 1 Y. & C. Ch. Ca. 380; Egbert v. Butler, 21 Beav. 560.

<sup>(d)</sup> Ex parte King, 2 M. & A. 410. <sup>(e)</sup> Ex parte Barff, 1 De Gex, 613.

<sup>(f)</sup> Keble v. Thompson, 3 B. C. C. 112; Moons v. De Bernales, 1 Russ. 301; Dornford v. Dornford, 12 Ves. 127; Ex parte Shakeshaft, 3 B. C. C. 197; Bick v. Motly, 2 M. & K. 312; Lincoln v. Wright, 4 Beav. 427.

<sup>(g)</sup> Dornford v. Dornford, Bick v. Motly, Moons v. De Bernales, ubi supra.

<sup>(h)</sup> Ex parte Shakeshaft, 3 B. C. C. 197; Ex parte Gurner, 1 Mont. Deac. & De Gex, 497; and see Ex parte Moody, 2 Rose, 413; Ex parte Stutely, 1 Mont. Deac. & De Gex, 643.

<sup>(i)</sup> Ex parte Heaton, Buck. 368; Ex parte Watson, 2 V. & B. 414; see Ex parte Poulson, 1 De Gex, 79.

<sup>(k)</sup> Ex parte Biddulph, 3 De G. & Sm. 587; Ex parte Geaves, 2 Jur. N. S. 651.

<sup>(l)</sup> In re Montefiore, 9 Jur. 562.

<sup>(m)</sup> Ex parte Turner, 2 De Gex, Mac. & Gor. 927.

<sup>(n)</sup> Ex parte Holt, 1 Deac. 248. As to the discharge of a debt created by a

the trustee to make sure that *some person* prove on behalf of the trust, and if he do \*not, he is liable in equity for this neglect of duty; [\*773] and though he has obtained his certificate he will remain responsible personally for the amount that might have been received by way of dividend.(o) If the bankrupt was one of several *co-trustees*, who were jointly implicated in a breach of trust, then proof may be made against the bankrupt's estate for the whole money lost, though he was not the party benefited by the breach of trust;(p) and though the other trustee be living and solvent.(q) And the proof against the bankrupt, will not be precluded by a *bond* given not to sue the other trustee reserving the rights against all other parties,(r) though a *release* to the other trustee, being an extinguishment of the debt, would prevent any subsequent proof.(s)

So if two co-trustees be bankrupts, proof may be made against the estates of both;(t) but of course more than 20s. in the pound cannot be received in the whole. Or at the same time that proof is made against the estate of one who is a bankrupt, legal proceedings may be taken against the solvent trustee; for *proof* under a bankruptcy is not payment.(u)

But where the whole debt is proved against the estate of the bankrupt trustee, the assignees may afterwards file a bill, and compel contribution from the other trustee,(v) even where the bankrupt trustee himself could not, from his fraudulent conduct, have obtained such relief.(w)

In assigning to the *cestui que trust* the foregoing remedies against the trustee, it must of course be understood that the *cestui que trust* has not himself *concurred* in the breach of duty, or subsequently *acquiesced* in it, and, *à fortiori*, has not executed a formal *release*.

If a *cestui que trust* concur in the breach of trust, he is forever estopped from proceeding against the trustee for the consequences\*of [\*774] the act.(x) Thus, in the leading case of *Brice v. Stokes*,(y) where the trust estate was sold *with the approbation of Brice, the tenant for life*, and the purchase-money was improperly left in the hands of one of the trustees *with the knowledge of Brice*, Lord Eldon held, that the trustees were answerable to the *remainderman* for the principal, but not

breach of trust under the Insolvent Acts, see *Thompson v. Finch*, 22 Beav. 316; on appeal, 25 L. J. N. S. (Ch.) 681.

(o) *Orrett v. Corser*, 21 Beav. 52. (p) *Ex parte Shakeshaft*, 3 B. C. C. 197.

(q) *Ex parte Beilby*, 1 G. & J. 167. (r) *Ib.*

(s) See *Blackwood v. Borrowes*, 2 Conn. & Laws, 478.

(t) *Keble v. Thompson*, 3 B. C. C. 112; *Ex parte Poulson*, 1 De Gex, 79.

(u) *Ex parte King*, 1 Deac. 164, &c.

(v) See *Ex parte Shakeshaft*, 3 B. C. C. 97; *Bromley v. Lingard*, 1 V. & B. 114.

(w) See *Muckleston v. Brown*, 6 Ves. 68; *Joy v. Campbell*, 1 Sch. & Lef. 335, 339; *Otley v. Browne*, 1 B. & B. 360.

(x) *Walker v. Symonds*, 3 Sw. 64, per Lord Eldon; *Wilkinson v. Parry*, 4 Russ. 272; *Cocker v. Quayle*, 1 R. & M. 535; *Nail v. Punter*, 5 Sim. 555; *Newman v. Jones*, Rep. t. Finch, 58; and see *Fellows v. Mitchell*, 1 P. W. 81; *Booth v. Booth*, 1 Beav. 125; *Langford v. Gascoyne*, 11 Ves. 336; *White v. White*, 5 Ves. 555; *In re Chertsey Market*, 6 Price, 280, 284; *Baker v. Carter*, 1 Y. & C. 255; *Byrchall v. Bradford*, 6 Mad. 13; *Morley v. Lord Hawke*, cited in *Small v. Attwood*, 2 Y. & J. 520; *Fyler v. Fyler*, 3 Beav. 550.

(y) 11 Ves. 319.



to the *tenant for life* for the interest. "If," said his lordship, "there are two trustees, and a transaction takes place, in which the fund is taken out of the state in which it ought to have remained, and is not placed in a state in which it ought to be, but is kept in hands which ought not to retain it, if any particular *cestui que trust* has acted in authorizing that as much as the trustee who has not the money in his hands, and continues to permit it to be so treated, in a question between that *cestui que trust* and that trustee, the latter shall not be called upon by the former."

But persons cannot be held to have concurred in a breach of trust who had not the means of knowing that the acts to which they were parties involved a breach of trust.<sup>(z)</sup>

And persons cannot *concur* in a breach of trust, who, as *femes covert*(*a*) and infants,<sup>(b)</sup> have no legal capacity to consent to the transaction.

But neither coverture nor infancy will be a protection from a charge [\*775] of *fraud*, and therefore if a *feme covert*,<sup>(c)</sup> or \*infant,<sup>(d)</sup> draw in a trustee to commit a breach of trust, such *feme covert* or infant cannot afterwards call the trustee to account for having exceeded the line of his duty.

And a *feme covert* will be bound by her concurrence in a breach of trust as to a fund which is settled to her separate use.<sup>(e)</sup> But she will not be estopped upon the ground of concurrence where it was not her own voluntary act, but her judgment was misled, or she was under undue influence.<sup>(f)</sup> And a *feme covert* has no power to concur in any act as to a fund settled to her separate use, with a restraint against anticipation,<sup>(g)</sup> and of course concurrence will not operate beyond the interest settled to her separate use, as if a *feme* be tenant for life to her separate use with a power of appointing the *corpus* by will, though her concurrence would affect the life interest it does not prevent the appointees under the will from holding the trustees responsible.<sup>(h)</sup> But otherwise, if the *feme* be tenant for life, with a general power of appointment which is equivalent to ownership, and is therefore regarded as an estate to her separate use.<sup>(i)</sup>

(z) *Buckeridge v. Glasse*, 1 Cr. & Ph. 135, per Lord Cottenham.

(a) *Ryder v. Bickerton*, cited *Walker v. Symonds*, 3 Sw. 80; *Underwood v. Stevens*, 1 Mer. 717; *Smith v. French*, 2 Atk. 243; *Needler's case*, Hob. 225; *Lench v. Lench*, 10 Ves. 517, per Sir W. Grant; *Lord Montfort v. Lord Cadogan*, 19 Ves. 639, 640, per Lord Eldon; and see *Parkes v. White*, 11 Ves. 221; *Bateman v. Davis*, 3 Mad. 98.

(b) See *supra*, pp. 34, 39; and *Wilkinson v. Parry*, 4 Russ. 276.

(c) *Ryder v. Bickerton*, cited *Walker v. Symonds*, 3 Sw. 82, per Lord Hardwicke, and see *Savage v. Foster*, 9 Mod. 35; *Lord Montfort v. Lord Cadogan*, 19 Ves. 640; *Vandebende v. Livingston*, 3 Sw. 625; *Evans v. Bicknell*, 6 Ves. 181; *Jones v. Kearney*, 1 Dru. & War. 166.

(d) See the cases at note (a), p. 39, *supra*.

(e) *Walker v. Shore*, 19 Ves. 387; see 393; and see *Buckeridge v. Glasse*, Cr. & Ph. 136.

(f) *Whistler v. Newman*, 4 Ves. 129; *Hughes v. Wells*, 9 Hare, 773; and see *Walker v. Shore*, 19 Ves. 393.

(g) *Cocker v. Quayle*, 1 R. & M. 535; but see *Derbshire v. Home*, 3 De G. M. & G. pp. 102, 113.

(h) *Kellaway v. Johnson*, 5 Beav. 319.

(i) *Brewer v. Swirles*, 2 Smale & Giff. 219.

Again, a *cestui que trust*, though he did not *concur* at the time, may have *acquiesced* in the breach of trust subsequently. <sup>(k)</sup>

How far the *mere knowledge* of a right to sue in respect of a breach of trust, and the abstaining to sue will, without any other act, constitute *laches* in the eye of a court of equity, and disentitle the plaintiff to relief, as in the particular \*instances of purchases by trustees, &c., above referred to, <sup>(l)</sup> cannot be considered as clearly settled. The present [\*776] master of the rolls in a late case appears to have thought that mere delay disentitled a plaintiff under such circumstances to relief, but his decision rested also on facts amounting, in his honor's opinion, to actual acquiescence. <sup>(m)</sup>

A testator gave 400*l.* to A., B., C., and D., his executors, upon trust to invest in lands to be settled on E. The money was lent improperly to A. upon the security of his bond, and lost; but, as E., the legatee, had constantly accepted interest on the loan, and had neither brought his bill, nor called on the executors to invest the money in land, it was held he had virtually consented, and thus estopped himself from holding the trustees responsible. <sup>(n)</sup>

In another case, on the marriage of Mr. Segar with Miss French, a sum of 1000*l.*, belonging to the lady was assigned to her mother as trustee, and by indenture executed after the marriage, the trusts were declared for the *separate use* of the wife, remainder to the issue, remainder, if no issue, to the survivor. At the joint solicitation of the husband and wife the money was advanced to the husband, and, with the exception of 350*l.*, was never repaid; but the mother, who was the trustee, had threatened to proceed for the remainder, when the daughter fell upon her knees and begged her to desist, as she would release her from all claims. For seven years after the husband's death the widow lived with her mother, and made no demand, but several times offered to execute a release. The daughter then married again, and a bill was filed against the mother to make good the money lost; but Lord Hardwicke said, "I think it comes very near the case of an infant, who, contracting a debt during his minority, shows his consent to it by confirming it after he comes of age, which shall effectively bind him, though it was voidable at his election. So here a promise by the wife to release during the coverture, it is certain, would not bind the wife, but if, after the death of her \*husband, she repeats the promise, it is a confirmation of it, and good." <sup>(o)</sup> [\*777]

It seems that a public and fluctuating body, as parishioners, may be

<sup>(k)</sup> Walker v. Symonds, 3 Sw. 64, per Lord Eldon; Hope v. Liddell, 21 Beav. 183; Brice v. Stokes, 11 Ves. 326; Macdonnell v. Harding, 7 Sim. 190; Broadhurst v. Balguy, 1 Y. & C. Ch. Ca. 16; Lincoln v. Wright, 4 Beav. 432; Blackwood v. Borrowes, 2 Con. & Laws. 459; and see Thompson v. Simpson, 1 Dru. & War. 459; Kent v. Jackson, 14 Beav. 384; Graham v. Birkenhead Co., 2 Mac. & Gor. 146; Stone v. Godfrey, 5 De Gex, Mac. & Gor. 76.

<sup>(l)</sup> See p. 742, supra; Story v. Gape, 2 Jur. N. S. 706.

<sup>(m)</sup> Browne v. Cross, 14 Beav. 105, pp. 111, 113; and see the cases at pp. 741, 742, 743, supra.

<sup>(n)</sup> Harden v. Parsons, 1 Ed. 145; and see Loader v. Clarke, 2 Mac. & Gor. 382.

<sup>(o)</sup> Smith v. French, 2 Atk. 243.

bound by acquiescence.(p) But it is almost unnecessary to repeat, that acquiescence cannot be objected against a class of persons, as parishioners or creditors, *with the same degree of force* as against a single individual.(q)

Lastly, a *cestui que trust* may preclude himself from his remedy against the trustee by executing a formal *release* of the breach of trust, or giving validity to the transaction by an express *confirmation*.(r) And if the *cestui que trust* release the principal in a breach of trust or fraud, he cannot afterwards proceed against the other parties who would have been secondarily liable.(s)

But acquiescence, and release or confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions:—

1. As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a *feme covert* or infant, and in the case of infants, the court continues its protection even after they have attained twenty-one till such time as they have acquired all proper information.(t) However, a *feme covert* is clearly *sui juris* as regards property settled to her separate use in possession where there is no restraint against anticipation; though she cannot bind herself prospectively as to an estate which will stand limited to her separate use upon a contingency which has not yet occurred.(u)

[\*778] Whether the separate estate <sup>of</sup> a married woman who is restrained from application can be affected by her acquiescence, appears to be at present unsettled. In a late case(v) Lord Justice Turner intimated his leaning to be in favour of the affirmative, though, but for such high authority, the negative might have seemed the sounder view. The language of Lord Justice Knight Bruce in the case alluded to, was more guarded. But, of course, the restraint on anticipation can impose no fetter as respects income accrued due before the acts of acquiescence relied upon.(w)

2. The *cestui que trust* must be fully cognisant of all the facts and circumstances of the case.(x)

(p) See *Corporation of Ludlow v. Greenhouse*, 1 Bligh, New Rep. 92; In re *Chertsey Market*, 6 Price, 280, 284; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 105, 108; *Attorney-General v. Scott*, 1 Ves. 415; *Attorney-General v. Cumming*, 2 Y. & C. Ch. Ca. 150.

(q) See *supra*, p. 471.

(r) *Blackwood v. Borrowes*, 2 Conn. & Laws. 459; *French v. Hobson*, 9 Ves. 103; *Wilkinson v. Parry*, 4 Russ. 272; *Aylwyn v. Bray*, cited in *Small v. Attwood*, 2 Y. & J. 517.

(s) *Thompson v. Harrison*, 2 B. C. C. 164; see *Blackwood v. Borrowes*, 2 Conn. & Laws, 478.

(t) See *Walker v. Symonds*, 3 Sw. 69; *Hicks v. Hicks*, 3 Atk. 274; *Osmond v. Fitzroy*, 3 P. W. 131; *Hylton v. Hylton*, 2 Ves. 547; *Kilbee v. Sneyd*, 2 Moll. 233; *March v. Russell*, 3 M. & C. 42, 44; *Bateman v. Davis*, 3 Mad. 98; *Wedderburn v. Wedderburn*, 4 M. & C. 41.

(u) *Mara v. Manning*, 2 Jon. & Lat. 311.

(v) *Derbshire v. Home*, 3 De Gex, Mac. & Gor. 80; *Robinson v. Wheelwright*, 6 De Gex, M. & G. 535; *Wilton v. Hill*, 15 L. J. N. S. (Ch.) 156.

(w) *Rowley v. Unwin*, 2 Kay & John. 138.

(x) *Adams v. Clifton*, 1 Russ. 297; *Walker v. Symonds*, 3 Sw. 1; *Randall v. Errington*, 10 Ves. 423; *Buckeridge v. Glasse*, Cr. & Ph. 126; *Bennett v. Colley*, 2 M. & K. 232, per Lord Brougham; and see *Earl of Chesterfield v. Janssen*, 2



3. The *cestui que trust* must not only be acquainted with the *facts*, but be also apprised of the *law*, or how those facts would be dealt with if brought before a court of equity.(y)

4. The release must not be wrung from the *cestui que trust* by distress or terror.(z)

## SECTION IV.

### OF THE MODE AND EXTENT OF REDRESS IN BREACHES OF TRUST COMMITTED BY TRUSTEES OF CHARITIES.

#### I. Of the *mode* of redress.

The regular and ordinary course of proceeding is by way of \*information(1) in the name of the attorney-general: the king is [<sup>\*779</sup>] *parens patriæ*, and it is the duty of his officer, the attorney-general, to see that justice is administered to every part of his majesty's subjects. Relators need not be personally interested.(a) They are required merely because the attorney-general, prosecuting a suit in the name of the crown, would not be liable to costs, and unless some person were made responsible, proceedings might be instituted very oppressive to individuals.(b)

In the reign of Elizabeth an act was passed, commonly called the Statute of Charitable Uses,(c) by which the court of chancery was empowered to issue commissions to certain persons, including the bishop of the diocese, who were authorized, after summoning a jury of the county where the property was situate, to inquire into any abuse or misapplication of the trust estate. Many of these proceedings were so little consonant with justice, and, on appeal to the lord chancellor, were found at once so puzzling, and so far from accomplishing the object in view, that at length the practice of issuing commissions fell into disuse, and people again resorted to the original process by way of information.(d)

Ves. 146, 149, 152, 158; Roche v. O'Brien, 1 B. & B. 339, and the cases there cited; Bowes v. East London Water Works Company, 3 Mad. 375; McCarthy v. Decaix, 2 R. & M. 615; Wedderburn v. Wedderburn, 2 Keen, 722; 4 M. & C. 41; Munch v. Cockerell, 9 Sim. 339; 5 M. & Cr. 179; Broadhurst v. Balguy, 1 Y. & C. Ch. Ca. 16.

(y) Cockerell v. Chalmley, 1 R. & M. 425, per Sir J. Leach; and see Chesterfield v. Janssen, 2 Ves. 146, 149, 152, 158; Bowes v. East London Water Works Company, 3 Mad. 384; McCarthy v. Decaix, 2 R. & M. 615; Marker v. Marker, 9 Hare, 16; Stone v. Godfrey, 5 De Gex, Mac. & Gor. 90; Burrows v. Walls, 5 De Gex, M. & G. 254.

(z) Bowles v. Stewart, 1 Sch. & Lef. 209, see 226.

(a) Attorney-General v. Vivian, 1 Russ. 226.

(b) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. R. 48, per Lord Redesdale.

(c) 43 Eliz. c. 4.

(d) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. R. 61, 62, per Lord Redesdale.

(1) Where the management of no charity *revenue* is concerned, as in a suit instituted by parishioners for the mere purpose of setting aside the nomination of a clerk to the bishop by the trustees of the adowson, the attorney-general need not be a party; it is the simple case of *cestuis que trust* calling upon the trustees to exercise the legal right; and the suit should be not by information, but by bill. See Attorney-General v. Parker, 1 Ves. 43; S. C. 3 Atk. 576; Attorney-General v. Forster, 10 Ves. 335; Attorney-General v. Newcombe, 14 Ves. 1; Davis v. Jenkins, 3 V. & B. 151; Inhabitants of Clapham v. Hewer, 2 Vern. 387; Attorney-General v. Cuming, 2 Y. & C. Ch. Ca. 149.

After commissions had ceased to be issued, the legislature endeavoured to provide a remedy, not as before, by creating a new jurisdiction, but by giving liberty to proceed under the old jurisdiction in a summary mode. The 52 Geo. 3, c. 101, commonly called Sir Samuel Romilly's Act, and intituled "An act \*to provide a summary remedy in [\*780] cases of abuses of trusts created for charitable purposes," declared that "in every case of a breach of any trust created for charitable purposes, or whenever the direction or order of a court of equity should be deemed necessary for the administration of any trust for charitable purposes, it should be lawful for any two or more persons to present a petition to the chancellor, master of the rolls, or court of exchequer, praying such relief as the nature of the case might require, such petition to be heard in a summary way upon affidavits or such other evidence as should be produced, the order made thereon to be final and conclusive, unless appealed against to the house of lords within two years from the entry thereof." And it was provided that "every petition should be signed by the persons preferring the same in the presence of and be attested by the solicitor or attorney concerned for the petitioners, and should be allowed by his majesty's attorney or solicitor-general."

These enactments, though penned by a very able hand, have been strongly reprobated as very loosely and obscurely worded—as tending rather to increase than diminish the expense of the application—in short, as having produced more mischief than benefit. "It was a wise saying," observed Lord Redesdale, "that the farthest way about was often the nearest way home, and he believed that these summary proceedings would be not always the nearest, or at least not the best way home."(e)

Upon the construction of this statute the following points have been resolved :—

1. Although the act authorises *any* two or more persons to present the petition, the words must be understood to mean any persons *having an interest*:(f) and the court is bound to see not only that the petitioners are possessed of a clear interest, but that they prove themselves to be possessed of the identical interest they allege in their petition.(g)

2. It has been said that the body of the statute is to be governed by [\*781] \*the preamble, and therefore will not authorize a petition for any other purpose than relief against a breach of trust.(h) But this narrow construction gives no force to the words in the act, "*or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes*;" and the doctrine has since been called into question, and may be considered as overruled.(i)

(e) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. R. 49.

(f) In re Bedford Charity, 2 Sw. 518, per Lord Eldon.

(g) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. R. 91, per Lord Eldon.

(h) Corporation of Ludlow v. Greenhouse. 1 Bligh, N. R. 66, 67, 81, per Lord Redesdale; and see In re Clarke's Charity, 8 Sim. 42.

(i) In re Upton Warren, 1 M. & K. 410; In re Parke's Charity, 12 Sim. 332; In re Manchester New College, 16 Beav. 610; In re Hall's Charity, 14 Beav. 115; and see In re Slewing's Charity, 3 Mer. 707; Ex parte Rees, 3 V. & B. 12; In re Clarke's Charity, 8 Sim. 34; In re Phillipott's Charity, 8 Sim. 381; and the cases collected in the note to In re Hall's Charity, 14 Beav. 120.

3. The provision extends only to *plain and simple* cases for the opinion or direction of the court, *(k)* not where a question is to be discussed adversely who are to be intrusted with the administration of the charity estate, *(l)* or who are entitled to the benefit of it, *(m)* or whether the trustees or governors of the charity have or not, by the constitution of it, a certain authority, as of removing a master, *(n)* or where any stranger is interested *(o)* (for the right of a third person cannot be disposed of on petition, *(p)* or where the relief which is sought is directed against the *assets* of a deceased trustee, *(q)* or where the object of the application is not to have the existing charity regulated, \*but to have the funds diverted to some other charitable purpose. *(r)* The court has juris- [\*782] diction, however, under the act, to settle a scheme of the charity, *(s)* or to alter a scheme previously settled by decree, *(t)* or to appoint new trustees, *(u)* or where parishes have been divided to apportion the charities amongst the districts, *(v)* or to direct a sale of the charity estate in a proper case, *(w)* and generally the court, as between the trustees and *cestuis que trust* of the charity, exercises a discretion as to whether it can put in operation the powers given by the act with benefit to the charity. *(x)*

4. The allowance "by the attorney or solicitor-general" must be construed with reference to the previous law upon the subject, and must therefore be taken to mean, not by the attorney or solicitor-general indif-

*(k)* Corporation of Ludlow v. Greenhouse, 1 Mad. 92, reversed in D. P. 1 Bl. N. R. 17, see 66, 81, 89; In re Phillipott's Charity, 8 Sim. 381; Ex parte Brown. Coop. 295; Ex parte Skinner, 2 Mer. 456, 457, per Lord Eldon; and see In re Chertsey Market, 6 Price, 277.

*(l)* In re West Retford Church and Poor-lands, 10 Sim. 101; In re Phillipott's Charity, 8 Sim. 381.

*(m)* Corporation of Ludlow v. Greenhouse, 1 Bligh, N. R. 66; Re Manchester New College, 16 Beav. 610; In re Clarke's Charity, 8 Sim. 34.

*(n)* Attorney-General v. Corporation of Bristol, 14 Sim. 648; and see Manchester New College, 16 Beav. 610; Attorney-General v. East Retford Grammar School, 17 Law Journ. N. S. Ch. 450; but see Re Fremington School, 10 Jur. 512; 11 Jur. 421; Re Phillips's Charity, 9 Jur. 959.

*(o)* Corporation of Ludlow v. Greenhouse, 1 Bligh, N. R. 66, per Lord Redesdale; Ex parte Rees, 3 V. & B. 10; In re Manchester New College, 16 Beav. 610; but see In re Upton Warren, 1 M. & K. 410.

*(p)* Corporation of Ludlow v. Greenhouse, 1 Bl. N. R. 93, per Lord Eldon.

*(q)* Ex parte Skinner, Wils. 15, per Lord Eldon; In re Saint Wenn's Charity, 2 S. & S. 66.

*(r)* In re Reading Dispensary, 10 Sim. 118.

*(s)* In re Royston Free Grammar School, 2 Beav. 228; In re Berkhamstead Free Grammar School, 2 V. & B. 134; In re Shrewsbury Grammar School, 1 Mac. & Gor. 324; 1 Hall & Tw. 401.

*(t)* Attorney-General v. Bishop of Worcester, 9 Hare, 328.

*(u)* Bignold v. Springfield, 7 Cl. & Fin. 71.

*(v)* In re West Ham Charities, 2 De Gex & Sm. 218.

*(w)* Re Parke's Charity, 12 Sim. 328. In Re Alderman Newton's Charity, 12 Jur. 1011 (the case of an exchange), and again, in Re Sowerby's Charity, Jan. 26, 1849, before the V. C. of England (the case of a willing purchaser) such orders were made, but the court did not warrant the title; but in Suir Island Female Charity School, 3 Jon. & Lat. 171, the lord chancellor, notwithstanding Re Parke's Charity, declined to make such an order. As to the jurisdiction of the court generally to sell charity lands, see *supra*, p. 503; Re Ashton Charity, 22 Beav. 288.

*(x)* In re Manchester New College, 16 Beav. 610.



ferently, but by the attorney-general, when there is such an officer, and in the vacancy of that office, by the solicitor-general.(y)

5. If the petition be not signed by the attorney-general or solicitor-general, or if, after signature, it be not duly served, any order made by the court will be an absolute nullity.(z) and the petition may be taken off the file for irregularity.(a)

6. As the intention of the legislature was to guard the charity fund from abuse, and with that view to prevent proceedings from being instituted, as they frequently were before, for no other reason than because [783] it was known the costs would \*be paid out of the charity estate, the attorney-general, or, in the vacancy of that office, the solicitor-general, ought not to sanction the petition with his signature but upon as much deliberation as if the relief were sought by way of information.(b)

7. The attorney-general by his *allocatur*, or allowance, of the petition, is not *functus officio*, and precluded from all future control, but must be made a party to any subsequent proceedings under the petition, as he would have been to all proceedings by way of information.(c)

8. The attorney-general, as representing the person of the king in his character of *parens patrie*, is bound to see justice done, not only to the plaintiff in the petition, but also to the trustees and other defendants, and therefore is not estopped by his *allocatur* of the petition from afterwards correcting his judgment, but may support or oppose the views of the petitioners, as in his discretion he may think fit.(d)

9. When the jurisdiction of the court has been once attracted by the petition, any subsequent order may be made upon motion without the expense of any further petition.(e)

10. No appeal lies to the lord chancellor from an order made by the master of the rolls, but only to the house of lords directly.(f)

Under powers given by the 58 Geo. 3, c. 91, and 59 Geo. 3, c. 81, certain commissioners of inquiry into charities were appointed, and by the 59 Geo. 3, c. 91, it was enacted, that when it appeared to such commissioners of inquiry that the directions or orders of a court of equity were requisite for remedying any *neglect, breach of trust, fraud, abuse*, or misconduct in the management of any trust created for charitable purposes, &c., it should be lawful for the said commissioners, \*to [784] certify the particulars of such case to his majesty's attorney-general, and thereupon it should be lawful for the attorney-general to

(y) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. R. 51, 52, 82, per Lord Redesdale; *Ex parte Skinner*, 2 Mer. 456, per Lord Eldon.

(z) *Attorney-General v. Green*, 1 J. & W. 305.

(a) *In re Dovenby Hospital*, 1 M. & Cr. 279.

(b) *Ex parte Skinner*, 2 Mer. 456, per Lord Eldon.

(c) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. R. 51, 65, 82, 83, per Lord Redesdale; *Attorney-General v. Stamford*, 1 Phill. 737; and see *In re Chertsey Market*, 6 Price, 271; *Attorney-General v. Haberdashers' Company*, 15 Beav. 397.

(d) *Corporation of Ludlow v. Greenhouse*, 1 Bl. N. R. 43-52.

(e) *In re Slewringe's Charity*, 3 Mer. 707; *Ex parte Friendly Society*, 10 Ves. 287; *In re Chipping Sodbury School*, 5 Sim. 410.

(f) *Re Royston Grammar School*, 9 L. J. N. S. Ch. 250; and see *Re Manchester College*, 16 Beav. 618.

apply to, or commence a suit in the Court of Chancery, stating and setting forth the neglect, breach of trust, fraud, abuse, or misconduct or other cause of complaint or application, and praying such relief as the nature of the case might require. The labours of these commissioners of inquiry proved very valuable, and many informations were filed in consequence of certificates made by them; but their powers, after being frequently continued, expired in 1837.

By the late Charitable Trusts Act, 1853, great additional facilities have been afforded for detecting and remedying breaches of trust in charity matters.

Four commissioners are appointed,<sup>(g)</sup> to whom are confided powers of inquiry<sup>(h)</sup> similar to those given to the commissioners appointed by the acts of George 3, and also a similar power of certifying cases to the attorney-general as fit for his interference.<sup>(i)</sup>

In cases of charities the incomes of which exceed 30*l.* per annum, the same jurisdiction is given in charity cases to the chancery judges at chambers as was before the act exercisable by the Court of Chancery or the lord chancellor intrusted with the custody of lunatics in a suit regularly constituted, or upon petition; but the judge may direct an information, bill, or petition to be filed or presented.<sup>(k)</sup> And the provisions of the act in respect to charities whose incomes exceed 30*l.* per annum, are applicable to charities within the city of London, the income whereof is less than 30*l.* per annum.<sup>(l)</sup>

Where the incomes of charities do not exceed 30*l.* per annum, the District Courts of Bankruptcy and County Courts have the same jurisdiction as the Court of Chancery;<sup>(m)</sup> and with the permission of the charity commissioners, to be applied for within one month after the order is made,<sup>(n)</sup> an appeal lies to the Court of Chancery.<sup>(o)</sup>

The act contains a special provision that no suit or \*proceed-  
ing not being an application "*in any suit or matter actually* [*\*785*]  
*pending*," shall be commenced or taken without an authority previously obtained from the charity commissioners. The construction of this clause has given rise to considerable difficulty. It was at first held that where money had been paid into court under the Trustee Relief Act, 10 & 11 Vict. c. 96,<sup>(p)</sup> or under a railway act,<sup>(q)</sup> no such suit or matter was pending as to obviate the necessity of previously obtaining the concurrence of the charity commissioners, and further, that if a scheme had been settled in the same charity under Sir S. Romilly's Act, a petition for a new application of part of the charity funds must have had the previous sanction of the charity commissioners.<sup>(r)</sup> But it has since been decided by the Court of Appeal, that in such cases the previous sanction of the charity commissioners is unnecessary. The object of the provision

(g) Sect. 1.

(i) Sect. 20.

(l) Sect. 30.

(n) Sect. 39.

(p) *Re Markwell's Legacy*, 17 Beav. 618; *In re Skeetes*, 1 Jur. N. S. 1037; and see *Re Bingley School*, 2 Drewry, 283.

(q) *Re London Brighton and South Coast Railway Company*, 18 Beav. 608.

(r) *Re Ford's Charity*, 3 Drewry, 324.

(h) Sects. 9 to 14.

(k) Sect. 28.

(m) Sect. 32.

(o) Sect. 40.

was merely to stop the enormous abuses in reference to proceedings in charity matters, and the words *suit or matter actually pending* mean pending at the time of the *application*, and not at the passing of the act.<sup>(s)</sup>

The act contains other provisions<sup>(t)</sup> of a preventive rather than a remedial kind. Thus by the 16th section, the board has power to entertain applications for their opinion or advice, and persons acting in accordance therewith are indemnified.

By the 48th section, lands belonging to any charity may be vested in the secretary of the board as a corporation sole by the name of the treasurer of public charities; and by the 51st section, annuities, stock, shares, or securities held for any charity may be vested in the official trustees of charitable funds; and by the 54th and following sections, the board have power to approve provisionally of new schemes of charities, varying from the original endowment, but which are to be submitted annually to parliament for its ratification.

By the amendment act, 18 & 19 Vict. c. 124, by the 15th \*section [\*786] the name of the treasurer of public charities is abolished, and the secretary of the board for the time being is styled the official trustee of charity *lands*; and, by the 17th and 18th section, the act provides for the appointment of the official trustees of charitable *funds* to consist of the secretary of the board for the time being, and such other persons as the lord chancellor may appoint who are to have perpetual succession.

## II. Of the *extent* of redress.

Under this head we propose to inquire only within what period of time the account of *mesne* rents and profits directed against the trustee guilty of the breach of trust will be restricted.

It has been stated in a former page, that to suits for relief in equity there exists but three bars: first, a statute of limitations; secondly, the presumption of an act which, if done, is an answer to the plaintiff's demand; and, thirdly, the public or private inconvenience that would arise from the court's interference.

1. It is clear that until the recent statute informations against trustees of charities (the trust being not constructive but direct) were not within the purview of the *Statutes of Limitations*.<sup>(u)</sup> It was at one time, indeed, held, that although the statute was not an absolute bar, yet the court would be governed by the same period, as a good rule how far back to carry the account; <sup>(v)</sup> but afterwards the doctrine was denied, and the court professed to pay no attention whatever to the limitation of any statute.<sup>(w)</sup> But now charities are within the operation of the 3 & 4

(s) *Re Lister's Hospital*, 6 De Gex, M. & G. 184.

(t) See p. 504, *supra*, for powers of leasing, sale, &c., given by the Acts.

(u) *Attorney-General v. Mayor of Exeter*, Jac. 448, per Sir T. Plumer; *Attorney-General v. Brewers' Company*, 1 Mer. 498, per Sir W. Grant; see *Incorporated Society v. Richards*, 1 Conn. & Laws. 58; 1 Dru. & War. 258.

(v) *Love v. Eade*, Rep. t. Finch, 269; 2 Eq. Ca. Ab. 12, pl. 20.

(w) *Attorney-General v. Mayor of Exeter*, *Attorney-General v. Brewers' Company*, *Incorporated Society v. Richards*, *ubi supra*.



W. 4, c. 27, but are protected by the saving clause, which excepts cases of an express trust.<sup>(x)</sup>

2. It was observed by Sir. T. Plumer, that *presumption* also did not apply to the case of trustee and *cestui que trust*.<sup>(y)</sup> \*However, [\*787] although the court cannot presume the *cestui que trust* to have released the right to the estate, it may, in certain cases, presume the employment of the funds in a particular manner to have been by the direction or with the consent of the *cestui que trust*. In *Attorney-General v. Scott*,<sup>(z)</sup> the parishioners had purchased an advowson by subscription in the names of trustees; and by a decree of the court the advowson had been vested in twenty-five of the principal inhabitants, upon trust to elect and present a proper clerk, the presentation to be approved by certain assistant preachers. The trustees, for a century, had been in the habit of electing and presenting without such approbation; and, the last election being disputed as irregular for want of that formality, Lord Hardwicke said, "The general disusage was evidence of the consent of the parishioners to lay aside that part of the constitution as useless: he would presume the common consent of the trustees and parishioners to lay aside the custom, as the court would presume an ancient bye-law to vary the constitution of a corporation."

3. The court may set a limit to the account on the ground of *inconvenience*; and this bar applies in its full force to cases of charities. "It is the constant practice of courts of equity," said Sir Thomas Plumer, "to discourage stale demands; and this principle has often been acted upon in cases of charities. When there has been a long period, during which a party has, under an innocent mistake, misapplied a trust fund from the *laches* and neglect of others, that is, from no one of the public setting him right, and when the accounts have, in consequence, become entangled, the court, under its general discretion, considering the enormous expense of the inquiries, and the great hardship of calling upon representatives to refund what families, acting on the notion of its being their property, have spent, has been in the habit, while giving relief, of fixing a period to the account. The result of the authorities is, that in each case the court is bound to be guided by the particular circumstances."<sup>(a)</sup>

\*In *Attorney-General v. The Corporation of Stafford*,<sup>(b)</sup> the trustees in their answer, filed in 1811, had furnished accounts of [\*788] the trust estate from the year 1791, and Lord Gifford saw no inconvenience in decreeing the account as far back as the trustees themselves had stated it, but refused to extend it farther.

When no inconvenience can be no objected, the court will carry back the account to the time of commencement of the misapplication, or at least up to the period, when the plaintiff's title to the fund first accrued.

In *Attorney-General v. The Mayor of Exeter*,<sup>(c)</sup> the defendants

(x) See ante, 749, 750.

(y) *Attorney-General v. Mayor of Exeter*, ubi supra.

(z) 1 Ves. 413; and see *In re Chertsey Market*, 6 Price, 280.

(a) *Attorney-General v. Mayor of Exeter*, Jac. 448.

(b) 1 Russ. 547.

(c) Jac. 443; 2 Russ. 362.

admitted by their answer, that they had been in possession of the charity estate for the last 200 years, and had applied considerable parts of the rents and profits to the purposes of the charity, and that the residue of the rents and profits, the amounts of which would appear from their books, they had always been ready and willing to apply; and Sir W. Grant decreed an account of the rents and profits without any limitation of time. Sir T. Plumer, before whom the cause was reheard, observed, "Suppose the case of trustees called upon to account for the receipts of two or three hundred years, who admit the receipt, and say they have conscientiously laid up the money, and that they have it ready for the charity, or that they have invested it in the funds or in land, unmixed with other money. What is the court to do? Can the court give to the trustees a part of the money or land which they acknowledge not to be theirs? It is admitted to belong to the charity, and the charity must have it. There is no difficulty from complicated accounts: all the topics of hardship that may sometimes be urged fail of application to this case." And his honour compelled the defendants to account for the rents and profits for the whole period of 200 years.

In *Attorney-General v. The Brewers' Company*,<sup>(d)</sup> an estate had been vested in that company upon trust for the repairs of the Harrow Road; and, by an act of 19 Geo. 3, the proprietors of all lands chargeable with [789] the said repairs were directed \*to pay the sums which should be so charged to certain trustees appointed by the act. About 1810, an information was filed in the name of the attorney-general, the trustees under the act being the relators, for an account of the rents and profits which the company had not applied. Sir W. Grant said, "It was a point not yet decided, from what period a corporate body should account in matters of trust; for to give the account only from six years would be to create an analogy between a trust account and a common account. However, the act which had been passed was not meant to have a retrospective operation, and the trustees under that act could not say they had a right to the accumulated fund from any antecedent period; and the attorney-general, suing at the relation of the trustees, could have only such an account as the trustees themselves would be entitled to;" and therefore his honor directed the account to be taken from the date of the act of parliament, a period of about thirty years.

In a recent suit against a corporation the account was carried back to the last appointment of new trustees of the corporation, a period short of ten years; and in another contemporaneous suit against the same corporation, but where the legal estate was not in trustees, but in the corporation itself, the court by analogy, and for want of another fixed point, ordered the account to commence at the date of the last appointment of new trustees in the first suit.<sup>(e)</sup>

In every suit, the limit of the account is regulated by the particular circumstances. In some cases it is carried back to the period when the corporation was first informed of the misapplication (as by the publication of the charity commissioners' report; ) in other cases it has been directed

(d) 1 Mer. 495.

(e) *Attorney-General v. Newbury*, 3 M. & K. 647.

from the time of filing the information, and in others from the date of the decree.(f)

In some cases, where the defendant has been in strictness accountable for a very long period, but, if the right were enforced, it would impose great hardship, it has been referred to the attorney-general, as representing the charity, \*to certify whether under the circumstances it might not be proper for the charity to accept a less sum.(g) [\*790]

But where the trustees have diverted the charity funds from their proper channel through *mistake*, it is now settled, that the court will not call back any disbursements made before the filing of the information,(h) or before the trustees had notice that the propriety of such application would be called into question.(i) The court holds a strict hand over trustees where there is any wilful misemployment; but where the court sees nothing but mistake, while it gives directions for the better management in future, it refuses to visit with punishment what has been transacted in time past. To carry back the account to the very commencement of the misapplication would be the ruin of half the corporations in the kingdom;(k) besides that to act on such a principle would be a great discouragement to undertake the office of trustees of charities.(l)

If an individual make an annual payment for a particular purpose out of the profits of his estate, it is a reasonable presumption, from the strong interest which he has to resist an unfounded demand, that he has inquired the origin of the claim, and he is therefore fixed with implied notice of all the circumstances that attend it; but the same presumption cannot be applied to corporations, because, having no immediate personal interest in the application of the profits of the corporate property, they may, without the imputation \*of culpable negligence, adopt and follow the practice of their predecessors.(m) [\*791]

When the charity fund has been administered by a parish and misapplied, as a parish is a fluctuating body, and the present rate-payers ought not to pay for past defaults, no retrospective account can be ordered.(n)

In the East Retford case,(o) before Sir J. Leach, the court, on proof of a breach of trust by the corporation, directed an inquiry by the master of what property the corporation was possessed not devoted to special

(f) See *Attorney-General v. Drapers' Company*, 6 Beav. 390.

(g) *Attorney-General v. Mayor of Exeter*, 2 Russ. 370; and see *Attorney-General v. Corporation of Carlisle*, 4 Sim. 279; *Attorney-General v. Brettingham*, 3 Beav. 91; *Attorney-General v. Pretyman*, 4 Beav. 462.

(h) *Attorney-General v. Corporation of Exeter*, 2 Russ. 45; affirmed 3 Russ. 395; *Attorney-General v. Dean of Christchurch*, Jac. 474, 637; S. C. 2 Russ. 321; *Attorney-General v. Rigby*, 3 P. W. 145; *Attorney-General v. Caius College*, 2 Keen, 150; *Attorney-General v. Drapers' Company*, 4 Beav. 67; *Attorney-General v. Christ's Hospital*, ib. 73; and see *Attorney-General v. Newbury*, 3 M. & K. 150.

(i) *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 35, see 37; and see *Attorney-General v. Corporation of Berwick-upon-Tweed*, Tam. 239; *Attorney-General v. Caius College*, 2 Keen, 150.

(k) *Attorney-General v. Burgesses of Retford*, 2 M. & K. 37, per Sir J. Leach.

(l) *Attorney-General v. Corporation of Exeter*, 2 Russ. 54, per Lord Eldon.

(m) *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 38, per Sir J. Leach.

(n) *Ex party Fowlser*, 1 J. & W. 70; and see cases cited ib. 73, note (a).

(o) 2 M. & K. 35.



purposes, with the view that compensation might be made to the charity by an immediate *sale*; but the case upon that point was subsequently appealed against and reversed, as contrary to principle,<sup>(p)</sup> and the plaintiff must now confine himself to a sequestration in the ordinary course.

[\*792]

## \*CHAPTER XXVII.

## MAXIMS OF EQUITY FOR SUSTAINING THE TRUE CHARACTER OF THE TRUST ESTATE AGAINST THE LACHES OR TORT OF THE TRUSTEE.

BESIDES the several rights and remedies which have just been the subject of discussion, the court, with the view of *keeping the trust estate in its regular channel, and sustaining its proper character, whether of realty or personalty, against the laches or other misbehaviour of the trustee*, has found it necessary to establish two maxims, which we now proceed to examine: viz., first, What ought to be done shall be considered as done; <sup>(a)</sup> and, secondly, The act of the trustee shall not alter the nature of the *cestui's que trust estate*.<sup>(b)</sup>

## SECTION I.

## WHAT OUGHT TO BE DONE SHALL BE CONSIDERED AS DONE.

"The forbearance of the trustees," said Sir J. Jekyll, "in not doing  
[\*793] what it was their office to have done, shall in no sort prejudice \*the *cestuis que trust*, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that what ought to have been done shall be taken as done, and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money."<sup>(c)</sup> And Lord Macclesfield, in the case of a bequest to a trustee for purchasing lands, observed, "If the purchase had been made it must have gone to the heir, but if the trustee, by delaying the purchase, might alter the right, and give it to the executors, this would be to *make it the will of*

<sup>(p)</sup> 3 M. & Cr. 484; and see *Attorney-General v. Newark-upon-Trent*, 1 Hare, 395.

<sup>(a)</sup> *Walker v. Denne*, 2 Ves. jun. 182, per Lord Loughborough; *Foone v. Blount*, Cowp. 467, per Lord Mansfield; *Holland v. Hughes*, 16 Ves. 114, per Sir W. Grant; *Gaskell v. Harman*, 11 Ves. 507, per Lord Eldon; *Stead v. Newdigate*, 2 Mer. 530, per Sir W. Grant; *Pulteney v. Darlington*, 1 B. C. C. 237, per Lord Thurlow; *Burgess v. Wheate*, 1 Ed. 186, per Sir T. Clarke; *Lechmere v. Earl of Carlisle*, 3 P. W. 215, per Sir J. Jekyll; *Fitzgerald v. Jervoise*, 5 Mad. 29, per Sir J. Leach; *Earl of Buckingham v. Drury*, 2 Ed. 65, per Lord Hardwicke; *Guidot v. Guidot*, 3 Atk. 256, per Lord Hardwicke; *Crabtree v. Bramble*, Ib. 687, *per eundem*; *Trafford v. Boehm*, Ib. 446, *per eundem*; &c.

<sup>(b)</sup> *Philips v. Brydges*, 3 Ves. 127, per Lord Alvanley; *Earlom v. Saunders*, Amb. 242, per Lord Hardwicke; *Selby v. Alston*, 3 Ves. 341, per Sir R. P. Arden.

<sup>(c)</sup> *Lechmere v. Earl of Carlisle*, 3 P. W. 215.

*the trustee, and not the will of the testator, which would be very unreasonable and inconvenient."*(d)

Upon these grounds it is in equity a universal rule, that money directed to be laid out in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement, or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose, or is only covenanted to be paid, whether the land has been actually conveyed, or is only agreed to be conveyed.(e)

Thus, if money be stipulated to be laid out in land to be settled on a *feme covert* in fee or in tail, the husband of the *feme* is entitled to his curtesy, though no purchase be actually made in the lifetime of the wife; and he will be decreed the interest of the money until a purchase can be found; and when the investment has been made, he will have a life estate in the lands.(f)

Whether under similar circumstances a widow could, before the late Dower Act, have established her title to dower, was much questioned. It was admitted she was not dowable of a *\*mere trust estate*;(g) [\*794] but, where money was to be converted into land, and the interest was only prevented from being legal through the forbearance of the trustee, it was contended that the rights of parties ought not to be varied by the neglect of the person who is merely the nominal instrument.

"Marriage," said Sir J. Jekyll, "is in its nature a *civil*, and in its celebration a *sacred* contract, and the obligation is a consideration moving from each of the contracting parties to the other, and from this obligation arises an equity to the wife in several cases without any previous agreement, as to make good a defective execution of a power, or defective conveyance, or supply the defect of surrender of copyhold estate: in all which the court relieves the wife, and makes a provision for her, where it is not unreasonable or injurious to others."(h) And he afterwards added, "I cannot but wonder how it ever came to be thought that a tenant by the curtesy was entitled to relief in equity more or farther than a dowress, and particularly that a tenancy by the curtesy may be of a trust estate, but not dower, which is no less than a direct opposition to the rule and reason of the law, which allows *dower* of a *seisin* in law, but not a *tenancy by the curtesy*, because the wife cannot gain an actual *seisin*, but the husband may; which reason holds in a trust estate; for the wife cannot gain or compel a trustee to convey the legal estate to the husband, but the husband himself may; therefore, if any distinction is to be made, dower, one would think, ought to be preferred to curtesy."(i) If the wife, therefore, had this *general equity*, why might she not come into chancery, and plead the rule of the court that what

(d) Scudamore v. Scudamore, Pr. Ch. 543.

(e) Fletcher v. Ashburner, 1 B. C. C. 499; and see Wheldale v. Partridge, 5 Ves. 396.

(f) Sweetapple v. Bindon, 2 Vern. 536; Cunningham v. Moody, 1 Ves. 174; Dodson v. Hay, 3 B. C. C. 405. (g) Altered by the late Act, 3 & 4 W. 4, c. 105.

(h) Banks v. Sutton, 2 P. W. 704.

(i) Banks v. Sutton, 2 P. W. 706.

ought to be done should be taken as done—that, as the equitable estate should have been made a legal estate, it ought to be so considered in respect of dower?

The opinion of Lord Hardwicke was on more than one occasion expressed adversely to the wife's claim; <sup>(k)</sup> but there were several authorities in favour of the dower. <sup>(l)</sup>

<sup>[\*795]</sup> \*Now, by a late act (except where the marriage was celebrated on or before the 1st day of January, 1834,) the legislature has given dower out of every species of trust estate: subject to be defeated, however, by any declaration of intention on the part of the husband. <sup>(m)</sup>

Upon the principle under discussion it has also been argued, that if money be articulated, or directed, to be laid out in land to be settled on a person in fee, if the *cestui que trust* die without heirs, the money shall, as land, escheat to the lord: but between dower and escheat there is, it is submitted, this manifest distinction, that a widow claims *through* her husband, and has a general equity, which gives her *locus standi* in court; but a lord by escheat comes under no head of equity—is entirely a stranger to the trust, claiming by title paramount of his own. <sup>(n)</sup> The pretence for his claim is, that the operation of the rule so absolutely converts the equitable into a legal estate, that all the incidents, that would have belonged to the legal, must be considered in chancery as attached to the equitable; but the rule was not meant to subvert the nature of a trust, but to be subservient to it—not to benefit third persons, but to protect the interest of parties privy to the trust. And of this opinion appears to have been Sir T. Clarke, in the case of *Burgess v. Wheate*. <sup>(o)</sup> There A., seised *ex parte paterna*, conveyed the estate to trustees in trust for herself, her heirs, and assigns, and died without heir of the paternal line, but leaving an heir of the maternal; and it was argued in favour of the heir *ex parte maternâ*, that, as the *cestui que trust* might at any time have called upon the trustees to convey, and equity looked upon what ought to have been done as done, the court would by a fiction consider the conveyance of the legal estate as actually executed; and then, in default of heirs of the paternal line, the lands would descend to the heir *ex parte maternâ*. But the master of the rolls said, “Had such a <sup>[\*796]</sup> conveyance been executed, it would have \*been like a feoffment and refoffment, and have made A. seised of a new use; but, as this was not done, the consequences insisted on will not follow, for nothing is looked upon in equity as done but what *ought* to have been done—not what *might* have been done; *nor will equity consider things in that light in favour of everybody, but only of those who had a right to pray it might be done.* The rule is, that it shall be either between the

(k) See *Cunningham v. Moody*, 1 Ves. 176; *Crabtree v. Bramble*, 3 Atk. 687.

(l) *Fletcher v. Robinson*, cited *Dudley v. Dudley*, Pr. Ch. 250; S. C. stated from R. L. in *Banks v. Sutton*, 2 P. W. 709; *Otway v. Hudson*, 2 Vern. 583; *Banks v. Sutton*, 2 P. W. 700; In re Lord Lismore, 1 Hog. 177.

(m) See p. 626, *supra*.

(n) *Walker v. Denne*, 2 Ves. jun. 185, per Lord Loughborough; *Henchman v. Attorney-General*, 3 M. & K. 494, per Lord Brougham.

(o) 1 Ed. 177; S. C. 1 W. Blackst. Rep. 123.



*parties who stipulate what is to be done, or those who stand in their place.* A. never prayed a conveyance, and one cannot tell whether she ever would, and the maternal heir is not to be considered as a privy in blood, but a mere stranger.”(p) As the lord by escheat claims not in privity, it results that, according to Sir T. Clarke’s construction of the rule, he has no title to a *subpœna*.

As money to be laid out in land is regarded as land, it could not before the late Wills Act have been devised by an infant, though of sufficient age to bequeath personal estate;(q) and, for the same reason, it will pass by the *cestui’s que trust* will under the general description of all the testator’s lands,(r) or of all his lands in the county of — or elsewhere,(s) though in the latter case it may very plausibly be contended, that the testator could not have referred to money, but must have alluded to something that possessed a local character.

So money to be converted into land is bound by a judgment,(t) but was never accounted personal assets, and therefore was not, until the late act,(u) liable to the payment of simple-contract debts.(v)

\*So a gift by a parent (a freeman of the city of London) to a child of money to be laid out in land was considered a purchase [\*797] by the father, and a donation of the estate, and consequently under the law existing before the recent act,(w) the child was not bound, before receiving his orphanage share, to bring the purchase into hotchpot.(x)

With respect to the *heir* of the person upon whom the lands, when purchased, are directed or agreed to be settled, it is necessary, for ascertaining his rights, to distinguish between the cases where the real representative, claims as against a *stranger*, and where he claims as against the *executor of his own ancestor*.

It appears to be perfectly established that the heir is entitled to the money as land, if he seek to enforce his equity against a *stranger*. Thus,  
1. If a sum of money be *bequeathed* to be laid out in a purchase of lands to be settled to the use of A. and his heirs, and A. die before a purchase has been obtained, the money is the property, not of the executor, but of the heir of A.(y) 2. If on the marriage of A. money be *actually depo-*

(p) 1 Ed. 186.

(q) *Earlom v. Saunders*, Amb. 241. By the late act, 7 W. 4, and 1 V. c. 26, an infant cannot make a will even of personal estate.

(r) *Guidot v. Guidot*, 3 Atk. 256, per Lord Hardwicke; *Rashley v. Masters*, 1 Ves. Jun. 201; S. C. 3 B. C. C. 99; *Green v. Stephens*, 17 Ves. 77; *Biddulph v. Biddulph*, 12 Ves. 161.

(s) *Lingen v. Sowray*, 1 P. W. 172; *Guidot v. Guidot*, 3 Atk. 254.

(t) *Frederick v. Aynscombe*, 1 Atk. 392.

(u) 3 & 4 W. 4, c. 104.

(v) *Whitwick v. Jermin*, cited *Baden v. Earl of Pembroke*, 2 Vern. 58; *Lawrence v. Beverley*, cited Ib. 55; S. C. 2 Keb. 841; *Fulham v. Jones*, cited *Pulteney v. Darlington*, 7 B. P. C. 550; *Foone v. Blount*, Cowp. 467, per Lord Mansfield.

(w) 19 & 20 Vict. c. 94.

(x) *Hume v. Edwards*, 3 Atk. 450; *Annand v. Honeywood*, 1 Vern. 345.

(y) *Scudamore v. Scudamore*, Pr. Ch. 543. *Abbott v. Lee*, 2 Vern. 284, at first sight appears contra, but it seems from the Registrar’s book that the direction for conversion was not imperative, but to be at the discretion of the testator’s executors. Had the money been absolutely converted into *land*, the ultimate remainder by failure of issue of the surviving daughter would have resulted to the executors of the *testator*, but, as *money* to be converted and settled in tail upon a discretion

sited in the hands of trustees, either by A. himself or by a stranger, to be laid out in a purchase of lands to be settled to the use of A. for life, remainder to his wife for life, remainder to the issue in tail, remainder to A. in fee, and A. die without issue, his heir, and not his executor is entitled.(z) 3. If on the marriage of A. there be a *covenant* on the part of B. to lay out money in a purchase of lands to the above uses, and A. die without issue, his heir takes the benefit of the covenant.(a)

[\*798] \*But if the heir have to enforce his claim, not against a stranger, but against the *personal representative of his own ancestor*, as if A. on his marriage covenant to lay out money in a purchase of lands to be settled to the use of himself for life, remainder to his wife for life, remainder to the issue in tail, remainder to his own right heirs, in this instance the question whether the heir can call upon the executor for the money must depend upon this further distinction:—

1. If at the death of A. there be an equitable interest in the fund outstanding in another, as a life estate in the wife, or an estate tail in the issue, then the real quality of the money is sustained and continued by that right, and the heir of A. is entitled to call upon A.'s executor;(b) and if there be such an outstanding claim at the death of the ancestor, the circumstance that the heir institutes his suit during the subsistence of that claim, or after its determination, seems to be perfectly immaterial.(c)

In *Walker v. Denne*(d) Lord Loughborough expressed some doubt upon this doctrine. "Is there," he said, "any case where the heir has filed a bill merely as such, and has had money paid to him, because it was directed to be laid out in land? The idea is commonly entertained, but there are doubts about it. I do not recollect any case where the heir has said, The money ought to be laid out—all the particular objects are gone, and I as heir claim the money as land for my benefit. Upon that I doubt what gives the heir a title to a *subpoena* in this court: between the heir and personal representative their rights are pure legal rights: chance decides what shall be real, what personal: neither has a *scintilla* of equity to make the property that which it is not in fact." To this reasoning of Lord Loughborough it may be replied, that, when it is said there is no equity between the real and personal representatives, the meaning is no more than this—that what is real estate at the death of the ancestor will go the heir, \*and what is personal estate at

[\*799] the death of the testator will go to the executor; but, for the purpose of determining what *is* real and what *is* personal estate, the court is guided, not by the *legal* nature of the property at the death of the

which was not exercised, it belonged to the administrators of the legatee, as was decreed by the court. See the case stated from Reg. Lib. App. No. II.

(z) *Disher v. Disher*, 1 P. W. 204; *Chaplin v. Horner*, Ib. 483; *Edwards v. Countess of Warwick*, 2 P. W. 171; and see *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(a) *Knights v. Atkyns*, 2 Vern. 20.

(b) *Kettleby v. Atwood*, 1 Vern. 298; re-heard, Ib. 471; *Lancy v. Fairechild*, 2 Vern. 101; *Chaplin v. Horner*, 1 P. W. 483; *Lechmere v. Earl of Carlisle*, 3 P. W. 211; affirmed, Cas. t. Talbot, 89; *Oldham v. Hughes*, 2 Atk. 452.

(c) See *Chaplin v. Horner*, 1 P. W. 483; *Lechmere v. Lechmere*, Cas. t. Talb. 80.

(d) 2 Ves. jun. 175, 176, 183; and see *Oxenden v. Lord Compton*, Ib. 70; *Lord Compton v. Oxenden*, Ib. 265.

owner, but, as appears in numerous instances, by the stamp and character impressed upon it in consideration of a court of equity. Thus if a *mortgagee in fee* die, the mortgage being regarded as a mere security for part of the mortgagee's personal estate, the executor may call upon the heir for a conveyance of the land. On the other hand, if the *mortgagor* die, the heir of the mortgagor may call on the executor to discharge the incumbrance out of the personal assets. So if a person contract for the sale of an estate, and die before the completion of the sale, the legal fee descends upon the heir, but the purchase-money passes to the executor; and, on the other hand, if a person contract for the purchase of an estate, and die, the executor must pay the money, but the heir is entitled to the purchase. Thus, in the words of Lord Talbot, "where the dispute is between the two representatives of the deceased, the one of his real, the other of his personal estate, the heir's being but a volunteer in regard to his ancestor will not exclude him from the aid of the court, for though the question is between two volunteers, the court will determine which way the right is, and will decree accordingly."(*e*) "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn in *Walker v. Denne*, and some other modern authorities, that if the instrument be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, it will remain for his benefit, and it is not correct to say the court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir."(*f*) And Sir W. Grant to the same effect observed, "There is no weight in the circumstance that the property is found in the shape of money or land, \*for the character is to be found in the deed. The opinion of Lord Rosslyn that property was to be taken as it happened to be at the death of the party from whom the representatives claimed, was much doubted by Lord Eldon, who held, in which I perfectly concur, it must be considered as being in the state in which it ought to be. Lord Rosslyn's rule was new, and not according to prior cases."(*g*)

2. But if A. die, leaving neither wife nor issue, so that, to use the technical expression, the money is "at home," that is, A. at the time of his death is the absolute and exclusive owner, and there is no outstanding right in another person, in this case the real quality of the money has become merged and extinguished, and on the death of A. the heir has no equity to call upon the executor. To keep on foot the *notional* conversion of money into land, it is evident there must be a right in some one to insist upon the *actual* conversion; but if A. be in possession of 20,000*l.* upon trust to lay out in a purchase of lands to be settled to the use of himself and his heirs, the right and the thing both centring in the same person, there is nobody to sue, and it follows the action is extinguished. (*h*)

(*e*) *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(*f*) *Wheldale v. Partridge*, 8 Ves. 235.

(*g*) *Thornton v. Hawley*, 10 Ves. 138; *Kirkman v. Miles*, 13 Ves. 339.

(*h*) See *Pulteney v. Darlington*, 1 B. C. C. 237.



The decision in the much litigated case of *Chichester v. Bickerstaff*,<sup>(i)</sup> amounted probably to no more than this. On the marriage of Sir J. Chichester with the daughter of Sir C. Bickerstaff, the latter agreed to pay 1500*l.* by way of portion, which, together with 1500*l.* more to be advanced by Sir John Chichester within three years after the marriage, was to be invested in lands to be settled on Sir John for life, remainder to his wife for life, remainder to the issue in tail, remainder to Sir John in fee. Sir John and his lady, within one year after the marriage, both died without issue, the husband having survived. Sir John by his will made Sir C. Bickerstaff his executor, and bequeathed the residue of his personal estate, after payment of his debts, &c., to Frances Chichester, his sister. The heir-at-law of Sir John brought his bill against Sir Charles to \*compel him to pay the 1500*l.*, insisting that by virtue [\*801] of the marriage articles the money ought to be looked upon as land, and therefore belonged to him as heir. Lord Somers said, "This money, though once bound by the articles, yet when the wife died without issue became free again, and was under the power and dispose of Sir John, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this is much stronger where there is a residuary legatee;" and therefore dismissed the bill. Then follows what is apparently the note of the reporter, viz. that "money shall in many cases be considered as land when bound by articles in order to a purchase, but whilst it remains still money, and no purchase made, the same shall be deemed as part of the personal estate of such person, who might have aliened the land in case a purchase had been made."

In this case it has been commonly, but surely without reason supposed, that the suit of the plaintiff was for the 1500*l.* which Sir Charles had articed to pay, and in consequence of this misconception, the authority of the decision has repeatedly been called into question. Thus Sir J. Jekyll, overlooking the very material circumstance that Sir Charles had been appointed the executor of the testator, observes, "It is remarkable with respect to this case, that the wife died within three years after the marriage, during which period the purchase was to be made, so that the time was not come within which the money was to be laid out; and till then it continued money; and possibly the court had some evidence to induce them to believe, that Sir John Chichester looked on the money as personal estate; and *if this does not distinguish it from other cases, I doubt, in opposition to so many decrees, the resolution here given would hardly be maintainable.*"<sup>(k)</sup> And Lord Talbot was apparently under the same misapprehension, for he observes, "Had the money in the case before me been *deposited in the hands of trustees*, it must have been looked upon as real estate, and the heir have been entitled. This seems [\*802] to \*be granted, and no authority against it but what has been collected from the case of *Chichester v. Bickerstaff*. It is probable the court went upon some reason, which induced it to think that

(i) 2 Vern. 295; S. C. cited *Pulteney v. Darlington*, 7 B. P. C. 554.

(k) *Lechmere v. Carlisle*, 3 P. W. 221.

Sir John looked upon that money as personal estate, for otherwise *the authority of that case is not to be maintained, being contrary to all former resolutions.*"<sup>(l)</sup> But Lord Thurlow viewed the case in a different light, and evidently considered the 1500*l.* sought by the bill of the plaintiff to be the 1500*l.* article to be paid by the testator himself, and so payable out of his assets in the hands of Sir John Bickerstaff, his executor. "Where," said his lordship, "a sum of money is *in the hands of one without any other use but for himself*, it will be money, and the heir cannot claim, *like the case of Chichester v. Bickerstaff*, against which I think there is no judgment, though there are a number of opinions. I know no better authority than that case."<sup>(m)</sup>

The registrar's book has been searched, but no *decree* can be found. It appears, however, from a motion in the cause for dissolving an injunction, that the circumstances of the case were as follows:—Sir Charles Bickerstaff had brought an action at law against the plaintiff, and had obtained judgment for a certain sum upon a balance of accounts. Upon this the plaintiff instituted a suit in equity for staying the proceedings at law, alleging, that Sir Charles stood indebted to him *in the sum of 3000*l.**, to which the plaintiff was entitled as heir-at-law of Sir John, under Sir John's marriage articles. It was ordered by the court that judgment should be entered up, but execution should be stayed till the cause should be heard the Easter term following. As Vernon, the reporter, speaks only of one sum of 1500*l.*, to which the executor was declared entitled, it is probable the other sum was adjudged to the heir, a decision that would in every respect be conformable to principle; for while the 1500*l.*, covenanted to be paid by Sir John himself was, by the death of his wife without issue in his lifetime, "at home," and therefore set free from the articles, the other sum of 1500*l.* which was covenanted to be paid by Sir Charles, was outstanding in *\*the hands of Sir Charles as trustee*, and would therefore retain the character of [\*803] real estate until some act by Sir John to remove that impression.

To the principle under consideration must be referred the case of *Pulteney v. Darlington*.<sup>(n)</sup> Henry Guy the testator appointed Lord Bath, Taylour, and Lake, his executors, and devised to them, their heirs, and assigns, all his estates at Earl's Court, and certain freeholds and copyholds at Muswell Hill, upon trust to sell, and directed that, after payment of his debts and legacies, all such moneys or other personal estate as should remain in the hands of the executors, or be raised by sale of the devised estates, should be laid out in the purchase of lands to be settled to the use of Lord Bath for life, remainder to the first and other sons in tail, remainder to General Pulteney for life, remainder to the first and other sons in tail, remainder to Daniel Pulteney for life, remainder to the first and other sons in tail, with a remainder in fee to the father of Lord Bath, which afterwards became vested in Lord Bath himself. The testator died in 1710. Daniel died without issue in the lifetime of Lord Bath and General Pulteney. Lord Bath had issue, a son, who died, without having disturbed the settlement, in the lifetime of his

(l) *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(m) *Pulteney v. Darlington*, 1 B. C. C. 238.

(n) 1 B. C. C. 223.

father. General Pulteney never had any issue. Lord Bath, who acted in the executorship, retained in his hands the sum of 23,488*l.* upon the trusts of the will; and, after the decease of Daniel and of his own son, by his will, bearing date in 1763, devised all his real and personal estate to General Pulteney and appointed him executor; so that, whether the sum of 23,488*l.* was to be regarded as the real or as the personal estate of Lord Bath, *utraque viâ datâ* it became vested in General Pulteney under this devise and bequest. General Pulteney proved the will, took possession of the estates, and transferred the securities upon which the 23,488*l.* was invested into his own name. By his will bearing date in 1767, General Pulteney devised all his estates in Middlesex, Salop, and York, to certain uses, and gave all his money, *securities*, goods, chattels, and personal estate, [\*804] to his executors upon certain trusts; so that, under \*General Pulteney's will, if the 23,488*l.* was, under the circumstances, to be taken as land, then, for want of a general devise, it had descended upon the plaintiff as General Pulteney's heir; but if it was to be regarded as personalty, it was included in the bequest of the General's personal estate. Lord Bathurst, before whom the cause was first heard, conceived the heir had no title, and dismissed the bill. It was afterwards reheard before Lord Thurlow, who affirmed the decree upon two grounds; first, that the money was "at home," the possibility of issue having, on the death of General Pulteney, the surviving tenant for life, become extinct, and therefore, at his decease, there was no claim upon the fund outstanding in any other person; and, secondly, that General Pulteney had manifested a disposition to destroy the impression of real estate, and continue the fund as money. His lordship said, "If there be no legal or equitable title out against the party who is in possession of the fund, there the rule, that when the right and the thing centre in one and the same person the action is extinguished, applies, and the heir cannot say there was a use for him;" and then, after commenting upon the numerous decisions upon the subject, his lordship continued: "the use that I make of these cases, notwithstanding the *dicta* they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. But whether that is clearly so or not, circumstances of demeanor in the person, even though slight, will be sufficient to decide it: a very little would do: receiving it from the trustees there is no doubt would be sufficient: Lord Bath did receive it—he had it in his hands. Suppose he had it by way of covenant; otherwise where would there be an end? If he kept it subject to a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences." The decree was afterwards affirmed in the House of Lords, and upon the ground, as stated by Lord Eldon, that the money was "at home."<sup>(o)</sup>

Of course the money will be "at home" where the person absolutely [\*805] entitled to the fund receives it from the trustee the \*depository of it, and that whether the payment is made with the sanction of the court, or by the voluntary act of the trustee himself.<sup>(p)</sup>

(o) *Wheldale v. Partridge*, 8 Ves. 235.

(p) See *Pulteney v. Darlington*, 1 B. C. C. 236; *Bowes v. Earl of Shaftesbury*, 5 B. P. C. 144; *Chaplin v. Horner*, 1 P. W. 483, as to the 1350*l.*



If a testator bequeath a sum of money to be laid out in lands, to be settled to certain uses, with the ultimate remainder to his *own right heirs*, and the prior limitations fail, the heir may file a bill against the executor of his ancestor, and though the only person entitled, may claim to have the benefit of the conversion.

Lord Loughborough, in *Walker v. Denne*,<sup>(q)</sup> appears to have doubted upon this point, and observed, that in general a limitation to the right heirs of the testator was an indication that he had no will concerning it, and meant that he did not know what to do with it: but his lordship's doctrines have, as before remarked, been repeatedly disapproved, and the very point was decided by Lord Northington in the case of *Robinson v. Knight*.<sup>(r)</sup>

Lord Macclesfield advanced the position, that if a person *voluntarily and without consideration* covenanted to lay out money in a purchase of land to be settled on himself and his heirs, the court would compel the execution of such a contract, though merely voluntary; for in all cases, where it was a measuring cast between an executor and an heir, the latter should in equity have the preference.<sup>(s)</sup> But the position that the heir is more favoured than the executor, though often repeated,<sup>(t)</sup> does not appear to be founded on any intelligible principle. The notion may have arisen from the leaning of the court towards the heir *in respect of lands of which the ancestor was seised*. And as to the application of the rule, that what ought to be done shall be looked upon as done, the heir in the case put by Lord Macclesfield cannot, it seems, take advantage of it; for the \*court will not act upon the rule [\*806] universally, but only where the agreement is founded on a good or valuable consideration.<sup>(u)</sup> The opinion expressed by Lord Macclesfield may therefore justly be doubted.

In the preceding observations it has of course been assumed, that the direction or agreement for conversion is by the terms of the instrument made *absolute and imperative*; for, where a mere *option* is given, the original character of the property continues, until the discretion has been exercised, and the conversion actually effected; as, if the direction or agreement be to lay out money in "*lands or securities*,"<sup>(v)</sup> in "*freeholds or leaseholds*,"<sup>(w)</sup> or if by any other mode of expression an intention be manifested of not converting the property at all events.<sup>(x)</sup>

But where *the uses declared are exclusively applicable to real estate*, the direction or agreement will be construed to be imperative, though the direction or agreement be to lay out the money in "*freeholds, lease-*

(q) 2 Ves. jun. 175-177.

(r) 2 Ed. 155.

(s) *Edwards v. Countess of Warwick*, 2 P. W. 176; and see *Lechmere v. Lechmere*, Cas. t. Talb. 90, 91.

(t) See *Crabtree v. Bramble*, 3 Atk. 689; *Scudamore v. Scudamore*, Pr. Ch. 544; *Haytor v. Rod*, 1 P. W. 364; *Wilson v. Beddard*, 12 Sim. 32.

(u) See *Crabtree v. Bramble*, 3 Atk. 687; *Frederick v. Fredrick*, 1 P. W. 713.

(v) *Curling v. May*, cited *Guidot v. Guidot*, 3 Atk. 255; *Amler v. Amler*, 3 Ves. 583; and see *Van v. Barnett*, 19 Ves. 102.

(w) *Walker v. Denne*, 2 Ves. jun. 170; *Davies v. Goodhew*, 6 Sim. 585.

(x) *Wheldale v. Partridge*, 5 Ves. 388; S. C. 8 Ves. 227; and see *Abbott v. Lee*, 2 Vern. 284; *Davies v. Goodhew*, 6 Sim. 585; *Polley v. Seymour*, 2 Y. & C. 708.

*holds, or copyholds,"*(y) or the instrument contain an authority to invest the money upon securities until a purchase can be found,(z) or, the fund being already out upon security, a power is inserted to call it in, and lay it out upon other securities,(a) or even though the direction or agreement be to lay out the money on lands or securities, the intention in the last case apparently being, that the money shall be invested upon security until a suitable purchase can be found, and that the interest and dividends in the mean time shall be paid to the person who would be entitled to the rents.(b)

[\*897] \*And, where the uses are thus exclusively applicable to real estate, the direction or agreement will be regarded as imperative, though the settlement require the purchase to be made at the request of a party,(c) for the insertion of such a clause has been taken to mean, not that a conversion may not be effected *before*, but that it shall certainly be effected *after* request.(d) And the construction is the same, though the purchase be directed to be made with a person's consent and approbation;(e) for upon a convenient purchase being proposed, the court, said Sir J. Jekyll, will take upon itself to judge thereof, and, without some reasonable objection made, will order the money to be laid out in it, so that such a proviso seems to be immaterial, and as if omitted.(f) But of course the instrument may be so strongly expressed as to show the intention of the parties, that the request or consent of a particular person should be a substantial ingredient, and that no conversion should take place unless it were given.(g)

As money to be converted into land is considered as land, so land to be converted into money is, upon the same principle, invested with all the properties of money. Thus, if an estate be directed or agreed to be sold, and the proceeds be made payable to A., the property, though unconverted at A.'s decease, will pass by a general bequest of all his personal estate;(h) and, if A. die intestate, will vest in his personal representative,(i) but will not be liable to probate duty.(k)

(y) Hereford v. Ravenhill, 5 Beav. 51.

(z) Edwards v. Countess of Warwick, 2 P. W. 171; Earlom v. Saunders, Amb. 241; and see Davies v. Goodhew, 6 Sim. 585.

(a) Thornton v. Hawley, 10 Ves. 129; and see Triquet v. Thornton, 13 Ves. 345.

(b) Earlom v. Saunders, Amb. 241; Cowley v. Hartstonge, 1 Dow. 361; Arnold v. Johnson, 1 Ves. 169; Cookson v. Reay, 5 Beav. 22; 12 Cl. & Fin. 121.

(c) Thornton v. Hawley, 10 Ves. 129; Johnson v. Arnold, 1 Ves. 169.

(d) Ib. 137; but see Stead v. Newdigate, 2 Mer. 530.

(e) Thornton v. Hawley, ubi supra. In Symons v. Rutter, 2 Vern. 227, Hutchins was right according to Sir J. Jekyll, Lechmere v. Earl of Carlisle, 3 P. W. 220, and Lord Thurlow, Pulteney v. Darlington, 1 B. C. C. 238; but see Stead v. Newdigate, 2 Mer. 530.

(f) Lechmere v. Earl of Carlisle, 3 P. W. 220, per Sir J. Jekyll.

(g) Davies v. Goodhew, 6 Sim. 585; and see Re Taylor's Trust, 9 Hare, 596.

(h) Stead v. Newdigate, 2 Mer. 521.

(i) Ashby v. Palmer, 1 Mer. 296; Biggs v. Andrews, 5 Sim. 424; Burton v. Hodsohl, 2 Sim. 24; Grieveson v. Kirsopp, 2 Keen, 653; Griffith v. Ricketts, 7 Hare, 299; Hardey v. Hawkshaw, 12 Beav. 552.

(k) Matson v. Swift, 8 Beav. 368; Custance v. Bradshaw, 4 Hare, 324; nor would such proceeds be forfeitable to the crown as personalty until the period for conversion arrives. Thompson's Trusts, 22 Beav. 506.

So, if the proceeds be given to an alien, he is capable of taking for his own benefit, and the crown is excluded.(l)

\*And if leaseholds be stamped with a trust for conversion, and the proceeds be given to A., and A. dies having by his will given [\*808] his personal estate to a charity, the leasehold will pass by the bequest.(m)

But if real and personal estate be given to trustees upon trust for a class, with a *discretionary* and not an *imperative* power to convert the whole into personal estate, and if the trustees make a partial conversion, and then the discretionary power becomes extinguished by their death or otherwise, the objects of the trust will take the property as real or personal estate, according to the actual condition in which it is found.(n) So if a mortgage deed contain a power of sale with a direction that the surplus proceeds shall be paid to the mortgagor, his executors, administrators, and assigns, and the property is sold by the mortgagee, the surplus will be personal or real estate of the mortgagor, according as the sale takes place before or after his death.(o) But where an option to purchase has been created by a testator, and exercised after his death, such exercise has been held to effect a retrospective conversion.(p)

In some cases a conversion of personal estate is implied. Thus as a general rule, if a testator give his personal estate,(q) or the residue of his personal estate,(r) or the interest of his property,(s) in trust for or to(t) several persons in succession, and the property is of a wasting nature, as leaseholds, long annuities, &c., the court implies the intention that such perishable estate \*should assume a permanent character, and so become capable of succession. The court accordingly in [\*809] these cases, directs a conversion into 3 per cent. Bank Annuities. "It is given," observed Lord Eldon in the leading case of *Howe v. Earl of Dartmouth*,"(u) as all his personal estate, and the mode in which he says it is to be enjoyed is to one for life, and to the others afterwards. Then the court says it is to be construed as to the perishable part, so that one shall take for life and the others afterwards, and unless the testator directs the mode so that it is to continue as it was, the court understands that it shall be put in such a state that the others may enjoy

(l) *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 M. & Cr. 525.

(m) *Shadbolt v. Thornton*, 17 Sim. 49. But the ground upon which the court held that there was such a trust for conversion does not appear in the report.

(n) *Walter v. Maunde*, 19 Ves. 424; *Shipperdson v. Tower*, 1 Y. & C. Ch. Ca. 441; *Polley v. Seymour*, 2 Y. & C. 708; and see *Cowley v. Harstongue*, 1 Dow. 378; *Bourne v. Bourne*, 2 Hare, 35. Otherwise, where the power is imperative, *Grieveson v. Kirsopp*, 2 Keen, 653.

(o) *Wright v. Rose*, 1 Sim. & Stu. 322; and see *Re Cooper's Trust*, 4 De G. M. & G. 768.

(p) *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 590; but see *Drant v. Vause*, 1 Y. & C. Ch. Ca. 580; *Emuss v. Smith*, 2 De Gex & Sm. 722.

(q) *Howe v. Earl of Dartmouth*, 7 Ves. 137.

(r) *Cranch v. Cranch*, cited *Howe v. Earl of Dartmouth*, 7 Ves. 141, note; *Powell v. Cleaver*, cited, *Ib.* 142; *Wichfield v. Baker*, 2 Beav. 481; *Crawley v. Crawley*, 7 Sim. 427; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441.

(s) *Fearn v. Young*, 9 Ves. 549; *Benn v. Dixon*, 10 Sim. 636. See *Oakes v. Strachey*, 13 Sim. 414.

(t) *House v. Way*, 12 Jur. 959.

(u) 7 Ves. 148; *Wilkinson v. Duncan*, 3 Jur. N. S. 530.



it after the decease of the first, and the thing is quite equal, for it might consist of a vast number of particulars ; for instance, a personal annuity not to commence in enjoyment till the expiration of twenty-one years from the death of the testator, payable upon a contingency perhaps. If in this case it is equitable that long or short annuities should be sold to give every one an equal chance, the court acts equally in the other case, for those future interests are for the sake of the tenant for life to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant for life. As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other, that of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth."

But an intention that the property should be enjoyed *in specie* may appear from the form of the bequest, or be collected from the terms in which it is expressed. As if there be a specific bequest of leaseholds or of stock, *or* if the testator assume that the property is to remain in specie by speaking of the devisees or legatees as in the perception of the rents of leasehold estate, or the dividends of stock, *or* if a testator negative a sale at the time of his death by directing a conversion at a subsequent period.

Thus, the property was decreed to be enjoyed *in specie* where a testatrix having *long annuities*, and no other stock \*gave certain legacies out of her "*funded property*" and bequeathed "the remainder of her *dividends* to A. for life," and after her decease gave sums of "stock" of various amounts to different persons.<sup>(v)</sup> So where a testator having *long annuities* gave 100*l.* long annuities to A., "the residue of his property all he did or might possess in the *funds*, copy or leasehold estate," to B. and C. for their lives, and on the death of both to be divided among certain persons in the will named.<sup>(w)</sup> So where a testator having *leaseholds* gave all his estate to A. and B. upon trust to permit C. to enjoy "the *rents*, issues, profits, interest, and annual proceeds thereof," for her life, and on her decease upon trust for the two daughters of C.<sup>(x)</sup> So where a testator having *leaseholds* gave all his property of every description and denomination unto three trustees upon trust for A. B. for her life, for her separate use, and upon her decease upon trust for C. D. for her life, for her separate use, and on her decease unto her children in equal shares ; and if there should be no children, the whole of the property to be *sold* by auction, and the proceeds to be distributed amongst certain parties.<sup>(y)</sup> So where a testator having *leaseholds*, gave his wife "all his property in every *shape*, and without any reserve, and in whatever manner it was *situate* for her life, and at her

(v) Vincent v. Newcombe, Younge, 599 ; and see Sutherland v. Cooke, 1 Coll. 503.

(w) Bethune v. Kennedy, 1 M. & C. 114.

(x) Goodenough v. Tremamondo, 2 Beav. 512 ; Bowden v. Bowden, 17 Sim. 65 ; Harris v. Poyner, 1 Drew. 174 ; Blann v. Bell, 2 De Gex, Mac. & Gor. 775 ; Crowe v. Crisford, 17 Beav. 507 ; Hood v. Clapham, 19 Beav. 90 ; Marshall v. Bremner, 2 Sm. & Gif. 237 ; and see contra, Pickup v. Atkinson, 4 Hare, 624.

(y) Daniel v. Warren, 2 Y. & C. Ch. Ca. 290 ; Chambers v. Chambers, 15 Sim. 183 ; Burton v. Mount, 2 De Gex & Sm. 383.

death, the property to be *divided*" amongst certain persons.(z) So where a testator having *leaseholds*, and being entitled to an annuity *pur autre vie* gave to his wife "all the interest, *rents*, dividends, annual produce or profits, use and enjoyment" of all his real and personal estate for her life, and after her decease to A., or in case he died in the testator's lifetime, \*to B. and C.(a) So where a testator having *long annuities* and no other stock, gave all his real and personal estate to his [\*811] executors "upon trust to permit his wife to receive the rents and profits, *dividends*, and annual proceeds for life, and on her decease upon trust to *sell* his freehold and leasehold houses, and to *convert the whole of his estate* into money."(b) So where a testator having *leaseholds* gave to his wife "the full and entire enjoyment" of his real and personal estate for her life, and after her decease he directed his trustees to *sell* all the leasehold and chattel property.(c) So where a testator having leaseholds and long annuities gave to his wife "the whole *income* of his property" for her life, "but not to sell without the whole consent of all parties," and at her decease the testator gave a debt owing to him to A. and 100l. 3 per cent. stock to be "bought in" within three months from his wife's decease to B., and then disposed of the residue.(d) So where a testator gave the residue of the *stocks and funds* that should be standing in his name at his decease to trustees upon trust to pay the *interest and dividends* thereof to A. for life, and on her decease upon trust for B. and C., and the testator gave a power to the trustees to transfer the stocks and funds into any other funds and bequeathed the residue of his personal estate to A. absolutely, it was held that the *long annuities* of which the testator died possessed, were to be specifically enjoyed, and that the power given to the trustees was for the security of the property, and was not intended to cut down the specific gift.(e)

The case of *Mills v. Mills*,(f) is not to be reconciled with the foregoing authorities, and is not considered as law. A testator gave his freeholds, and leaseholds, stocks in the public funds, and all other his real and personal estate to trustees upon trust to pay the *rents*, issues, and profits of his freehold and *leasehold* estates and the dividends, interest, and proceeds of his money in the funds, and other his said personal estate to \*A. for life, with remainders over, and a question arose as to the testator's leaseholds, and bank stock. The vice-chancellor [\*812] held that the leaseholds were not to be specifically enjoyed, but must be sold; "Unless," he said, "the bequest is construed as a general bequest the consequence would be that if he had surrendered the leaseholds and taken renewals they would not have passed;" but there seems to be some confusion here between a specific bequest and a direction for specific enjoyment.(g) Unquestionable, it was a general bequest in the sense that

(z) *Collins v. Collins*, 2 M. & K. 703; see observations on this case in *Vaughan v. Buck*, 1 Phill. 78; *Lichfield v. Baker*, 13 Beav. 447.

(a) *Pickering v. Pickering*, 2 Beav. 31; 4 M. & C. 289; but the will was also of a very special character.

(c) *Harvey v. Harvey*, 5 Beav. 134.

(e) *Lord v. Godfrey*, 4 Mad. 455.

(f) 7 Sim. 501; see *Oakes v. Strachey*, 13 Sim. 414.

(g) As to the distinction, see *Pickering v. Pickering*, 2 Beav. 57; 4 M. & C. 299.

(b) *Alcock v. Sloper*, 2 M. & K. 699.

(d) *Hinves v. Hinves*, 3 Hare, 609.

the testator meant all the leaseholds he should have at the time of his death to pass, but consistently with this intention, he might declare, as the legal construction apparently was, that all such leaseholds should be specifically enjoyed. It was rightly decided, that the bank stock should be sold, for it did not fall under the description of "public funds," and therefore, had not been specifically mentioned. There could have been no difficulty in holding, that under the same clause, part should be specifically enjoyed and part be converted.<sup>(h)</sup>

The rule of the court under which perishable property is converted does not proceed upon the assumption that the testator in fact *intended* his property *to be sold*, but is founded upon the circumstance that the testator has intended the perishable property to be enjoyed by different persons in succession, which can only be accomplished by means of a sale.<sup>(i)</sup> The object of the rule in truth is to secure a fair adjustment of the rights of the tenants for life and those coming after him. Upon similar grounds, therefore, where a residue which is without any express trust for conversion, bequeathed to persons in succession, consists of property which, though not wasting, is of a class producing a high rate of interest in proportion to its money value, and liable consequently to additional risk, such as railway shares, canal shares, shares of insurance [\*813] or other companies, foreign bonds or stocks, &c., &c., the persons \*entitled in expectancy have a right to call for the conversion of such property into three per cent. stock.<sup>(k)</sup>

If a testator direct that his personal estate shall be laid out in a purchase of lands, to be settled on A. for life, with remainders over, and that *the interest of the personal estate shall be accumulated and laid out in a purchase of lands* to be settled to the same uses, the court to prevent the hardship that would fall upon the tenants for life, if the purchases were protracted for a long period, either from unavoidable circumstances, or from the dilatoriness of the trustee, interprets the intention in such cases to be that the accumulation should be confined to one year from the testator's death. At the expiration of that period, the court presumes the trustees to be in a condition to invest the personal estate, and gives the tenant for life the interest from that time.<sup>(l)</sup>

So if a testator devise his real estate to be sold and the produce thereof, and also the *rents and profits of the said estate, in the meantime to be laid out in bank annuities or other securities*, upon trust for A. for life, with remainders over, the accumulation of the rents is not extended beyond one year from the testator's death, but the tenant for life is entitled to them from that period.<sup>(m)</sup>

(h) See *Vaughan v. Buck*, 1 Phill. 75; *Bethune v. Kennedy*, 1 M. & C. 114.

(i) *Cafe v. Bent*, 5 Hare, 35.

(k) *Thornton v. Ellis*, 15 Beav. 193; *Blann v. Bell*, 5 De Gex & Sm. 658; 2 De Gex, Mac. & Gor. 775.

(l) *Sitwell v. Bernard*, 6 Ves. 520; and *Entwistle v. Markland*, *Stuart v. Bruere*, cited, *Ib.* 528, 529; *Griffith v. Morrison*, cited 1 J. & W. 311; *Tucker v. Boswell*, 5 Beav. 607; *Kilvington v. Gray*, 2 S. & S. 396; *Parry v. Warrington*, 6 Mad. 155; *Stair v. Macgill*, 1 Bligh, N. S. 662.

(m) *Noel v. Lord Henley*, 7 Price, 241; *Vickers v. Scott*, 3 M. & K. 500; and see *Vigor v. Harwood*, 12 Sim. 172; *Greisley v. Earl of Chesterfield*, 13 Beav. 288; *Beanland v. Halliwell*, 1 C. P. Cooper, t. Cottenham, 169, note (a).



From the language used by Lord Eldon, in the case of *Sitwell v. Bernard*,<sup>(n)</sup> (in which the rule, that the accumulation where expressly directed, extends only to one year from the testator's death, was first established,) an impression prevailed that in no case was the tenant for life entitled to the produce of the land, or fund to be converted during the first year. Both Sir John Leach,<sup>(o)</sup> and Sir Thomas Plumer,<sup>(p)</sup> [\*814] \*sanctioned this doctrine by their authority. However, Lord Eldon had no intention of laying down any such rule,<sup>(q)</sup> and it has since been unquestionably settled that the tenant for life has an interest in the first year's produce,<sup>(r)</sup> varying, however, according to the circumstances of the case, as will appear from the following distinctions.

If a testator desire that his personal estate shall be laid out and invested in government or real securities,<sup>(s)</sup> or in a purchase of lands, with a direction express<sup>(t)</sup> or implied<sup>(u)</sup> for the investment thereof in the meantime in government or real securities, and that the lands to be purchased shall be in trust for A. for life, with remainders over; the produce of the government and real securities of which the testator was possessed at the time of his death (these being the very investments contemplated by his will,) belong *from the time of the death* to the tenant for life.

If, during the first year, the conversion directed by the testator is actually made, the tenant for life is also entitled to the produce of the property, in its converted form, from the time of the conversion, as if land be directed to be sold, and the produce invested in government or real securities,<sup>(v)</sup> or money is directed to be laid out on land,<sup>(w)</sup> the tenant for life is entitled to the dividends or interest in the first case, from the time of the sale and investment, and to the rents in the latter case from the time of the purchase, though in the course of the first year.

Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life is, before the conversion, entitled, as the court has now decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion, whether made in the course of the first year or \*subsequently, as if personal estate be directed to be laid out [\*815] in government or real securities, and part of the personal estate consists of bonds, bank stock, &c., (not being government or real securities,) the tenant for life is entitled to the dividends on so much of 3 per cent. consolidated bank annuities as such part of the personal estate, not being government or real securities, would have purchased at the expiration of one year from the testator's death.<sup>(x)</sup>

(n) 6 Ves. 520.

(o) *Stott v. Hollingworth*, 3 Mad. 161.

(p) *Taylor v. Hibbert*, 1 J. & W. 308.

(q) See *Angerstein v. Martin*, T. & R. 238; *Hewitt v. Morris*, Ib. 244.

(r) *Macpherson v. Macpherson*, 16 Jur. 847.

(s) *Hewitt v. Morris*, T. & R. 241; *La Terriere v. Bulmer*, 2 Sim. 18.

(t) *Angerstein v. Martin*, T. & R. 232.

(u) *Caldecott v. Caldecott*, 1 Y. & C. Ch. Ca. 312, 737.

(v) *La Terriere v. Bulmer*, 2 Sim. 18; *Gibson v. Bott*, 7 Ves. 89.

(w) See *Angerstein v. Martin*, T. & R. 240.

(x) *Dimes v. Scott*, 4 Russ. 195. In *Douglas v. Congreve*, 1 Keen, 410; the M. R. gave the tenant for life the interest of the personal estate making interest from the death of the testator; but in the subsequent cases of *Taylor v. Clark*, 1 Hare,

But of course, if it appear from the terms of the will that the testator intended to give his trustees a discretion as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule.(y)

In *Gibson v. Bott*,(z) a testator directed his personal estate to be converted into government or real securities, and the title of some leaseholds being defective they could not be sold; and Lord Eldon said, they must be considered as property which it was for the benefit of all parties to retain in *specie*, and decreed the tenant for life to have interest at 4 per cent. from the death of the testator on the value thereof at that time.(a) And so in another case Sir J. Parker, vice-chancellor, observed that when the property was so laid out as to be secure, and to produce a large annual income, but was not capable of immediate conversion, without loss and damage to the estate, there the rule was not to [816] convert the property but to set a \*value upon it, and give to the tenant for life 4 per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainderman.(b)

If a testator direct his real estate to be sold, and the proceeds to be laid out and invested upon trust for A. for life, with remainders over, the tenant for life is entitled to the rents of the estate from the testator's decease;(c) and so if the sale be directed on the death of a particular person, the tenant for life is entitled to the rents from the death of that person.(d)

In connection with the subject of conversion, it will be proper to introduce a few remarks upon the doctrine of election; for where land is to be converted into money, or money into land, the notional conversion will subsist only until some *cestui que trust* who is competent to elect, intimate his intention to take the property in its original character.(e) The court will not compel a conversion against the will of the absolute owner; for should the conversion be made, he would immediately reconvert it, and equity will do nothing in vain.(f)

161; and *Morgan v. Morgan*, 14 Beav. 72; the authority of *Dimes v. Scott* was followed. In *Caldecott v. Caldecott*, 1 Y. & C. Ch. Ca. 312, 737, the court gave the tenant for life the actual interest of the mortgages as being proper investments, and 4 per cent. interest on the personal estate not consisting of government or real securities, on the assumption, apparently, that the case fell within the principle of *Gibson v. Bott*. In *Sutherland v. Cooke*, 1 Coll. 503, under special circumstances, 4 per cent. on the value was also allowed.

(y) *Mackie v. Mackie*, 5 Hare, 70; *Wrey v. Smith*, 14 Sim. 202; *Sparling v. Parker*, 9 Beav. 524.

(z) 7 Ves. 89.

(a) See the decree from Reg. Lib. *Caldecott v. Caldecott*, 1 Y. & C. Ch. Ca. 320.

(b) *Meyer v. Simonsen*, 5 De Gex & Sm. 726.

(c) *Casamajor v. Strobe*, cited *Walker v. Shore*, 19 Ves. 390; *Hutcheon v. Mannington*, 1 Ves. jun. 367, per Cur.

(d) *Fitzgerald v. Jervoise*, 5 Mad. 25, of which the marginal note does not exactly accord with the report itself.

(e) *Harcourt v. Seymour*, 2 Sim. N. S. 45; *Cookson v. Reay*, 5 Beav. 22; 12 Cl. & Fin. 121; *Dixon v. Gayfere*, 17 Beav. 433.

(f) *Seeley v. Jago*, 1 P. W. 389.

Upon this subject we shall consider :—1. What persons are capable of electing ; and, 2. In what manner the act of election may be manifested.

1. In respect of *personal incapacity*, an infant,(*g*) lunatic,(*h*) or *feme covert*,(*i*) has no power to make election.

“ But although,” said Lord Hardwicke, “ a *feme covert* cannot alter the nature of money to be laid out in land by contract or deed, yet if the money be invested in land (and \*sometimes sham purchases [*\*817*] have been made for the purpose,)(*k*) she may then levy a fine of the land, and give it to her husband or anybody else. There is a way, also, of doing this without laying the money out in land, and that is, by coming into a court of equity, and consenting to take the money as personal estate ; for upon her being present in court, and being examined [as a *feme covert* upon a fine is,] her consent binds the money artied to be laid out in land as much as a fine at law would the land, and she may dispose of it to the husband or anybody else. And the reason of it is this—that at law, money so artied to be laid out in land is considered barely as money till an actual investment, and the equity of this court alone views it in the light of real estate ; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land.”(*l*) And at a later date Lord Hardwicke’s views were ratified by express decision.(*m*)

Now by the 3 & 4 W. 4, c. 74, ss. 40, 71, 77,(*n*) a married woman is enabled, with the concurrence of her husband and with the formalities required by the act, to dispose of any estate at law or in equity, or any interest, charge, lien, or incumbrance in or upon lands or money to be laid out in a purchase of lands, or to relinquish or release any power over the same, as if she were a *feme sole*, so that in the case of money liable to be laid out in land, a *feme covert* can, through the medium of the power of disposition conferred by the act, virtually elect to take the money.

And the act enables a married woman not only to dispose of property which, though personal estate in fact, is real estate in equity (as money to be invested in land,) but also of property which is in equity personal estate, provided only it be *an interest in land* ; and this although according to the ordinary doctrines of the court the married woman would, by reason of her interest being reversionary, have no such power of disposition. Thus, where real estate is devised upon trust for sale in terms amounting to a conversion out and out, and \*a married woman takes a share of the proceeds, she can, under the statute, dispose [*\*818*] of her share, even though reversionary, as being an interest in land.(*o*)

(*g*) Carr v. Ellison, 2 B. C. C. 56 ; Earlom v. Saunders, Amb. 241 ; Thornton v. Hawley, 10 Ves. 129 ; Van v. Barnett, 19 Ves. 102 ; Seeley v. Jago, 1 P. W. 389 ; Padbury v. Clark, 2 Mac. & Gor. 298 ; and see Ashby v. Palmer, 1 Mer. 301.

(*h*) Ashby v. Palmer, 1 Mer. 296.

(*i*) Oldham v. Hughes, 2 Atk. 452 ; Frank v. Frank, 3 M. & C. 171 ; Re Fosard’s Trust, 1 Kay & Johns. 233.

(*k*) See Henley v. Webb, 5 Mad. 407.

(*l*) Oldham v. Hughes, 2 Atk. 453.

(*m*) Binford v. Bawden, 1 Ves. jun. 512.

(*n*) Extended to contingent interests by the 8 & 9 Vict. c. 106, s. 6.

(*o*) Briggs v. Chamberlain, 11 Hare, 69 ; Tuer v. Turner, 20 Beav. 460.



And it is conceived, that the same principle must apply to the case of a reversionary money legacy raisable out of land, notwithstanding the doubts entertained by Lord Justice (then vice-chancellor) Knight Bruce, in the case of *Hobby v. Collins*.<sup>(p)</sup>

It has been held that a *remainderman* may elect so as to bind the rights "*inter se*" of his heir and personal representative, notwithstanding the subsistence of the prior estate. Thus, in *Lingen v. Sowray*,<sup>(q)</sup> A., on his marriage, agreed to add 700*l.* to the lady's portion of 700*l.*, and the securities for both sums were assigned to trustees, and the money was directed to be laid out in lands to be settled to the use of the husband for life, remainder to the wife for life, remainder to the first and other sons in tail, remainder to the right heirs of the husband. There was no issue of the marriage, and 250*l.* of the trust-money was called in by the direction of the husband, and placed out upon other securities, and a trust declared, not for the husband and his heirs, but for the husband and his executors and administrators. The husband afterwards died, having devised part of his real estate to his wife, and the residue to J. S., and having bequeathed his personal estate and all his securities for money to his wife. It was debated whether the 250*l.* ought, as to the operation of the husband's will, to be regarded in the light of realty or personalty. Lord Harcourt said, "as to the 250*l.* which was called in by the testator, and afterwards placed out on securities on a different trust, that shall be taken to be personal estate, forasmuch as, there being no issue of the marriage, it was in the power of the husband to alter and dispose of it as against the heir-at-law, though not as against his wife." But the remainderman can, of course, only elect subject to the right of [\*819] the owner of the prior estate to call for the actual conversion \*of the land or money in accordance with the instrument of trust;<sup>(r)</sup> and it is conceived that, should this right be insisted on, the conversion "*de facto*" would render the intended election ineffectual.

Where an estate is directed to be sold, the proceeds to be divided amongst several persons, no one singly has a right to elect that his own undivided share shall not be disposed of,<sup>(s)</sup> for the other undivided shares will not sell so beneficially in proportion as if the estate were entire;<sup>(t)</sup> but if money be directed to be laid out in lands to be settled on A., B., and C., as tenants in common, any one of them may elect to take his own third as money, for two-thirds may be invested just as advantageously as the whole sum.<sup>(u)</sup>

Sound principle would require that a *tenant in tail* of lands to be purchased should not be allowed to elect, because the interests of the

(p) 4 De Gex & Sm. 289; and see observations of Lord St. Leonards in his essay on the real property Statutes, 240.

(q) 1 P. W. 172; and see *Stead v. Newdigate*, 2 Mer. 531; *Gillies v. Longlands*, 4 De Gex & Sm. 379.

(r) *Gillies v. Longlands*, 4 De Gex & Sm. 379; *Ex parte Stewart*, 1 Sm. & Gif. 32.

(s) *Holloway v. Radcliffe*, 3 Jur. N. S. 198; *Fletcher v. Ashburner*, 1 B. C. C. 500, per Sir T. Sewell; *Deeth v. Hale*, 2 Moll. 317; and see *Smith v. Claxton*, 4 Mad. 494.

(t) *Chalmer v. Bradley*, 1 J. & W. 59; and see *Trower v. Knightley*, 6 Mad. 134.

(u) *Seeley v. Jago*, 1 P. W. 389; *Walker v. Denne*, 2 Ves. jun. 182, per Lord Loughborough.

issue and the remainderman, who both take by title paramount, would otherwise be prejudiced. But the old rule appears to have been, that tenant in tail might in *every case* have elected, and on filing a bill would have been entitled to the money;(v) and the principle upon which the practice was grounded was said to be, that equity will do nothing in vain, and it were nugatory to direct an actual purchase and settlement when the tenant in tail the next moment might dispose of the fee simple. Lord Cowper, however, in the case of *Colwal v. Shadwell*,(w) took the distinction, that where the *remainder in fee* was not vested in the tenant in tail himself, but was limited over to a stranger, there, as the absolute fee could only be acquired by a *recovery*, which was a thing of time, and could not be suffered in *vacation*, the remainderman should not lose his chance; and as in that case the tenant in tail did actually die before the recovery was suffered, it showed \*the remainderman's interest in so glaring a light, that it established the pre- [\*820]cedent ever afterwards.(x) But even then the money would have been decreed to the tenant in tail, provided the remainderman waived his right and consented to the payment.(y)

In *Eyre's case* (z) Lord Chancellor King was for extending the same protection to the *issue*. "I cannot see," he said, "why I should not have the like regard to the *issue* in tail as for the *remainderman*. It is possible the tenant in tail, before he can light on a purchase and settle it, may die, leaving *issue*, and this is a chance of which I would not deprive such *issue*." And in *Speaker Onslow's Case*,(a) he declared his adherence to the same opinion, observing, that "the levying of a fine also was a thing of time, there being several offices to pass, and the writ of covenant to be under the great seal." But the rule which had been uniformly acted upon before his time(b) appears, notwithstanding his lordship's authority, to have been revived by his successors.(c)

And the election of the tenant in tail need not necessarily have been made in a suit, but might have been expressed by act *in pais*, as if tenant in tail with remainder to himself had received the money of the trustee, or if tenant in tail with remainder to a stranger had received it of the trustee with the consent of the remainderman. Upon this subject Lord Hardwicke observed, "The court *pursues* the rights of parties, and whatever a court of common law does by a judgment, or chancery by a decree, is in affirmance of those rights, and does not give them a right which they had not before.(d) Why does the court decree the money? Because the parties are entitled \*to it. There is, therefore, no [\*821] occasion for a decree of the court to destroy the real quality of the

(v) *Cunningham v. Moody*, 1 Ves. 176, per Lord Hardwicke.

(w) Cited *Chaplin v. Horner*, 1 P. W. 485.

(x) See *Cunningham v. Moody*, 1 Ves. 176; *Talbot v. Whitfield*, Bunb. 204.

(y) See *Trafford v. Boehm*, 3 Atk. 440.

(z) 3 P. W. 13.

(a) 3 P. W. 14, note (G).

(b) *Benson v. Benson*, 1 P. W. 130; *Short v. Wood*, Ib. 470; *Edwards v. Countess of Warwick*, 2 P. W. 173, admitted.

(c) *Trafford v. Boehm*, 3 Atk. 447, per Lord Hardwicke; *Cunningham v. Moody*, 1 Ves. 176, *per eundem*; *Holderness v. Carmarthen*, 1 B. C. C. 382, per Lord Thurlow; and see the preamble of the 39 & 40 G. 3, c. 56.

(d) And see *Earl of Bath v. Earl of Bradford*, 2 Ves. 590.

money, unless there be an incapacity of the person, as in the case of a *feme covert*, who must first be examined.”(e)

Lord Thurlow, indeed, once said, “If the fund be outstanding in trustees, and it be necessary to come hither in order to obtain it, the money, when obtained, will be personal property; and so it would also, if the trustees pay it without suit. That is, supposing the estate, when purchased, would be a fee simple, for *it would be otherwise in case of its being an estate tail.*”(f) But the concluding remark must have been intended (as Mr. Serjeant Hill, in a note on the passage, has observed)(g) to apply, not to every tenant in tail, as, not to tenant in tail with remainder to himself in fee, but only to tenant in tail with remainder to a stranger; for in a subsequent case, where the tenant in tail had executed an assignment of two sums of money directed to be laid out in lands, his lordship said, “As to the 500*l.* the assignor was tenant in tail, remainder to a stranger, remainder to himself in fee; as to the 1000*l.* he was tenant in tail, with remainder in fee to himself. I am clear, that in regard to the 1000*l.* he had the absolute dominion over it, having the immediate remainder in fee; but as to the 500*l.* I am equally clear the other way, because of the intermediate remainder.”(h)

By the 39 & 40 G. 3, c. 56,(i) the inability of the tenant in tail (with remainders over,) of money to be laid out in the purchase of land to obtain possession of the money, except through the medium of a fictitious purchase,(k) was removed. And the court was empowered on the petition of the first tenant in tail of such money-land, and of the parties (if any) having antecedent estates therein (with a provision for the separate examination of married women,) to order the money to be paid to the petitioners or as they should appoint.(l) So \*that a kind of statutory [\*822] power of election was thus conferred on tenants in tail.

Now, by the Fines and Recoveries Act,(m) a tenant in tail may, with the consent of the protector, if any, dispose absolutely of the lands entailed *at any time, whether in term or vacation*, and by the 71st section of the statute(n) it is enacted, that “money to be invested in the purchase of lands to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall be treated as the lands to be purchased, and the previous clauses of the act shall apply to such money, as if it were directed to be laid out in the purchase of *freehold* lands, and such lands were actually purchased and settled.”

Upon the consideration of the late enactments, a doubt suggests itself whether, even at the present day, a tenant in tail may not elect to take in its original character money which is liable to be laid out in the purchase of lands, and declare such election either by the institution of a

(e) *Trafford v. Boehm*, 3 Atk. 448; but see *Pearson v. Lane*, 17 Ves. 106.

(f) *Pulteney v. Darlington*, 1 B. C. C. 236.

(g) *Ib.* note (a), Lord Henley's edit.

(h) *Holderness v. Carmarthen*, 1 B. C. C. 382.

(i) Extended by 7 G. 4, c. 45.

(k) See *Henley v. Webb*, 5 Mad. 407.

(l) See 5 Ves. 12, note (8) as to the qualification introduced by the court in making orders for payment under this act.

(m) 3 & 4 W. 4, c. 74.

(n) The preceding section repeals the 39 & 40 G. 3, c. 56, and 7 G. 4, c. 45.



suit or by act *in pais*. It is true that under the 71st clause of the late act the tenant in tail may at any time defeat his issue and the remaindermen by a deed executed with the proper formalities; but what is there to prevent him from exercising a power founded upon principles independent of the statute, and so acquiring the fee simple by the mere act of election? It may be said that the old rule, which made election a bar to the issue, might have been grounded on this—that, because no fine or recovery could have been levied or suffered of money,<sup>(o)</sup> the court, on that account, held election to have the effect of a bar, lest the tenant in tail should lose the power, which the law intended him, of defeating the settlement; but that, since by the Fines and Recoveries Act a tenant in tail of money may bar his issue and the remainderman by \*the same formalities as if the lands were actually purchased and settled, the same indulgence ought not now to be shown. But to this it may be answered, that the tenant in tail was allowed to elect, not because the tenant in tail of money had a right to exercise the same powers of ownership as a tenant in tail of lands, but for the purpose of avoiding circuitry. Had the former been the principle, the tenant in tail might equally have barred the remainderman as the issue; but for the destruction of remainders an actual settlement was necessary, and a sham purchase was often resorted to for the purpose.<sup>(p)</sup> It is, however, clear, that no person being tenant in tail of money to be laid out on land could at the present day be advised, if he would acquire the absolute interest, to dispense with the formalities prescribed by the Fines and Recoveries Act.

2. The act of election either may be *presumed* by the court, or may be *expressly declared*.

The *presumption* may arise from slight circumstances of conduct.<sup>(q)</sup> Thus it will be sufficient, where land is to be converted into money, if the *cestui que trust* enter into possession and take the title-deeds into his own custody, for the trustees cannot recover the deeds from the *cestui que trust*, and they cannot sell without them,<sup>(r)</sup> or if the *cestui que trust* merely keep the estate for a length of time unsold<sup>(s)</sup> (but in one case a period of two years was considered not to be a sufficient indication of such an intention,)<sup>(t)</sup> or, where money is to be turned into land, if the *cestui que trust* receive the money from the trustee;<sup>(u)</sup> but not if he merely receive the annual income though for a considerable length of time.<sup>(v)</sup>

(o) See *Benson v. Benson*, 1 P. W. 130; *Edwards v. Countess of Warwick*, 2 P. W. 174; *Maynwaring v. Maynwaring*, 3 Atk. 413.

(p) See — *v. Marsh*, cited *Chaplin v. Horner*, 1 P. W. 485, note(+); *Maynwaring v. Maynwaring*, 3 Atk. 413; *Henley v. Webb*, 5 Mad. 407.

(q) See *Pulteney v. Darlington*, 1 B. C. C. 238; *Van v. Barnett*, 19 Ves. 109; *Bradish v. Gee*, Amb. 229; *Dixon v. Gayfere*, 17 Beav. 433.

(r) *Davies v. Ashford*, 15 Sim. 42; and see *Palbury v. Clark*, 2 Mac. & Gor. 298.

(s) See *Ashby v. Palmer*, 1 Mer. 301; *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Fremantle*, 17 Beav. 314.

(t) *Kirkman v. Miles*, 13 Ves. 338; *Cookson v. Cookson*, 12 Cl. & Fin. 121; but see *Crabtree v. Bramble*, 3 Atk. 688; *Inwood v. Twyne*, 2 Ed. 148.

(u) *Pulteney v. Lord Darlington*, 1 B. C. C. 238, per Lord Thurlow; *Trafford v. Boehm*, 3 Atk. 440; and see *Rook v. Worth*, 1 Ves. 461.

(v) *Gillies v. Longlands*, 4 De Gex & Sm. 372.

[\*824] \*It was determined by Lord Harcourt that a *cestui que trust* had divested money of its real quality by causing the securities to be changed, and the trust to be declared to himself and his *executors*; for this, he observed, was tantamount to saying the money should *not* go to the heir; *(w)* and *vice versa*, where land was to be converted into money, it was held by Lord Hardwicke, that a lease by the *cestui que trust*, reserving a rent to her *heirs* and assigns, was evidence of an intention to continue the property as real estate. *(x)* To constitute an act of election it is not necessary that the person entitled, as for instance, to money to be laid out on land, should know that but for the act of election it would pass as land, but it is sufficient if the court can collect the intention that with or without such knowledge he meant the money to be dealt with and treated as money. *(y)*

A person may *express* his election, even by parol. This, at least, was the opinion of Lord Macclesfield, *(z)* and apparently was actually decided in the case of *Chaloner v. Butcher*, *(a)* in which, the husband having *declared* the money should not be laid out in land, the court held, that, if the question concerned the right of a third person, the declarations of the husband ought not to be admitted; but, as it was between his personal and real representative, they should be read. And both Lord Thurlow, *(b)* and Lord Eldon, *(c)* seem to have lent their sanction to the same doctrine, so that an *obiter dictum* of Lord Hardwicke to the contrary, *(d)* though supported by so illustrious a name, must be considered as overruled.

Where money bore the notional impress of realty, the testator might have bequeathed it as so much money to be laid out in land, and the money would have passed, though the will was not attested \*ac-  
[\*825] cording to the Statute of Frauds; *(e)* the will operated first by way of election, and then by way of bequest. Now by the late Wills Act *(f)* the same formalities are required for the testamentary disposition of both real and personal estate.

## SECTION II.

### THE ACT OF THE TRUSTEE SHALL NOT ALTER THE CESTUI'S QUE TRUST ESTATE.

At law the trustee is the absolute proprietor of the land or fund, and

*(w)* *Lingen v. Sowray*, 1 P. W. 172; and see *Cookson v. Cookson*, 12 Cl. & Fin. 121; *Harcourt v. Seymour*, 2 Sim. N. S. 12.

*(x)* *Crabtree v. Bramble*, 3 Atk. 680, see 688, 689; and see *Griesbach v. Fremantle*, 17 Beav. 314.

*(y)* *Harcourt v. Seymour*, 2 Sim. N. S. 12, see p. 46.

*(z)* *Edwards v. Countess of Warwick*, 2 P. W. 174.

*(a)* Cited *Crabtree v. Bramble*, 3 Atk. 685.

*(b)* *Pulteney v. Darlington*, 1 B. C. C. 237.

*(c)* *Wheldale v. Partridge*, 8 Ves. 236.

*(d)* *Bradish v. Gee*, Amb. 229.

*(e)* See the cases cited, *Lechmere v. Earl of Carlisle*, 3 P. W. 221, note (C); and see *Pulteney v. Darlington*, 1 B. C. C. 235, 236.

*(f)* 7 W. 4, and 1 Vict. c. 26.

therefore may exercise any control or dominion over it—may convert realty into personalty, or personalty into realty ; but *equity*, which regards a trustee as a mere instrument for the execution of the trust, will not permit the interest of the *cestui que trust* to be affected by any act of misconduct, but, as often as any wrongful conversion is made, will transfer to the new interest the quality and character of the old—will treat real estate as personal, and personal as real, as the circumstances of the case may require. But of course where a power (as a power of sale) is given to a trustee, the mere circumstance that the exercise of it may vary the rights of the *cestuis que trust* will not be allowed to fetter the free action of the trustee. *(f)*

Where the *cestui que trust* is *sui juris*, every change in the nature of the property made without the authority of the beneficial owner, must in general be considered a misfeasance ; but with respect to *lunacy* and *infancy* it is necessary that some distinctions should be taken.

It has been laid down as the general rule in *lunacy*, that the court will not alter the condition of the lunatic's property to the prejudice of his successors ; but the maxim must be received with the qualification, *except it be for the benefit of the lunatic himself*. *(g)* The chancellor takes the advice and assistance of the presumptive next of kin and presumptive heir-at-law in the care and management of the property ; *(h)* but through all the cases runs this prevailing principle—that \*the object of attention is exclusively and entirely the interest of the lunatic, [\*826] without any regard to those who may have eventual rights of succession. *(i)*

"Nothing," said Lord Loughborough, "would be more dangerous or mischievous than for the court to consider how it would affect the representatives : there would always be among them an emulation of each other, and their speculations, if the administrator were to engage in them, would mislead his attention, and confine his observation as to the interest of the only person he is bound to protect ; there would be a continued running account between the personal and real estates ; the chancellor would be perpetually looking to the right or left, and the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events." *(k)*

Upon this principle, where a lunatic was seised *ex parte paternâ* of estate A., and *ex parte maternâ* of estate B., and the latter was subject to a mortgage, the money arising from a fall of timber upon A. was directed to be applied in discharge of the mortgage upon B. ; and upon a question between the respective heirs it was held, that the representa-

*(f)* Lantsbery v. Collier, 2 Kay & Johns, 709.

*(g)* Ex parte Grimstone, cited Oxenden v. Lord Compton, 4 B. C. C. 235, note, per Lord Apsley.

*(h)* Ex parte Phillips, 19 Ves. 123, per Lord Eldon.

*(i)* Oxenden v. Lord Compton, 2 Ves. jun. 72 ; and S. C. 4 B. C. C. 233, per Lord Thurlow ; and see Ex parte Bromfield, 1 Ves. jun. 462 ; Ex parte Grimstone, Amb. 708 ; S. C. cited 2 Ves. jun. 75, note *(x)*, and 4 B. C. C. 235, note ; Ex parte Phillips, 19 Ves. 123 ; Dormer's case, 2 P. W. 265 ; Ex parte Chumley, 1 Ves. jun. 297 ; Ex parte Baker, 6 Ves. 8.

*(k)* Oxenden v. Lord Compton, 2 Ves. jun. 72, 73 ; S. C. 4 B. C. C. 233, 234.



tive who succeeded to A. was not entitled to any recompense from the representative who inherited B. *(l)*

So, if the lunatic be considerably indebted, and it appears his maintenance would be better provided for, and his advantage promoted, by the sale of a real estate inconvenient and ill-conditioned, instead of exhausting the personalty, the court, on a proper representation of the case, would have no difficulty in making an order to that effect. *(m)*

So, timber which ought to be cut on a lunatic's estate may be felled [\*827] by the direction of the court, and the proceeds may \*either be applied to the redemption of the land-tax, or payment of debts, *(n)* or any other purpose which the true interest of the lunatic may require; or if not wanted for *any* particular purpose, will go to the next of kin as personalty, and not to the heir as part of the realty. *(o)*

Where the lands of the lunatic are in mortgage, and that whether they have descended to him subject to the charge, *(p)* or the debt is the lunatic's own, *(q)* the chancellor, not *ex necessitate*, but feeling it to be prudent when the personal estate can afford to disincumber the real estate, *(r)* will order the requisite sum to be applied; and the next of kin after the lunatic's decease will have no *lien* upon the real estate for the amount expended.

So, if it be necessary for the interest of the real estate to bring an action of trespass, resort may be had to the lunatic's personal fund. *(s)*

And by the same rule the money of the lunatic may be laid out in improvements; *(t)* but here the chancellor must act *tanquam bonus paterfamilias*, taking every opportunity of ameliorating the estate by fair and ordinary means, such as draining, inclosures, &c., *(u)* erecting a fire-engine for the purpose of working a coal-mine. *(v)* but must not engage in risks and dangerous adventures. *(w)* And of course the personalty may be drawn upon for *necessary expenses*, as repairs, *(x)* fines for re-

*(l)* Ex parte Phillips, 19 Ves. 123, per Lord Eldon.

*(m)* Ex parte Phillips, 19 Ves. 124, per Lord Eldon.

*(n)* Ex parte Phillips, 19 Ves. 119; *Bevan's case*, cited Ex parte Bromfield, 1 Ves. jun. 455, 457.

*(o)* Ex parte Bromfield, 1 Ves. jun. 453; S. C. 3 B. C. C. 510; *Oxenden v. Compton*, 2 Ves. jun. 69; S. C. 4 B. C. C. 231; *Shelly's case*, cited 1 Ves. jun. 457; Ex parte Phillips, 19 Ves. 124, per Lord Eldon. The dictum in *Marquis of Anandale v. Marchioness of Anandale*, 2 Ves. 384, must be considered as overruled.

*(p)* *Dennis v. Badd*, cited *Winchelsea v. Norcliffe*, 1 Vern. 436; but see *Weld v. Tew*, Beat. 266.

*(q)* Ex parte Grimstone, Amb. 706; S. C. cited *Oxenden v. Lord Compton*, 4 B. C. C. 234; *Dormer's case*, 2 P. W. 262.

*(r)* *Oxenden v. Lord Compton*, 2 Ves. jun. 74, per Lord Thurlow.

*(s)* *Oxenden v. Lord Compton*, 2 Ves. jun. 72, per Lord Loughborough.

*(t)* *Sergeson v. Sealey*, 2 Atk. 414, per Lord Hardwicke; *Dormer's case*, 2 P. W. 262.

*(u)* See Justice De Grey's argument in *Ex parte Grimstone*, cited *Oxenden v. Lord Compton*, 2 Ves. jun. 75, note.

*(v)* *Oxenden v. Lord Compton*, 2 Ves. jun. 73.

*(w)* *Oxenden v. Lord Compton*, 2 Ves. jun. 73, per Lord Loughborough.

*(x)* *Sergeson v. Sealey*, 2 Atk. 414, per Lord Hardwicke; Ex parte Grimstone, Amb. 708; S. C. cited *Oxenden v. Lord Compton*, 4 B. C. C. 237, note, per Lord Apsley; 2 Ves. jun. 72, per Lord Loughborough; *Newport's case*, cited, *ib.*; In re *Badcock*, 4 M. & Cr. 440. But it was said in this case, that "if the money were

newals \*of leases, or admissions to copyholds.(y) But where the committees of a lunatic, who were entitled to the estate themselves [\*828] after his death, laid out a sum in *purchasing* timber for repairs, when they ought to have cut timber on the estate, Lord Hardwicke said, that, having done so merely to serve their own interest, they should make good the disbursement to the lunatic's next of kin.(z)

In the preceding cases the conversion has been for the clear benefit of the lunatic, but in general the court will not lightly change the condition of the property, but will only act on pressing and urgent occasions : (a) it will interfere with great caution, and do nothing that is unnecessary or uncalled for. (b) The court will not *buy and sell* for the lunatic ; (c) and, therefore, if the committee of the lunatic wantonly, and of his own head, lay out money upon land, or turn land into money, the court will not suffer such fraudulent mangament to affect the rights of the representatives, (d) but will transfer to the heir what ought to have remained real estate, and to the next of kin what ought to have remained personal estate. (e) However, if timber be cut down, not by a committee in breach of his duty, but by a stranger tortiously, then, as there is no abuse of confidence, the heir has no equity, and \*the property of the timber, like a windfall, will belong to the executor. (f) [\*829]

Next, as to *infants*.

In *Ex parte Bromfield*, Lord Thurlow, without having examined the authorities, said he could not distinguish between lunatics and infants ; (g) but, when the cause came on again, and he had maturely considered the subject, he never once hinted at the existence of such a doctrine ; (h) and, indeed, until the late Wills Act, there was a very broad distinction between the two cases ; for, if a *lunatic* recovered, which in contemplation of law is always possible, he had precisely the same power of disposition, though by different modes, over one species of property as over the other ; (i) but an *infant*, while he could have bequeathed personal estate under the age of twenty-one, could not have devised a freehold

laid out in a purchase of land, or, what was the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty.

(y) Justice De Grey's argument in *Ex parte Grimstone*, *supra* ; but see Degg's case, cited *Oxenden v. Lord Compton*, 4 B. C. C. 235, note.

(z) *Ex parte Ludlow*, 2 Atk. 407.

(a) *Ex parte Bromfield*, 1 Ves. jun. 463, and 3 B. C. C. 515, per Lord Thurlow.

(b) *Oxenden v. Lord Compton*, 2 Ves. jun. 76, and 4 B. C. C. 238, per Lord Loughborough.

(c) *Oxenden v. Lord Compton*, 2 Ves. jun. 73, per Lord Loughborough ; *Ex parte Grimstone*, cited in *Oxenden v. Lord Compton*, 4 B. C. C. 235, note, per Lord Apsley ; *Sergeson v. Sealey*, 2 Atk. 414, per Lord Hardwicke.

(d) See *Ex parte Bromfield*, 1 Ves. jun. 462.

(e) *Anon.* case, 2 Freem. 114 ; *Awdley v. Awdley*, 2 Vern. 192 ; *Marquis of Anandale v. Marchioness of Anandale*, 2 Ves. 384, per Lord Hardwicke ; and see *In re Badcock*, 4 M. & Cr. 440.

(f) *Anon.* case, cited *Ex parte Bromfield*, 1 Ves. jun. 462, and 3 B. C. C. 515, per Lord Thurlow.

(g) 1 Ves. jun. 461 ; S. C. 3 B. C. C. 515.

(h) *Oxenden v. Lord Compton*, 2 Ves. jun. 69 ; S. C. 4 B. C. C. 231.

(i) See *Ex parte Phillips*, 19 Ves. 123.

APRIL, 1858.—42

until he had attained that age.<sup>(k)</sup> The court, therefore, would not allow an infant's estate to be converted from one species of property into another, not from any tenderness to the rights of the representatives, but from a regard to the circumstances and capacity of the infant himself. Should his money have been turned into land, he would have lost a power of disposition which the law permitted him to exercise: should land have been turned into money, he would indirectly have gained a power which the policy of the law had forbidden him.<sup>(l)</sup>

Upon the same principle, had timber been cut an an infant's estate, the proceeds, and, it seems, the accumulation of the proceeds,<sup>(m)</sup> would have continued part of the realty, and have \*descended to the [\*830] heir.<sup>(n)</sup> But a distinction was taken in *Mason v. Mason*,<sup>(o)</sup> (and Sir Thomas Clarke said he allowed it),<sup>(p)</sup> between the case of an infant tenant in fee and an infant tenant in tail: that in the former case the proceeds of the timber should be taken as realty, inasmuch as the infant was thus at all events absolutely entitled; but in the latter case, as the proceeds might, if impressed with the character of realty, become vested in the remainderman, the court would treat the fund as personalty, and give it to the infant's executors.

Again, if an infant's money had been applied to pay off a charge, or redeem a mortgage affecting his real estate, it seems the better opinion (though some old authorities are against it,) that the sum so invested would still have been looked upon as part of the personalty.<sup>(q)</sup>

But *necessary expenses*, though affecting the infant's *lands*, were allowed to be thrown upon the personal fund, as disbursements for repairs,<sup>(r)</sup> for keeping up a house, &c.<sup>(s)</sup>

So in *Vernon v. Vernon*,<sup>(t)</sup> where an estate was devised to an infant in consideration of his paying the sum which the original purchase had cost, it was held, that the amount, being a *necessary* outlay, had properly fallen upon the personalty, and the next of kin were not entitled to compensation.

(k) See *Earl of Winchelsea v. Norcliffe*, 1 Vern. 437, in which case the distinction appears first to have been noticed.

(l) *Ware v. Polhill*, 11 Ves. 278, and *Ex parte Phillips*, 19 Ves. 122, per Lord Eldon; *Ashburton v. Ashburton*, 6 Ves. 6; *Sergeson v. Sealey*, 2 Atk. 413, and *Rook v. Worth*, 1 Ves. 461, per Lord Hardwicke; *Witter v. Witter*, 3 P. W. 99; but see *Earl of Winchelsea v. Norcliffe*, 1 Vern. 435; *Inwood v. Twyne*, 2 Ed. 152; *Ex parte Bromfield*, 1 Ves. jun. 461.

(m) See *Ex parte Bromfield*, 1 Ves. jun. 454.

(n) *Tullet v. Tullet*, 1 Dick. 322; *S. C. Amb.* 370; *Mason v. Mason*, cited *Ib.* 371; *Ex parte Phillips*, 19 Ves. 124, per Lord Eldon; and see *Rook v. Worth*, 1 Ves. 461; but see *Ex parte Bromfield*, 3 B. C. C. 516.

(o) *Ubi supra*.

(p) *Tullet v. Tullet*, *Amb.* 371.

(q) *Ex parte Bromfield*, 3 B. C. C. 516, per Lord Thurlow; *Tullet v. Tullet*, 1 Dick. 323, per Sir T. Clarke; *Seys v. Price*, 9 Mod. 220, per Lord Hardwicke; *Dowling v. Belton*, 1 Flan. & Kelley, 462; but see 2 Freem. 114, c. 126; *Ex parte Grimstone*, *Amb.* 708; *Palmer v. Danby*, *Pr. Ch.* 137; *Zoach v. Lloyd*, cited *Awdley v. Awdley*, 2 Vern. 192; as to *Dennis v. Badd*, cited *Ib.* 193, see *Earl of Winchelsea v. Norcliffe*, 1 Vern. 436.

(r) *Ex parte Grimstone*, cited *Oxenden v. Lord Compton*, 4 B. C. C. 235, note, per Lord Apsley.

(s) *Ex parte Grimstone*, *Amb.* 708, *per eundem*.

(t) Cited in *Ex parte Bromfield*, 1 Ves. jun. 456.



There were some cases to which the reason for preserving the original character of the property did not apply. Thus, if \*an infant [\*831] was seised of a lease for lives *ex parte maternâ*, and the guardian took a new lease to the infant and his heirs, the substituted lease would not descend in the maternal line, but, as a new acquisition, would go to the heirs on the part of the father;(u) but it being perfectly immaterial to the infant himself whether the *seisin* was in the paternal or maternal line, the representative *ex parte maternâ* had no equity against the representative *ex parte paternâ*.

Now, by the late Wills Act(v) an infant has no greater testamentary power over personal than over real estate, and it would seem, therefore, that in all cases the principles which have been stated with reference to lunatics must henceforth be regarded as applicable equally to infants

## \*CHAPTER XXVIII.

[\*832]

OF STATUTORY ENACTMENTS FOR REMEDYING THE INCONVENIENCES ARISING FROM THE DISABILITY OF THE TRUSTEE AND OTHER DEFECTS CONNECTED WITH THE STATE OF THE TRUSTEESHIP.

It frequently happens that the *cestui que trust* is in equity entitled to call for a conveyance, but from the disability of the trustee, or some other accidental circumstance, the object of the party cannot by the ordinary course of law be carried into effect. To obviate the prejudice to which in these cases the interest of the *cestui que trust* might be liable, the legislature has from time to time interposed its aid by remedial statutes.

The first act of the kind was the 7 Anne, c. 19, which provided for the case of *infancy* in respect of *lands*. It was thereby declared that "it should be lawful for infants having estates in lands only in trust for others, or by way of mortgage, by the direction of the Court of Chancery or Exchequer, by order made on the petition of the *cestui que trust*, mortgagor, or other person interested, to convey the said lands as the Court of Chancery or Exchequer should direct."

This statute was held to extend neither to constructive trusts,(a) (except, perhaps, after a decree had established the right),(b) nor to cases where the infant himself possessed an interest,(c) nor where any personal

(u) *Mason v. Day*, Pr. Ch. 319; *Pierson v. Shore*, 1 Atk. 480.

(v) 7 W. 4, and 1 V. c. 26.

(a) *Goodwyn v. Lister*, 3 P. W. 387; *Anon. case*, cited *Ib.* 389, note (A), *Jerdon v. Foster*, cited *Sanders on Uses*, 356, 4th Edit.; *Sikes v. Lister*, 5 Vin. Ab. 541; *In re Janaway*, 7 Price, 679; but see *Ex parte Vernon*, 2 P. W. 549; *Smith v. Hibbard*, 2 Dick. 730.

(b) *Price v. Oneby*, cited *Fearne's P. W.* 239; *Hawkins v. Obeen*, 2 Ves. 559.

(c) *Hawkins v. Obeen*, *ubi supra*; *Ex parte Sergison*, 4 Ves. 147; *Ex parte Tutin*, 3 V. & B. 149; — *v. Handcock*, 17 Ves. 384, per Lord Eldon; and see *Ex parte Bellamy*, 2 Cox, 422; *Ex parte Carter*, 2 Dick. 609.

[\*833] duty was imposed upon the \*trustee, <sup>(d)</sup> though all the *cestuis que trust* might be willing to concur. <sup>(e)</sup> The act directing the application to be made by *petition*, the court considered such an interlocutory method to indicate an intention of remedying only the *plainest* cases of trust.

The next statute was the 4 Geo. 2, c. 10, which provided for the disability of *lunacy* in respect of *lands*. It was thereby enacted that "it should be lawful for idiots, lunatics, and persons *non compos* having estates in lands only in trust for others, or by way of mortgage, or for their committees, by the direction of the lord chancellor on petition to convey the lands whereof such idiots, lunatics, or persons *non compos* should be seised or possessed on trust or by way of mortgage, as the lord chancellor should direct."

This statute, as it followed the language, so it received the interpretation of the statute of Anne: and it was held not to apply to *constructive* trusts, or to cases where the trustee was concerned in *interest*, or had any duty to perform. <sup>(f)</sup> Nor did the act extend to a lunatic who had not been expressly found such by inquisition. <sup>(g)</sup>

Hitherto the remedial enactments had reference to *lands* only but by the 36 Geo. 3, c. 90, the legislature provided for similar inconveniences in respect of *stock*. The statute declared, that "when trustees of stock or the personal representatives of such persons deceased should be *out of the jurisdiction* or not amenable to the process of the court, or should [\*834] be *bankrupts* or *lunatics*, or should *refuse to transfer the stock*, or \*it should be *uncertain or unknown whether they were living or dead*, <sup>(h)</sup> it should be lawful for the Court of Chancery or Exchequer in any cause depending to direct or order a transfer of such stock."

This statute also was held not to apply to lunatics who had not been found such by inquisition; <sup>(i)</sup> a defect which, however, was afterwards remedied by 1 & 2 Geo. 4, c. 114.

The enactments of the preceding statutes were all consolidated and amended by the 6 Geo. 4, c. 74, and provision was further made for the case of a trustee possessing an *interest*, or having a *duty* to perform; but still the court had no jurisdiction where the trust was *constructive*, <sup>(k)</sup> though it seems the bill originally contained such a clause, but Lord Redesdale objected to it strongly, and it was struck out. <sup>(l)</sup>

<sup>(d)</sup> *Ex parte Tutin*, 3 V. & B. 149; *Riggs v. Sykes*, 1 Dick. 400. But in *Attorney-General v. Pomfret*, 2 Cox. 221, Lord Alvanley held, that where new trustees were duly appointed, the circumstance of a duty to perform would not take the case out of the statute, for by the conveyance to the new trustees the duty as regarded the old trustees would cease, and be laid upon others: but if there were no appointment of new trustees, then the statute would not apply.

<sup>(e)</sup> *Ex parte Chasteney*, 1 Jac. 56.

<sup>(f)</sup> *Ex parte Currie*, 1 J. & W. 642; *Ex parte Tutin*, 3 V. & B. 149.

<sup>(g)</sup> *Ex parte Gillam*, 2 Ves. jun. 587; and see *Ex parte Otto Lewis*, 1 Ves. 298.

<sup>(h)</sup> It is almost unnecessary to observe, that in the case of *infancy* no remedy was needed in respect of stock: for if the executor of a trustee happened to be an infant, administration might have been granted to a stranger *durante minoritate*.

<sup>(i)</sup> See *Sylva v. Da Costa*, 8 Ves. 316; *Simms v. Naylor*, 4 Ves. 360; *West v. Ayles*, 1 Turn. & Russ. 330.

<sup>(k)</sup> *King v. Turner*, 2 Sim. 549; *Dew v. Clarke*, 4 Russ. 511; *In re Moody*, Taml. 4.

<sup>(l)</sup> *Dew v. Clarke*, 4 Russ. 514.

This statute was afterwards repealed, and the provisions of it, with material alterations, additions, and improvements, were re-enacted by Lord St. Leonards' Act, the 11 G. 4, and 1 W. 4, c. 60. This last statute has also since been repealed, but as its enactments must still be referred to in the case of titles derived under it, the leading provisions together with the more important decisions upon them will be shortly stated.

The third, fourth, and fifth sections related exclusively to *lunatics*, idiots, persons of unsound mind, and persons incapable of managing their affairs,<sup>(m)</sup> who were trustees<sup>(n)</sup> or mortgagees. By the third and fourth sections, the *committee of the estate*<sup>(o)</sup> of a lunatic, idiot, or *non compos*, \*might, by direction of the *lord chancellor*,<sup>(p)</sup> convey the lands<sup>(q)</sup> [\*835] or transfer the stock; and by the fifth section, where the lunatic had not been found such by inquisition, and so there was no committee, the lord chancellor might *appoint* a person to make the conveyance or transfer; but not if any sum of money exceeding 700*l.* was payable to the lunatic.<sup>(r)</sup>

The sixth section remedied the disability of *infancy* in respect of *lands*<sup>(s)</sup> vested in infants upon trust or by way of mortgage,<sup>(t)</sup> and enabled them to convey under the direction of the court, such conveyance to be as valid as if the infants were adult.<sup>(u)</sup>

(*m*) See *In re Wakeford*, 1 Jones & Lat. 2; *In re Jones*, 6 Jur. 545; Walker, 1 Cr. & Ph. 147.

(*n*) A decree for sale having been made in a creditor's suit, the tenant for life (a lunatic) was held by the effect of the decree to have become a trustee within the act; *Re Milfield*, 2 Phill. 254; 5 Hare, 538. And see *Thomas v. Gwynne*, 9 Beav. 275; and the cases referred to at note (*e*), p. 839.

(*o*) Not an *ad interim* committee; *Re Poulton*, 1 Mac. & Gor. 100.

(*p*) The lord chancellor having jurisdiction in respect of lunatics and idiots, not as presiding over a court of equity, but by virtue of an authority specially delegated to him by the crown; a vice-chancellor could neither direct the reference to the master in the first instance, nor make the final order; *In re Sborrocks*, 1 M. & C. 31, overruling *Anon. case*, 5 Sim. 322; *In re Mount*, 12 L. J. N. S. Ch. 95. So, what had been found in another court, as the exchequer, could not be adopted by the lord chancellor, but a new reference must have been directed. *In re Brideaux*, 2 M. & C. 640.

(*q*) Bengal government notes were lands as defined by the act; *Re Dyce Sombre*, 1 Mac. & Gor. 101.

(*r*) See *Re Sandford*, 2 Hall. & Tw. 137.

(*s*) In the construction of former acts, it was held that lands in the colonies, *Ex parte Fenniliteau*, 2 Dick. 569; *Ex parte Bosanquet*, Ib. 540; *Ex parte Prosser*, 2 B. C. C. 325; and in the territories of the East India Company; *Ex parte Anderson*, 5 Ves. 240; and in Ireland, *Evelyn v. Forster*, 8 Ves. 96; were included. By sections 26 and 29 of this act its provisions were expressly extended to lands abroad within the queen's dominions; but lands abroad out of the queen's dominions were not within the statute. *Price v. Dewhurst*, 8 Sim. 617.

(*t*) See *Prendergast v. Eyre*, Ll. & G. t. Sugd. 11; *Re Kent*, 9 Sim. 501; *Ex parte Ommaney*, 10 Sim. 298; *Re Barry*, 2 Jones & Lat. 1; *Peyton v. McDermott*, 6 Ir. Eq. Rep. 220; *Goddard v. Macaulay*, 6 Ir. Eq. Rep. 221.

(*u*) As the conveyance of an infant under the act would only be as effectual as if he were adult, it was necessary to see that the conveyance would be effectual were the infant of age. Thus, before the abolition of fines and recoveries, had the trustee devised the estate to an infant *in tail*, the conveyance must have been by recovery; *Ex parte Johnson*, 3 Atk. 559; *Ex parte Smith*, Amb. 624. So, if the infant had been a *feme covert*, the conveyance must have been by fine; *Ex parte Maire*, 3 Atk. 479; *Ex parte Bowes*, 3 Atk. 164. When fines and recoveries were abolished, the assurance must have been attended with the formalities required by



The eighth section remedied sundry other inconveniences in [\*836] \*the case of *freeholds* (that is, of freeholds in interest, whether of freehold or copyhold tenure;)(v) and it was thereby enacted, that [\*837] where any person seised of land(w) upon any trust(x) \*should be *out of the jurisdiction or not amenable to the process of the court*, or it should be *uncertain, where there were several trustees, which of them was the survivor*, or it should be *uncertain whether the trustee last known to have been seised(y) as aforesaid was living or dead, or if known to be dead it should not be known who was his heir,(z)* or if any trustee seised as aforesaid, or the heir of any such trustee, should *neglect or refuse to*

the Fines and Recoveries Act; See *Radcliffe v. Eccles*, 1 Keen, 130; *Penny v. Pretor*, 9 Sim. 135.

(v) The second section defined "lands" to include real property of *any tenure*. But as to copyholds see *Queen v. Pitt*, 10 Ad. & Ell. 272.

(w) An estate was devised to the use of the poor of a parish, and it did not appear in whom the legal estate was vested, and the case was held not to be within the act; *Attorney-General v. Randles*, 8 Beav. 185. But see *Re Gore's Charity*, 4 Drur. & W. 270.

(x) It was at first held, that this did not include a *complicated* trust; *Ex parte Merry*, 1 M. & K. 677; but the 12th section authorizing the court, where it should be proper, to direct a bill to be filed to establish the right, it was afterwards ruled that the court had a discretion of making an order in such a trust upon an *ex parte* application; *In re De Clifford*, 2 M. & K. 624, 820.

So it was originally the opinion of the court, that "trust" did not include a *mortgage*; *In re Goddard*, 1 M. & K. 25; *Ex parte Payne*, 6 Sim. 645; *In re Stanley*, 5 Sim. 320; *In re Dearden*, 3 M. & K. 508; and see *Prendergast v. Eyre*, *Lloyd & Goold*, t. Sugden, 11. But the *Escheat and Forfeiture Act* (4 & 5 W. 4, c. 23, s. 2,) declaring, that "where any person seised of any land upon any trust or by way of mortgage died without an heir, it should be lawful for the court of chancery to appoint a person to convey in like manner as was provided" (by the 11 G. 4, and 1 W. 4, c. 60,) "in case such trustee or mortgagee had left an heir and it was not known who was such heir," it was held, as the legislature could best interpret its own provisions, that the 8th section of the act did extend to a mortgage; *Ex parte Whitton*, 1 Keen, 278; *In re Stanley*, 7 Sim. 170; *In re Wilson*, 8 Sim. 393.

A supplemental act was afterwards passed (1 & 2 V. c. 69,) the effect of which was, that for the time to come the relief was confined to the case of a mortgagee dying seised *without having had possession*, and *where the mortgage money should have been or should be paid*; and the word *trust*, in the 8th section of Lord St. Leonards' Act, was restricted from being construed to comprise a mortgage; *Green v. Holden*, 1 Beav. 207; *Spinner v. Walsh*, 10 Ir. Eq. Rep. 214. As the statute recited only the 8th section of Lord St. Leonards' Act, it is presumed it was not meant to repeal the *previous sections* relating to mortgages, and apparently the master of the rolls was of this opinion: see *Green v. Holden*, *ubi supra*. It is remarkable that the decisions of the vice-chancellor of England, *In re Williams*, 9 Sim. 642, and *In re Thompson*, 12 Sim. 392, though the latter at least was correct if the mortgagee was never in possession, appear to have been made without reference to the 1 & 2 Vict. c. 69.

A mortgagor against whom a *decree for sale* was taken by an equitable mortgagee, became thereby a *trustee for sale*, and if he went out of the jurisdiction or was of unsound mind the court appointed a person in his place to execute a conveyance for giving effect to the sale; *King v. Leach*, 2 Hare, 57; *Barfield v. Rogers*, 8 Jur. 229; and see *Hood v. Hall*, 14 Jur. 127.

And when the mortgage money had been paid, the heir of the mortgagee was a *trustee* for the mortgagor, and a petition for a reconveyance should have been presented not by the executors of the mortgagee, but by the mortgagor; *In re Manifold*, 4 Hare, 308.

(y) Qu. if this was applicable to the seisin of the husband where he and his wife were seised in right of the wife; see *Moore v. Vinten*, 12 Sim. 161.

(z) See *In re Bishop Gore's Charities*, 2 Conn. & Laws. 411.

*convey such lands for the space of twenty-eight days next after a proper deed for making such conveyance should have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same,*(a) it should be lawful for the court to appoint a person in the place of the trustee or heir to convey, such conveyance to be as effectual as if the trustee or heir had made and executed the same.

The ninth section remedied certain inconveniences relating to *chattels real*, and enacted that where any person possessed of land for a term of years upon trust(b) should be *out of the jurisdiction or not amenable to the process of the court*, or it *\*should be uncertain whether the trustee last known to have been possessed as aforesaid should be* [\*838] *living or dead,*(c) or if any trustee as aforesaid, or the executor of any such trustee, should *neglect or refuse, &c.*, (as in the former clause,) it should be lawful for the court to appoint a person to make a vicarious assignment or surrender, such assignment or surrender to be as valid as if made by the trustee or executor.

The tenth section related to inconveniences in respect of *stock*, and enacted, that where any person in whose name as a trustee or executor (either alone or together with the name of any other person,) or in the name of whose testator(whether as a trustee or beneficially),(d) any stock should be standing, or any other person who should otherwise have power to transfer, or join with any other person in transferring, any stock to which some other person should be beneficially entitled, should

(a) The tender must have been made by "some person entitled to require a conveyance." What would amount to such a tender was often a question. A person duly nominated a new trustee under a power for that purpose was entitled to require a conveyance to give effect to the appointment; *In re Law*, 4 Beav. 509. And if the court decreed a sale with a direction that all necessary parties should join in the conveyance that converted the owner of the estate into a trustee for the purposes of the decree, and if a conveyance settled by the master had been tendered to him, and he neglected or refused to execute it for twenty-eight days, the court, on the petition of the purchaser or other person interested, ordered a person to convey in the place of the party so neglecting or refusing; *Warburton v. Vaughan*, 4 Y. & C. 247; *Billing v. Webb*, 1 De Gex & Sm. 716; *Robinson v. Wood*, 5 Beav. 246. Note, The refusing trustee need not and ought not to have been served with the petition; *Re Burntree Building Society*, 16 Sim. 296; and see *In re Bradburne*, 12 L. J. N. S. Ch. 353.

(b) In a foreclosure suit by an equitable mortgagee of leaseholds, the plaintiff having obtained a decree for sale, the defendant, the mortgagor, was held to have been thereby converted into a trustee for the plaintiff; *King v. Leach*, 2 Hare, 57; and see *Re Milfield*, 2 Phil. 254.

(c) The words in the preceding clause, "where it should be uncertain, where there were several trustees, which of them was the survivor," were here omitted; for in respect of chattels the personal representatives of *both* the trustees might assign, or if there were no such representatives, administration might be taken out to *both*. It was not intended to provide by the act for any case which could be remedied in any other mode; see *In re Anderson*, L. & G. t. Sugd. 28.

(d) A person was an executor within the meaning of this clause before probate, if he had not renounced; see *Ex parte Winter*, 5 Rus. 284.

A testator gave a sum of consols to A., B., and C., in trust for D. for life. All the trustees died, and the survivor appointed two executors. D. applied to one executor to prove, who refused, and the other was out of the jurisdiction. Held to be within the act; *Ex parte Hagger*, 1 Beav. 98; and see *Cockell v. Pugh*, 6 Beav. 293. From the words "in the name of whose testator," it was ruled that the clause did not apply to the case of a trustee dying *intestate*; *Re Lunn's Charity*, 15 Sim. 464.

be out of the jurisdiction or not amenable to the process of the court,<sup>(e)</sup> or it should be uncertain whether such person was living or dead, or if any such trustee or executor or other person should neglect or refuse<sup>(f)</sup> to transfer such stock, or receive and pay over the dividends thereof to the person entitled thereto or to any part thereof respectively, for the space [\*839] of thirty-one \*days after request<sup>(g)</sup> in writing by the person entitled as aforesaid,<sup>(h)</sup> the court might appoint a person to transfer the stock, or receive and pay over the dividends, such transfer, receipt, or payment to be as effectual as if made by such trustee, executor, or other person.

The eleventh section determined the *mode* of application, by declaring that every direction or order to be made under the act should be signified either by an order made *in any cause depending in the court*,<sup>(i)</sup> or upon *petition in the lunacy or matter*;<sup>(k)</sup> and where the order was made on petition, declared who, according to the circumstances of the case, should be the petitioner.

The fifteenth section provided that the act should extend to trustees having an interest or having a duty to perform, and the sixteenth and seventeenth made special provision for certain cases of specific performance.

The eighteenth section extended the provisions of the act to every case of a constructive trust or of a trust arising or resulting by implication of law, but where the alleged trustee had or claimed a beneficial interest, no order was to be made until after it had been declared by the Court of Chancery, in a suit regularly instituted in such court, that such person was a trustee.<sup>(l)</sup> And cases of election and partition were expressly excepted.

\*By the Trustee Act, 1850, (13 & 14 Vict. c. 60,) and 1 & 2 [\*840] Vict. c. 69, the 1 W. 4, c. 60, and 4 & 5 W. 4, c. 23, were re-

(e) Where a trustee (one of the plaintiffs in a suit) commanded a merchant vessel, and was on his voyage to India, it was held he was not out of the jurisdiction within the meaning of the act; *Hutchinson v. Stephens*, 5 Sim. 498; and see *Ex parte Dover*, 5 Sim. 500.

(f) Refusing to transfer for a just cause was of course no ground for an application to the court; *Pepper v. Tuckey*, 2 Jones & Lat. 95; *Re Moloney*, ib. 391.

(g) An order of the court could not be construed to be the request of a party; *Madge v. Riley*, 3 Y. & C. 425.

(h) See *Re Law*, 4 Beav. 509; *Cockell v. Pugh*, 6 Beav. 293; and note (a), p. 837, *supra*.

(i) Where a suit was depending, the order might have been made on the *decree without a petition*; *Miller v. Knight*, 1 Keen, 129; *Broom v. Broom*, 3 M. & K. 443; *Walton v. Merry*, 6 Sim. 328; overruling *Fellowes v. Till*, 5 Sim. 319; *Prytharch v. Havard*, 6 Sim. 9. The order was also sometimes made on *motion* subsequently to the decree; *Callaghan v. Egan*, 1 Drury & Walsh, 187.

(k) The order could not have been made upon *motion*, instead of petition, where there was no *lis pendens*; *Evelyn v. Forster*, 8 Ves. 96; *Baynes v. Baynes*, 9 Ves. 462; and see *Anon.* 1 Y. & C. 75.

(l) The various orders to convey, &c., made under the preceding sections, in cases of decrees for sale in suits by mortgagees and creditors, must be viewed as deriving their force from this section; see *Prendergast v. Eyre*, Ll. & G. t. Sugd. 11; *Warburton v. Vaughan*, 2 Y. & C. 247; *King v. Leach*, 2 Hare, 57; *Jackson v. Milfield*, 5 Hare, 538. From the last case, and *Re Milfield*, 2 Phil. 254, it appears that an express declaration in the decree of the fact of trusteeship was not necessary. Of course if a sale be directed by the court without jurisdiction the act cannot apply; *Calvert v. Godfrey*, 6 Beav. 97.



pealed, and their provisions consolidated and extended. The chief feature of the act, in connection with the subject of this chapter, was the authority given to the court to divest the legal estate out of the person from whom a conveyance might be desired, and vest it in the proper person or persons by the mere order of the court itself, now familiarly known as a vesting order. Additional facilities were also created for dealing with shares in public companies, and "*choses in action*" held upon trust.

The provisions of this act having been found defective in some respects, they were again extended by 15 & 16 Vict. c. 55.

These two acts, with the decisions of the court upon the construction of the different clauses, will be found *in extenso* at the end of the Treatise.

## \*CHAPTER XXIX.

[\*841]

### PLEADING AND PRACTICE IN REFERENCE TO THE LAW OF TRUSTS.

UNDER this head we propose considering, First, The necessary parties to suits relating to trusts; Secondly, The order and manner in which trustees and *cestuis que trust* ought to sue or defend; Thirdly, Distringas; Fourthly, Compulsory payment into court; Fifthly, Receivership; Sixthly, Costs of suit.

## SECTION I.

### OF NECESSARY PARTIES.

It will be more convenient, first, to state the general practice, and then to mention the modifications introduced by statutory enactment and the orders of the court.

Suits in equity affecting trusts are either between strangers on the one hand, and the persons interested in the trust on the other; or between the persons interested in the trust *inter se*.

I. In suits by or against strangers it is a general rule (unless some enactment or order of the court make an exception) that all the trustees and *cestuis que trust*, who together constitute but one interest, must be made parties. (a)

Thus where a mortgage is made to A. in trust for B., the [\*842] \*latter cannot file a foreclosure bill without making A. a party, (b) who on redemption would be the person to convey the legal estate. (b) And, in the case of a contract to convey to A. in trust for B., the latter

(a) *Bifield v. Taylor*, 1 Moll. 198, per Sir A. Hart; *Adams v. St. Leger*, 1 B. & B. 184, per Lord Manners.

(b) *Wood v. Williams*, 4 Mad. 186; *Scott v. Nicoll*, 3 Russ. 476; *Hichens v. Kelly*, 2 Sm. & Gif. 264.

cannot sue for specific performance without A., to whom the conveyance of the legal estate, if at all, will be decreed.<sup>(c)</sup>

So, one of several *cestuis que trust* cannot file a bill of foreclosure<sup>(d)</sup> or redemption<sup>(e)</sup> without bringing before the court the other *cestuis que trust* who are interested in the mortgage or equity of redemption.

So a mortgagee could not foreclose without making all the *cestuis que trust*, claiming under the mortgagor, parties;<sup>(f)</sup> and a mortgagor could not file a bill to redeem without bringing before the court all the *cestuis que trust* interested in the mortgage.<sup>(g)</sup> However, it was observed by Lord Hardwicke that "where a mortgagee, who had a plain redeemable interest, made several conveyances upon trust in order to entangle the affairs, and render it difficult for the mortgagor or his representatives to redeem, there it was not necessary that the plaintiff should trace out all the persons who have an interest in such trust to make them parties."<sup>(h)</sup>

If A. grant an annuity to B., and vest a term in C. to secure it, A. cannot file a bill against B. to set aside the annuity without making C. a party, for A. might have to institute another suit against C. to get the legal estate, and then B. (who would again be a necessary party) would be doubly vexed.<sup>(i)</sup>

[\*843] \*It was laid down by Lord Redesdale, that, "Trustees of real estate for payments of debts or legacies might sustain a suit, either as plaintiffs or defendants without bringing before the court the creditors or legatees for whom they were trustees, which in many cases would be almost impossible, and the rights of creditors or legatees would be bound by the decision of the court against the trustees."<sup>(k)</sup> But in *Harrison v. Stewardson*,<sup>(l)</sup> V. C. Wigram, upon this passage being referred to, observed "that it was impossible to say the practice of the court was in conformity with the passage which had been cited," and he held, in the case before him, in which the deed was for the benefit of twenty-one scheduled creditors, and only three were before the court, that it was necessary to make all the creditors parties."

Again, it was also said by Lord Redesdale, that "persons having demands prior to the creation of a trust, might enforce those demands against the trustees without bringing before the court the persons

(c) *Cope v. Parry*, 2 J. & W. 538; *Hobson v. Staneer*, 9 Mod. 83.

(d) *Palmer v. Lord Carlisle*, 1 S. & S. 423; *Lowe v. Morgan*, 1 B. C. C. 368; Note, The decree in *Montgomerie v. Marquis of Bath*, 3 Ves. 360, was made without opposition, though it is not expressed (see 1 S. & S. 425,) to have been made by consent.

(e) *Palmer v. Lord Carlisle*, 1 S. & S. 425; per Sir J. Leach; *Henley v. Stone*, 3 Beav. 355.

(f) *Calverley v. Phelps*, 6 Mad. 229; and see *Wilton v. Jones*, 2 Y. & C. Ch. Ca. 244; *Thomas v. Dunning*, 5 De Gex. & Sm. 618; *Anderson v. Stather*, 2 Coll. 209.

(g) *Osborne v. Fallows*, 1 R. & M. 741; *Whistler v. Webb*, Bunb. 53; *Yates v. Hambly*, 2 Atk. 237; *Drew v. Harman*, 5 Price, 319; *Wetherill v. Collins*, 3 Mad. 255.

(h) *Yates v. Hambly*, 2 Atk. 237; and see *Osborne v. Fallows*, 1 R. & M. 743.

(i) *Bromley v. Holland*, 7 Ves. 3, p. 11, 12; and see *Butler v. Prendergast*, 2 B. P. C. 170.

(k) Mitf. Eq. Pl. 174, 4 Ed.

(l) 2 Hare, 530; and see *Holland v. Baker*, 3 Hare, 68; *Thomas v. Dunning*, 5 De G. & Sm. 618.

interested under the trust, if the absolute disposition of the property was vested in the trustees ; but if the trustees had no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the trust must also be parties. Persons having specific charges on the trust property in many cases were also necessary parties, but this would not extend to a general trust for creditors or others whose demands were not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who might answer a general description, might greatly embarrass a prior claim against a trust property.<sup>(m)</sup> But it is apprehended that an absolute power of disposition in the trustees was not sufficient to dispense with the *cestuis que trust*, and that in *all* cases persons having specific charges must have been parties, and that even creditors must not have been omitted as parties altogether, but must have been represented by a few. Assignees of bankrupts and insolvents, however, although *quasi* trustees, were competent to sue or sustain a suit without the presence of the [\*844] creditors.

In suits for the specific performance of a contract, or to have it cancelled, upon any ground, the general rule is that the parties to the contract are the only parties to the suit, and therefore if trustees enter into a contract, not as the agents of their *cestuis que trust* but as principals (though the property of the *cestuis que trust* is in fact concerned,) they may sustain a suit either as plaintiffs or defendants without the presence of the *cestuis que trust*. And not only is it unnecessary, but in many cases would be highly improper, to make the *cestuis que trust* parties.<sup>(n)</sup> But where persons sustaining a fiduciary character enter into a contract not as *principals*, but on behalf and as the *agents* of other parties, those other parties as the principals and not their agents are the proper persons to sue.<sup>(o)</sup>

In marriage articles the husband and wife and their issue are all purchasers for valuable consideration, and parties to the contract, and therefore if any agreement had been made in articles with trustees, they alone could not have filed a bill for specific performance without bringing the *cestuis que trust* before the court, for the latter being also in fact parties to the contract, if the bill of the trustees were dismissed, might afterwards file themselves another bill against the defendant for the like purpose.<sup>(p)</sup>

Where several persons have united in constituting another their representative in a matter for all purposes, there it seems such representative may sue or be sued in the absence of the *cestui que trust*.<sup>(q)</sup> But the intention to constitute such a representative must clearly appear. For trustees are not themselves owners of the property ; they are in a

(m) Mitf. Eq. Pl. 176, 4 Ed.

(n) Wood v. White, 4 M. & C. 460 ; Keon v. Magawly, 1 Dru. & War. 400 ; Tasker v. Small, 3 M. & C. 63 ; Humphreys v. Hollis, Jac. 73 ; Wakeman v. Duchess of Rutland, 3 Ves. 233, 504.

(o) Douglas v. Horsfall, 2 S. & S. 184 ; Hook v. Kinnear, 3 Sw. 417, note ; Small v. Atwood, Younge, 457.

(p) Kirk v. Clark, Pr. Ch. 275.

(q) Vernon v. Blackerly, 2 Atk. 145 ; Bifield v. Taylor, 1 Moll. 193 ; S. C. Beat. 91.



sense agents for the owners in executing the trusts, but they are not constituted agents for the purpose of defending the owners against the adverse claims of third parties.<sup>(r)</sup>

[\*845] \*II. Where the suit is between the parties interested in the trust *inter se*, the rule (where no enactment or order of the court dispenses with it) equally prevails that all the trustees and all the *cestuis que trust* must be before the court.

1. As to trustees. In suits by *cestuis que trust*, praying relief against their trustees, it is necessary as a general rule to make *all* the co-trustees parties,<sup>(s)</sup> on the ground that as *each* co-trustee was liable to the *cestuis que trust*, a multiplicity of suits for the same matter might be avoided, and that the accounts might not be taken twice over; and also that the court may, if possible, do justice to one defendant by a decree over against a co-defendant,<sup>(t)</sup> and it is the *plaintiff's* duty so to frame his suit that complete justice may be done without throwing it on the defendant to file a cross bill.<sup>(u)</sup> But it is to be remembered that a decree between co-defendants must always be founded on the proofs in the cause, upon the issue between the plaintiff and the co-defendants, for though one defendant may read against a co-defendant the proofs by the plaintiff as having been examined against all the defendants, he cannot read the answer of a co-defendant.<sup>(v)</sup>

It commonly happens that, in a suit by a *cestui que trust* for relief against the trustees for a breach of trust, the merits of the case as between the co-defendants are not sufficiently elicited to authorize the court to adjust the equities between them, but they are left to institute a future suit *inter se* for the purpose of obtaining a contribution, or otherwise working out the relief to which they are entitled. They must nevertheless have been all made parties to the original suit, for although the court [\*846] would make no decree between them, it would proceed as far \*as it could by declaring the joint liability, and settling the amount of it by accounts taken in the presence of all; and then in a future suit instituted for contribution or other relief, the court might make its decree upon the basis of the amount so ascertained.<sup>(w)</sup>

If co-trustees commit a breach of trust and a third party reaps the benefit, he must also, as a quasi-trustee, be made a defendant, since he is liable to be sued by the *cestui que trust*, and the equities between himself and the co-trustees ought to be settled so far as is practicable.<sup>(x)</sup>

(r) *Holland v. Baker*, 3 Hare, 72.

(s) *Munch v. Cockerell*, 8 Sim. 219; *Perry v. Knott*, 4 Beav. 179; and see *In Re Chertsey Market*, 6 Price, 278; *Attorney-General v. Newbury Corporation*, C. P. Cooper's Rep. 1837-38, 77; *Wilson v. Broughton*, cited ib. 78; but see *Walker v. Symonds*, 3 Sw. 75; *Tarleton v. Hornby*, 1 Y. & C. 336; *Humberstone v. Chace*, 2 Y. & C. 213; *Attorney-General v. Wilson*, Cr. & Ph. 28.

(t) See *Jones v. Jones*, 3 Atk. 112; *Walker v. Preswick*, 2 Ves. 622; *Latouche v. Dunsany*, 1 Sch. & Lef. 137, 2 Sch. & Lef. 690; *Farquharson v. Seton*, 5 Russ. 45; *Conry v. Caulfield*, 2 B. & B. 255.

(u) See *Jones v. Jones*, 3 Atk. 112; *Shipton v. Rawlins*, 4 Hare, 623, 624.

(v) *Eccleston v. Skelmersdale*, 1 Beav. 396; and see *Cottingham v. Shrewsbury*, 3 Hare, 627; *Lennard v. Curzon*, 1 De Gex & Sm. 350.

(w) See *Perry v. Knott*, 4 Beav. 180.

(x) *Burt v. Dennet*, 2 B. C. C. 225; *Perry v. Knott*, 4 Beav. 179; 5 Beav. 297; *Consett v. Bell*, 1 Y. & C. Ch. Ca. 569.

If a trustee transfer a fund improperly to a stranger without consideration and without notice, and the stranger transfer it over either for no consideration or for a valuable consideration not paid to himself, the intermediate assignee need not be made a defendant, for not having had any notice of the trust he cannot be sued personally on the ground of liability, and not having derived any benefit from it there is no property in his hands to be specially attached.(y)

Of course, wherever the trust estate passes to a *purchaser for valuable consideration without notice*, it is unnecessary to make such purchaser a party.

If a person invested with a fiduciary character be guilty, not of a mere breach of trust or non-performance of a civil obligation, but of a tort or delictum,(z) that is, a fraudulent(a) or wrongful(b) act, the remedy might always have been pursued against that *person only*, without making those who confederated with him also parties.(c) "In cases of this kind," observed Lord Cottenham," where the liability arises from the wrongful act of the parties, each is liable for all the \*consequences, and [847] there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties, who may more or less have joined in the act complained of, nor would any one derive any advantage from their being all made defendants, because as the decree would be general against all found to be guilty of the charge, it might be executed against any of them."(d) The cases to which this doctrine has been applied, have been where corporators deserting their duty have made a fraudulent alienation of the corporate property, or certain members of a company have been the means of inveigling strangers by fraudulent misrepresentations.

It is not necessary to bring before the court the representatives of a trustee who, as the bill is framed, had no concern with the matters in question in the suit.(e) In some cases the plaintiff has been allowed to proceed in the absence of the representative of a co-trustee, by waiving all relief which could not be granted in the absence of such representative.(f)

A person need not be made a party who has merely been named a trustee but has disclaimed.(g)

And the suit may proceed so far as it can in the absence of a trustee who is out of the jurisdiction,(h) or cannot be compelled by the utmost

(y) *Harrison v. Pryse*, Barn. 324; *Knye v. Moore*, 1 S. & S. 61.

(z) See *Lingard v. Bromley*, 1 V. & B. 117.

(a) See *Seddon v. Connell*, 10 Sim. 86.

(b) See *Attorney-General v. Wilson*, 1 Cr. & Ph. 28.

(c) *Attorney-General v. Wilson*, 1 Cr. & Ph. 1; *Seddon v. Connell*, 10 Sim. 58, see p. 86; *Waldburn v. Ingilby*, 1 M. & K. 77; and see *Charity Corporation v. Sutton*, 2 Atk. 406; *Attorney-General v. Brown*, 1 Sw. 265.

(d) *Attorney-General v. Wilson*, 1 Cr. & Ph. 28.

(e) *Glass v. Oxenham*, 2 Atk. 121; *Routh v. Kinder*, 3 Sw. 144, note; *Slater v. Wheeler*, 9 Sim. 156; *Beattie v. Johnstone*, 8 Hare, 169.

(f) *Selyard v. Harris*, 1 Eq. Ca. Ab. 74; *Moon v. Blake*, 1 Moll. 284.

(g) *Wilkinson v. Parry*, 4 Russ. 274; *Richardson v. Hulbert*, 1 Anst. 65; *Creed v. Creed*, 2 Hog. 215.

(h) See *Morrill v. Lawson*, 2 Eq. Ca. Ab. 167; *Walley v. Whalley*, 1 Vern. 487. *Cowstad v. Cely*, Pr. Ch. 83.

process against him to appear to the bill; <sup>(i)</sup> or if it be proved to the court that diligent search and inquiry has been made after him to serve him with process, and that he cannot be found. <sup>(k)</sup>

Where a trustee has died insolvent, it is not necessary in a suit that under other circumstances would cast a liability upon the estate of the trustee, as for having joined in a breach of \*trust, to bring his personal representative before the court. <sup>(l)</sup> But a trustee, if otherwise a necessary party, cannot be dispensed with as a party during his lifetime, on the ground that he is in insolvent circumstances, for the embarrassment may be only temporary, and he may eventually be able to discharge the debt. <sup>(m)</sup>

In suits between parties for the adjudication of their rights to an estate, it is not necessary to have the presence of a mere trustee of an outstanding term. <sup>(n)</sup>

An intermediate trustee of a mere equity need not, except under special circumstances, <sup>(o)</sup> be made a party. Thus A., the *cestui que trust* of a fund of which the legal estate is in B., assigns his interest to C. in trust simply for D.; here D. may sue B. for the fund without making C. a party. <sup>(p)</sup>

A trustee who has assigned his interest over to a new trustee, need not be a party. Thus where A. was trustee for B. for securing an annuity, and B. assigned the annuity to C., and A. assigned the term to D., it was of course not necessary in a suit to set aside the annuity, to make A. a party. <sup>(q)</sup>

Where a person mortgaged his reversionary interest in stock, and then assigned it to trustees by a voluntary instrument upon trust for payment of his debts, it was held the trustees were not necessary parties to a foreclosure suit, the deed being defeasible at any moment, and the trustees the mere agents of the mortgagor. <sup>(r)</sup>

It has been said that sometimes bills have been brought by a *cestui que trust* without making the trustee a party, upon the principle of the *cestui que trust* undertaking for the trustee, who has no personal interest, that he should conform to what decree should be made. <sup>(s)</sup> But this must be regarded as an anomaly.

\*If a bill be filed against several trustees but does not seek to <sup>[\*849]</sup> charge them personally, on the death of one, the trusteeship survives, and the representatives of the deceased trustee need not be brought

(i) *Butler v. Prendergast*, 2 B. P. C. 170.

(k) See s. 49 of the trustee act, 1840. re-enacting s. 24 of 11 G. 4, and 1 W. 4, c. 60, s. 24; and see *Moore v. Vinten*, 12 Sim. 161; *Heath v. Percival*, 2 Eq. Ca. Ab. 167; S. C. 1 P. W. 683; *Walley v. Whalley*, 1 Vern. 487.

(l) *Seddon v. Connell*, 10 Sim. 85; *Madox v. Jackson*, 3 Atk. 406; but see *Haywood v. Ovey*, 6 Mad. 113.

(m) See *Thorpe v. Jackson*, 2 Y. & C. 560, 563; *Haywood v. Ovey*, 6 Mad. 113.

(n) *Brookes v. Burt*, 1 Beav. 106. (o) *Scully v. Scully*, 3 Ir. Eq. Rep. 494.

(p) *Head v. Teynham*, 1 Cox, 57; *Munch v. Cockerell*, 8 Sim. 219; and see *Malone v. Geraghty*, 2 Conn. & Laws. 249; *Whittle v. Halliday*, 2 Conn. & Laws. 430; *Horrocks v. Ledsam*, 2 Coll. 208.

(q) *Bromley v. Holland*, 7 Ves. 11; and see *Knye v. Moore*, 1 S. & S. 65; *Reed v. O'Brien*, 7 Beav. 32.

(r) *Slade v. Rigg*, 3 Hare, 35.

(s) *Kirk v. Clark*, Pr. Ch. 275.



before the court; (t) and the representative of a deceased trustee who was not a party to the breach of trust complained of, and on whose death the trust fund devolved on the surviving trustee, need not be made a defendant to a suit for recovering amends for the breach of trust against the surviving trustee. (u)

If a person entitled to a share of a fund standing in the names of trustees make a new settlement and appoint new trustees, who commit a breach of trust in which the old trustees are also implicated, the *cestui que trust* under the last settlement may have relief, in respect of the breach of trust, against the new trustees without making the old trustees parties. (v)

2. It was necessary until recently to have all the *cestui que trust* before the court, in order that the rights of all parties interested might be ascertained, so that future litigation might be excluded, and that the trustee might not be afterwards harassed for having obeyed the order of the court. (w) But the general rule was and is subject to numerous exceptions.

If a *cestui que trust* was abroad, the court might proceed without him if he was merely a passive party, and the disposition of the property was in the power of those before the court. (x) But if the primary object of the suit be to affect the right of the absent *cestui que trust*, as in a bill for equitable execution against his estate, the court will not make a decree behind his back, even though the legal interest may be vested in some of the defendants. (y) In one case liberty was reserved to make alterations in the decree apparently that the absent *\*cestui que trust* might, if so advised, apply by petition to have the decree [\*850] amended. (z) In another case where one of the *cestui que trust* was abroad and could not be found, the court, though the right of that *cestui que trust* was involved, directed a conveyance of the estate, but without prejudice to any right or interest which might be claimed by that *cestui que trust*. (a)

A suit might proceed in the absence of a *cestui que trust* if process was made against him to a sequestration, and he could not be compelled to appear. (b)

If a *cestui que trust* assign his interest over, the original *cestui que trust* need not be a party to a suit instituted by the assignee. (c)

A *cestui que trust*, entitled to a distinct aliquot share of an ascertained fund, might file a bill against the trustee of the fund for the transfer of

(t) *London Gas Light Company v. Spottiswoode*, 14 Beav. 271.

(u) *Simes v. Eyre*, 6 Hare, 137.

(v) *M'Gachen v. Dew*, 15 Beav. 84.

(w) *Pyncent v. Pyncent*, 3 Atk. 571; *Adams v. St. Leger*, 1 B. & B. 181; *Court v. Jeffry*, 1 S. & S. 105; *Manning v. Thesiger*, ib. 107; *Josling v. Karr*, 3 Beav. 495; *Morril v. Lawson*, 2 Eq. Ca. Ab. 167; *Phillipson v. Gatty*, 6 Hare, 26; *Hanne v. Stevens*, 1 Vern. 110.

(x) *Rogers v. Linton*, Bunb. 200; and see *Willats v. Busby*, 5 Beav. 193.

(y) *Browne v. Blount*, 2 R. & M. 83; see *Holmes v. Bell*, 2 Beav. 298; *Fell v. Brown*, 2 B. C. C. 276; *Willats v. Busby*, 5 Beav. 193.

(z) *Attorney-General v. Balliol College*, 9 Mod. 407; see 409.

(a) *Willats v. Busby*, 5 Beav. 193.

(b) *Downs v. Thomas*, 7 Ves. 206; *Phillips v. Duke of Buckingham*, 1 Vern. 228.

(c) *Goodson v. Ellisson*, 3 Russ. 583.

that share without making the *cestuis que trust* of the residue of the fund parties.(d) But where a plaintiff was entitled to an aliquot share not in an ascertained and existing fund, but in one for which the defendant was liable to account, he must have made the persons entitled to the other aliquot shares parties.(e) And it has been observed that suits for aliquot shares, without making the other persons interested parties, are not to be encouraged as being inconvenient.(f)

III. Certain exceptional cases depending upon considerations equally applicable to suits between the trust estate on the one hand, and strangers on the other, and to suits between the trustees and *cestuis que trust*, *inter se*, remain to be considered.

Where a breach of trust has been committed, it is competent to one or more of the trustees at any time to institute a suit against the person [851] liable to make good the fund without making \*the *cestuis que trust* parties. It may be objected, that, as a suit by the *cestuis que trust* would also clearly lie in such a case, the defendant would thus be liable to be twice vexed for the same matter. However, the rule from its great convenience has been repeatedly recognised, and may be considered established.(g)

Where the *cestuis que trust* are so numerous a body that the suit could not possibly, or at all events conveniently, proceed, if all were required to be parties, the court will, in accordance with its ordinary practice where numerous parties have a common interest, permit some of the *cestuis que trust* to sue on behalf of the rest and as their representatives.(h)

So where *cestuis que trust* are exceedingly numerous, a small number may be made defendants as representatives of the rest for the purpose of binding their rights.(i) But in such cases if all the *cestuis que trust* be not parties, the trustees must be so.(k) In many cases the plaintiff cannot have complete relief in the absence of the general body, as where they ought all to join in a conveyance; but even here if the plaintiff proceed against a few as defendants, the court will go as far as it can by binding the rights of all in equity.(l)

(d) *Smith v. Snow*, 3 Mad. 10; *Hutchinson v. Townsend*, 2 Keen. 675; *Hughson v. Cookson*, 3 Y. & C. 578; *Perry v. Knott*, 5 Beav. 293.

(e) *Lenaghan v. Smith*, 2 Phil. 301; *Alexander v. Mullins*, 2 R. & M. 568.

(f) *Hutchinson v. Townsend*, 2 Keen, 678, per Lord Langdale.

(g) *Franco v. Franco*, 3 Ves. 75; *May v. Selby*, 1 Y. & C. Ch. Ca. 235; *Bridget v. Hames*, 1 Coll. 72; *Noble v. Meymott*, 14 Beav. 471; *Peake v. Ledger*, 4 De Gex & Sm. 137; *Groom v. Booth*, 1 Drewry, 567; *Horsley v. Fawcett*, 11 Beav. 565; *Chancellor v. Morecraft*, ib. 262; *Hughes v. Key*, 20 Beav. 395; *Baynard v. Woolley*, ib. 583.

(h) *Chancey v. May*, Pr. Ch. 592; *Manning v. Thesiger*, 1 S. & S. 106; *Weld v. Bonham*, 2 S. & S. 91; *Harvey v. Harvey*, 4 Beav. 215; and see *Lloyd v. Loaring*, 6 Ves. 773; *Cockburn v. Thompson*, 16 Ves. 321; *Hichens v. Congreve*, 4 Russ. 562; *Preston v. Grand Collier Dock Company*, 11 Sim. 327; *Bromley v. Smith*, 1 Sim. 8; *Walworth v. Holt*, 4 M. & C. 619; *Attorney-General v. Heelis*, 2 S. & S. 67; *Taylor v. Salmon*, 4 M. & C. 134; *Williams v. Salmond*, 2 K. & J. 463.

(i) *Adair v. New River Company*, 11 Ves. 429, see pp. 443, 444, 445; *City of London v. Richmond*, 2 Vern. 421; *Meux v. Maltby*, 2 Sw. 277; *Bunnett v. Foster*, 7 Beav. 540; *Harvey v. Harvey*, 4 Beav. 215; 5 Beav. 134; *Milbank v. Collier*, 1 Coll. 237.

(k) *Holland v. Baker*, 3 Hare, 68.

(l) *Meux v. Maltby*, 2 Sw. 285; and see *Powell v. Wright*, 7 Beav. 449, 450.

In order to enable some to sue on behalf of themselves and others, it must appear that the relief sought is in its nature beneficial to all those whom the plaintiff undertakes to \*represent.<sup>(m)</sup> And the frame [\*852] of the suit must not involve any matter of contest between the plaintiff and the parties represented by him *inter se*.<sup>(n)</sup>

What number was large enough to induce the court to dispense with the rule requiring all to be made parties has never been exactly defined. It was held in one case that where the *cestuis que trust* were twenty, they ought all to be brought before the court.<sup>(o)</sup> But in two other cases where the original *cestuis que trust* were twenty-seven and twenty-six in number respectively, and bills were filed 20 and 17 years respectively after the dates of the respective deeds of trust praying performance of the trusts, it was held that some of the *cestuis que trust* could maintain the suits on behalf of themselves and all others.<sup>(p)</sup>

IV. The practice of the court has now been considerably varied by certain special enactments, and by the general orders of the court which we proceed to consider.

By the 30th order of 26th August, 1841, it was provided that in all suits concerning real estate, which is vested in trustees by *devise* who were competent to sell and give discharges, such trustees should represent the persons beneficially interested in the real estate, in the same manner as executors and administrators represent the persons beneficially interested in the personal estate.

Upon the construction of this clause it was held that devisees in trust for sale, subject to a *charge of debts*, being also executors, though without an express power of signing receipts, were within the meaning of the order.<sup>(q)</sup> But that it \*did not apply where the trustees had [\*853] not an absolute power of sale but only with the consent of another person,<sup>(r)</sup> or where the trust for sale was not immediate, but to be exercised on the death of a tenant for life,<sup>(s)</sup> or where the equitable estate only, and not the legal estate, was vested in the trustees by the will.<sup>(t)</sup> Where the trustees took the estate in the manner required by the order, they sufficiently represented the interests of the *cestuis que trust* in adverse suits between strangers on the one hand, and the privies to the trust on the other.<sup>(u)</sup> But where the suit was one for the adjustment of the rights of the *cestuis que trust*, *inter se*, as a suit for the general administration of a testator's estate, the order did not apply;<sup>(v)</sup> though

(m) Jones v. Del Rio, cited Attorney-General v. Heelis, 2 S. & S. 76; S. C. T. & R. 297; Gray v. Chaplin, 2 S. & S. 267; see 272; Bainbrigge v. Burton, 2 Beav. 539; Long v. Yonge, 2 Sim. 385; Richardson v. Larpent, 2 Y. & C. Ch. Ca. 507.

(n) Evans v. Stokes, 1 Keen, 24; Bainbrigge v. Burton, 2 Beav. 539; Richardson v. Larpent, 2 Y. & C. Ch. Ca. 507; Newton v. Earl of Egmont, 4 Sim. 574; 5 Sim. 130; see 137.

(o) Harrison v. Stewardson, 2 Hare, 533. The bill in this case was by a judgment creditor claiming priority over the *cestuis que trust* and praying a sale.

(p) Smart v. Bradstock, 7 Beav. 500; Bateman v. Margerison, 6 Hare, 496.

(q) Savory v. Barber, 4 Hare, 125; Ogden v. Lowry, 25 L. J. N. S. (Ch.) 198.

(r) Lloyd v. Smith, 13 Sim. 457.

(s) Cox v. Barnard, 5 Hare, 253.

(t) Turner v. Hind, 12 Sim. 414.

(u) Osborne v. Foreman, 2 Hare, 659; Ward v. Bassett, 5 Hare, 179; and see Miller v. Huddleston, 13 Sim. 468; Wilton v. Jones, 2 Y. & C. Ch. Ca. 244.

(v) Jones v. How, 7 Hare, 270; Miller v. Huddleston, 13 Sim. 467.



legatees whose legacies were charged merely on real estate devised so as to fall within the order were not necessary parties.(w)

The 32nd order of 26th August, 1841, declares that a plaintiff having a joint and several demand against several persons, either as principals or sureties, may sue without bringing before the court all the persons liable, but may proceed against one or more of the persons severally liable.

This order has been construed to embrace within it, and indeed was introduced expressly to meet the case of *co-trustees* concurring in a breach of trust,(x) and it applies to individual members of a public body of trustees as well as to private trustees.(y) But although it may not be necessary to have before the court all the *co-trustees* who joined in the breach of trust, the order does not dispense with the necessity of making the representatives of a person who was the principal in the breach of trust, and reaped the benefit of it, parties to \*the suit.(z) And a *cestui que trust* under a will cannot file a bill against a surviving executor for a general administration of the estate, including relief in respect of a breach of trust committed by the defendant and a deceased executor, without making the personal representative of the deceased co-executor a party.(a) And where a bill is originally filed on the basis of making all the co-trustees liable, the plaintiff cannot afterwards, upon one of the trustees dying,(b) or becoming bankrupt,(c) waive relief against the estate of that trustee, and go on against the other trustees only. And in one case where the bill sought to make several trustees liable, and the plaintiff by examining some of them as witnesses, had precluded himself from obtaining a decree against those so examined, the court would not under the order make a decree against the rest.(d)

By 15 & 16 Vict. c. 86, s. 42, rule 1, any residuary legatee, or next of kin, may have a decree for the administration of the personal estate, without making the other residuary legatees or next of kin parties. By rule 2, any person interested in a legacy charged upon or to be paid out of the proceeds of real estate, may have a decree for administration of the estate without serving the other persons interested. By rule 3, any residuary devisee or heir may have the like decree without serving any co-residuary devisee or co-heir. By rule 4, any one *cestui que trust* may have a decree for administration of the trust without serving the other *cestuis que trust*.(e) By rule 5, in suits for protection of property pending litigation, and in matters of waste, one person may sue on behalf of all others having the same interest. By rule 6, any executor, adminis-

(w) *Osborne v. Foreman*, 2 Hare, 656; *Ward v. Bassett*, 5 Hare, 179.

(x) See *Kellaway v. Johnson*, 5 Beav. 319; *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Strong v. Strong*, 18 Beav. 408; *Norris v. Wright*, 14 Beav. 310; *Perry v. Knott*, 4 Beav. 179; 5 Beav. 293.

(y) *Attorney-General v. Pearson*, 2 Coll. 581.

(z) *Perry v. Knott*, 4 Beav. 179; 5 Beav. 297; *Shipton v. Rawlins*, 4 Hare, 619; *Jesse v. Bennett*, 2 Jur. N. S. 964, 6 De Gex, Mac. & Gor. 609.

(a) *Biggs v. Penn*, 4 Hare, 469; *Hall v. Austin*, 2 Coll. 571.

(b) *London Gas Light Company v. Spottiswoode*, 14 Beav. 264.

(c) *Fussell v. Elwin*, 7 Hare, 29.

(d) *Attorney-General v. Dew*, 3 De Gex & Sm. 488.

(e) *Jones v. James*, 9 Hare, Append. lxxx.

trator, or trustee may obtain a decree for administration against any one legatee, next of kin, or *cestui que trust*. But by rule 7, the court in the above cases may require any other persons \*to be made parties. [\*855] And by rule 8, in all the foregoing cases, the decree when made must be served on all the persons who, according to the practice of the court at that time, and independently of the act, would be necessary parties.

By rule 9, in all suits concerning real or personal estate vested in trustees under a will, settlement, or otherwise, such trustees shall represent their *cestuis que trust* in the same manner as executors or administrators represent the persons beneficially interested in the personal estate. But the court may direct the *cestuis que trust* to be made parties.

It is to be observed upon these rules, that although in a large proportion of cases the old difficulties as to parties are removed down to the hearing, yet rule 8 still renders a reference to the old practice necessary, though at a different stage of the cause.

Rule 9 is much more comprehensive than the 30th order of 26th August, 1841, as it comprises trustees appointed not only by a will but by any instrument, and is not confined to trustees for sale merely, but extends to all trustees in whom the estate is vested. It has been held under this rule that trustees can sufficiently represent their *cestuis que trust* even in redemption(*f*) and foreclosure suits.(*g*) But it is discretionary with the court whether the *cestuis que trust* shall or not be made parties. Where the trustees fill the double character of executors and devisees in trust of the mortgagor, and thus may be supposed to have funds applicable for the purpose of redeeming, the court is disposed to dispense with the presence of the *cestuis que trust*;(h) but where the trustees are trustees of a settlement merely(*i*) or where the court for other reasons views the trustees as inadequate representatives, it refuses to adjudicate in the absence of the *cestuis que trust*.(*k*) And where a bill was filed by a settlor to set aside a settlement as having been fraudulently obtained by the trustees, it was \*held that the trustees (one of [\*856] whom was entitled beneficially under the settlement to one-twelfth of the trust fund, subject to a life interest in the plaintiff,) could not be treated as sufficiently representing the *cestuis que trust* for the purposes of the suit.(*l*)

By the 47th section of the same act any creditor or person interested under the will may apply at chambers for an order of administration where the whole real estate is by devise vested in the trustees, who are empowered to sell, and authorized to sign receipts for the rents and profits and produce of sale.(*m*)

(*f*) *Stansfield v. Hobson*, 16 Beav. 189.

(*g*) *Sale v. Kitson*, 3 De Gex, Mac. & Gor. 119; *Hanman v. Riley*, 9 Hare, Append. xl.

(*h*) *Hanman v. Riley*, 9 Hare, Append. xl.

(*i*) *Goldsmid v. Stonehewer*, 9 Hare, Append. xxxviii.

(*k*) *Cropper v. Mellersh*, 1 Jur. N. S. 299; *Chaffers v. Baker*, 5 Weekly Rep. 326.

(*l*) *Reed v. Prest*, 1 K. & J. 183.

(*m*) See the decisions on the 30th order of August, 1841, the language of which is similar, p. 852, supra. *Rump v. Greenhill*, 20 Beav. 512; *Ogden v. Lowry*, 25 L. J. N. S. (Ch.) 198.

By the 51st section the court may adjudicate upon questions in the presence of some only of the parties interested,<sup>(n)</sup> and as to a portion only of the trust estate,<sup>(o)</sup> and without taking the accounts.

## SECTION II.

OF THE ORDER AND MANNER IN WHICH THE TRUSTEES AND CESTUIS QUE TRUST OUGHT TO APPEAR UPON THE RECORD, AS WHETHER JOINTLY OR SEVERALLY AS PLAINTIFFS OR DEFENDANTS.

In a contest between the *trust* on the one hand, and a *stranger* on the other, the trustees and *cestuis que trust* represent but one interest, and costs must not be multiplied unnecessarily by the severance of them in the suit.

It was said by Sir Anthony Hart, that a *cestui que trust* about to file his bill, ought to apply to his trustee to allow his name to be used as a co-plaintiff. This (he said) the trustee is bound to comply with upon being indemnified against costs. Should the trustee refuse, he would be departing from his duty, and in such a case would not be entitled to his costs when made defendant, in consequence of his refusal. But where no application is made to the trustee to permit his name to be used as co-plaintiff, he is in no default, and the *cestui que trust* would \*be [\*857] bound to pay the costs of the trustee for his unreasonable negligence in not having required the trustee to be co-plaintiff.<sup>(p)</sup> And where there is a just ground of suit, it is the duty of a trustee to allow himself to be made a co-plaintiff.<sup>(q)</sup>

Upon the same principle, where a trustee and *cestui que trust* are made *defendants* in the same right, as they have an identity of interest they ought not to split the defence, and file separate answers;<sup>(r)</sup> not that a trustee and his *cestui que trust* can be *compelled* to join in their defence;<sup>(s)</sup> but if they do not they will be mulcted in costs, as only one set of costs will be decreed against the plaintiff.<sup>(t)</sup>

In suits between trustees and *cestuis que trust*, *inter se*, it is equally the rule that all the *cestuis que trust* in the same interest should sue as co-plaintiffs;<sup>(u)</sup> or if the bill is by a trustee that he should join his co-trustees with him, unless there be some special circumstance demanding a severance.

So, as a general rule, in suits of every description, joint trustees should make a joint defence, and if they put in separate answers, one set of costs only will be allowed, which, if they be equally in fault, will be appor-

(n) See *Doody v. Higgins*, 9 Hare, Append. xxxii.

(o) *Prentice v. Prentice*, 10 Hare, Append. xxii.

(p) *Reade v. Sparks*, 1 Moll. 8, 11; but see *Browne v. Lockhart*, 10 Sim. 426.

(q) *Hughes v. Key*, 20 Beav. 395.

(r) *Reade v. Sparks*, 1 Moll. 10, 12, per Sir. A. Hart; *Woods v. Woods*, 5 Hare. 229; *Farr v. Sheriffe*, 4 Hare, 528.

(s) *Van Sandau v. Moore*, 1 Russ. 441; reversing S. C. 2 S. & S. 509.

(t) *Cuddy v. Waldron*, 1 Moll. 14; *Homan v. Hague*, 1 Moll. 14; *Galway v. Butler*, 1 Moll. 13.

(u) See *Hosking v. Nicholls*, 1 Y. & C. Ch. Ca. 478.



tioned amongst them.(v) But if there be two trustees, and one be willing to join, and the other refuse, who afterwards puts in an answer, and shows no reason for his refusal, the single costs allowed will be given exclusively to the trustee who expressed a willingness to join.(w) And where two trustees severed in their defence one of whom was charged with misconduct, the court held that the innocent trustee was justified in severing, and while allowing one set of costs gave the whole of them to him.(x) However, \*where the court sees there is a substantial reason for [\*858] it, as where one trustee has a personal interest which conflicts with his duty as trustee, or where one can admit facts which the other believes not to be true,(y) or where the co-trustees reside at such a distance from each other that a joint answer is impracticable,(z) or where other special grounds exist,(u) the several trustees will be allowed to put in separate answers, and each will be allowed his full costs.

A *feme covert* entitled to her separate use cannot join her husband as co-plaintiff, but must sue by her next friend, making her husband a defendant, who, under such circumstances, will be entitled to his costs ;(b) and if she be made a defendant in respect of such an interest, she should obtain an order to defend separately.(c) But the mere fact of a *feme covert* living apart from her husband, does not entitle her to appear separately at the costs of a trust estate under administration, where the interest which she claims is not settled to her separate use.(d)

### SECTION III.

#### OF DISTINGUISHING.

In the case of stock transferable in the books of the Bank of England, and also in the case of the stock and shares of many other public companies, no obligation exists on the part of the bank or public company to look beyond the title of the legal holder. The modern form of legislative enactment on the subject is usually to the effect that the company "shall not be \*bound to see to the execution of any trust, whether express, implied, or constructive."(e) Where, therefore, property [\*859] of this description is held upon trust, the interests of the *cestui que trust* are peculiarly liable to be endangered by the dishonesty of the trustee ;

(v) *Nicholson v. Falkiner*, 1 Moll. 559, per Sir A. Hart; *Gaunt v. Taylor*, 2 Beav. 347, per Lord Langdale.

(w) *Young v. Scott*, 1 Jones, Ir. Exch. 71 ; and see *Attorney-General v. Cuming*, 2 Y. & C. Ch. Ca. 156.

(x) *Webb v. Webb*, 16 Sim. 55.

(y) *Gaunt v. Taylor*, 2 Beav. 346.

(z) *Aldridge v. Westbrook*, 4 Beav. 212 ; *Dudgeon v. Cormley*, 2 Conn. & Laws. 422 ; *Nicholson v. Falkiner*, 1 Moll. 560 ; *Wiles v. Cooper*, 9 Beav. 294 ; but see *Farr v. Sheriffe*, 4 Hare, 528.

(a) *Anon. case*, cited *Barry v. Woodham*, 1 Y. & C. 538 ; *Nicholson v. Falkiner*, 1 Moll. 555, see 560 ; *Reade v. Sparkes*, 1 Moll. 10, per Sir A. Hart ; *Kampf v. Jones*, C. P. Cooper's Rep. 1837-38, 13 ; and see *Walsh v. Dillon*, 1 Moll. 13.

(b) *Thorby v. Yeats*, 1 Y. & C. Ch. Ca. 438.

(c) See *Norris v. Wright*, 14 Beav. 303 ; and p. 633, *supra*.

(d) *Garey v. Whittingham*, 5 Beav. 270 ; and see *Barry v. Woodham*, 1 Y. & C. 538.

(e) 8 Vict. c. 16, s. 20.

and, indeed, but for the means of protection now about to be explained, would be almost entirely at his mercy.

The *distringas* was originally a process of the equity side (now abolished) of the court of exchequer for compelling the appearance of a corporation to a bill filed, but formerly it was a common practice, more particularly in any emergency, to issue a subpoena before the bill was actually on the file. When, therefore, a party sought to restrain a transfer of stock, before he filed the bill against the holder of the stock and the bank (who were then necessary parties,) to prevent any mischief in the interim he served process immediately on the secretary of the bank to appear to the bill. But as the form of *distringas* gave no information as to the stock to be restrained, the *distringas* was accompanied with a notice in writing, which specified the stock, and required the bank not to permit the transfer. The effect of this was, that if the holder of the stock applied to the bank to make a transfer, the bank immediately forwarded a notice to the party issuing the *distringas*, that unless he actually filed a bill, and obtained and served an injunction before a certain day, they should permit the transfer to be made.

The 4 Anne, c. 16, s. 22, declared that no subpoena or other process for appearance should issue until after the bill was filed; and the 39 & 40 G. 3, c. 36, enable suitors to obtain an injunction against the bank, without making the bank a party. However, in practice the *distringas* still continued to be served on the bank, and the same attention was paid to it in not allowing a transfer.

The convenience of the *distringas* was so sensibly felt, from the frequent necessity of laying an embargo upon stock at a moment's notice, that when the 5 Viet. c. 5, abolished the equity side of the exchequer, [\*860] it was thought expedient to \*transfer the process to the court of chancery, and enlarge the remedy.

Accordingly, by section 4 of the act referred to, it was by way of additional remedy enacted, that "it should be lawful for the court of chancery, upon the application of any party interested, by motion or petition, in a summary way without bill filed, to restrain the Bank of England or other company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, or from paying any dividend or dividends due or to become due thereon; and every order of the court upon such motion or petition should specify the amount of the stock, or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same should be standing."

An application to the court under this section must be founded upon an affidavit verifying the special grounds upon which it proceeds.(f) And when the order has been made, as it was not the intention of the legislature to do more than protect the stock until the party could assert his right in the ordinary way, if the opposite party move to dissolve the injunction, and the court sees that there has been great neglect on the part of the person who obtained the order, and that any extension of

(f) Ex parte Field, 1 Y. & C. Ch. Ca. 1; Re Marquis of Hertford, 1 Hare, 586.

time would be oppressive to the party restrained, it will not as of course give further time for filing the bill. *(g)* When a bill has been filed, and an answer put in, and the defendant moves to discharge the restraining order, the plaintiff may file affidavits in opposition to the answer, and is not confined to the merits disclosed in the answer. *(h)*

By section 5 of the act it is thus enacted, "In the place and stead of the writ of *distringas*, as the same has been heretofore issued from the court of exchequer, a writ of *distringas* in the form set out in the schedule to the act shall be issuable from the court of chancery, and shall be sealed at the subpœna \*office, and the force and effect of such writ, and the practice under or relating to the same, shall be such [\*861] as is now in force in the said court of exchequer; provided, nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of this act, or of any other act now in force, or under the general authority of the court of chancery, be made with reference to the proceedings and practice of the court of chancery."

In the schedule to the act, the form of the writ is as follows: "Victoria, &c., to the sheriffs of London greeting. We command you that you omit not, by reason of any liberty, but that you enter the same, and distrain the governor and company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until We otherwise command you; and that you answer us the issue of the said lands, *so that they do appear before us in our High Court of Chancery on the      day of      , to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said court of chancery by      complainant*; and further, to do and receive what our said court shall then and there order in the premises, and that you then leave there this writ. Witness &c."

The act, as we have seen, empowered the court to regulate the practice of the *distringas*, and orders were issued in consequence to the following effect:—

1. That any person claiming to be interested in any stock transferable at the Bank of England may by his *solicitor* prepare a writ of *distringas* in the form set out in the schedule to the act, and present the same for sealing at the subpœna office. *(i)*

2. That such person must, before the writ is sealed, leave at the subpœna office an affidavit sworn by him or his *solicitor* in the following form:—*(k)*

\*"A. B." (the name of the party or parties in whose behalf the writ is sued out) "*v. the Governor and Company of the Bank of England.*" [\*862]

*(g)* In re Marquis of Hertford, 1 Hare, 584. See same case, 1 Phil. 203.

*(h)* In re Marquis of Hertford, 1 Phil. 203. See now 15 & 16 V. c. 86, s. 59.

*(i)* 1 Order of 17 Nov. 1841, 3 Beav. xxxiii.

*(k)* 2 Order of 17 Nov. 1841, 3 Beav. xxxiii; and Order of Dec. 10, 1841, correcting the form of affidavit at the foot of the Orders of the 17 Nov. 1841, ib. xxxviii.



"I \_\_\_\_\_, of \_\_\_\_\_, do solemnly swear, that, according to the best of my knowledge, information, and belief, I am" (or if the affidavit is made by the solicitor, "A. B. of \_\_\_\_\_, is) beneficially interested in the stock hereinafter particularly described, that is to say" (here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing.)

3. That such writ of *distringas*, and all process thereunder, may be discharged by order of the court, to be obtained, as of course, by the party on whose behalf the writ was issued; and to be obtained upon the application by motion or petition of any other person claiming to be interested in the stock sought to be affected. And power is given to the court to deal with the costs as may seem just.(l)

4. "That the bank having been served with such writ of *distringas*, and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer, or to pay such dividends, shall not by force, or in consequence of such *distringas*, be authorized without the order of the court to refuse to permit such transfer to be made, or to withhold payment of such dividends for *more than eight days after the date of such request*."(m)

5. That the patentee of the subpoena office shall cause the affidavit to be filed and registered at the office of the clerk of the affidavits.(n)

The present course, therefore, is this. The solicitor of the party [\*863] seeking the *distringas* prepares a writ of *distringas* in \*the form required by the act, and the party or his solicitor swears an affidavit in the form required by the general order. The writ and affidavit are then taken to the subpoena office, the former to be sealed, and the latter to be left for filing. A notice in writing is then prepared that the bank is not to permit the transfer of the stock or payment of the dividends upon which the restraint is sought, and the *distringas* and notice are then served on the secretary of the bank. The result is, that when the holder of the stock requests a transfer of the stock or payment of the dividends, the bank immediately forwards a notice to the party who issued the *distringas*, that unless he file a bill and obtain and serve an injunction within eight days from the date of such request, the transfer or payment will be made. The party must, of course, be then upon the alert to file a bill and obtain and serve the injunction before the eight days have expired.

Between the remedy given by the 4th section and that given by the 5th section of the act, the following distinctions exist. The former applies not merely to stock in the funds, but to stock and shares of public companies, whether incorporated or not; while the latter (whether intentionally or not may be doubted) is, by the joint effect of the schedule to the act of parliament and of the orders of the Court of Chancery before

(l) 3 Order of 17 Nov. 1841, 3 Beav. xxxiv.

(m) 4 Order, ib. xxxiv.

(n) 5 Order of same date, 3 Beav. xxxiv.

referred to, confined to stock transferable at the Bank of England. Again, the *distringas* under the 5th section may be, and is in fact, frequently obtained, not from any fear of immediate danger, but as a general safeguard merely ;(o) whereas a special case must be made in order to obtain a restraining order under the 4th section.(p) It is, indeed, much to be regretted that this extremely useful process should be limited in its application to stock in the public funds and government annuities.

As respects stock in the funds, the *distringas* under the 5th section, and the restraining order under the 4th section, may both occasionally be resorted to should circumstances require it ; for the adoption of either remedy is not an election of the \*one to the exclusion of the other.(q) “The 4th clause,” said Sir J. Wigram, “was intended [\*864] for interim purposes to protect stock until the party claiming it should have an opportunity of asserting his rights by bill in the ordinary way, an opportunity often wanting from the facility with which that species of property is transferred from hand to hand, and which the common *distringas*, preserved by the 5th section, does not in all cases afford. A *distringas* remains [*qu. restrains*] only at the discretion of the bank. The restraining order, which the 4th section enables the court to grant, is imperative ; it continues so long as the court sees fit to direct, and can only be discharged in the meantime upon the application of the parties interested. Cases might arise in which from the discovery of new matter after a *distringas* had issued, or from the bank peremptorily, but erroneously refusing to notice a *distringas*, or perhaps from other causes, the party who obtained that writ might notwithstanding, upon a full disclosure of the facts in a case of merits and urgency, entitle himself to a restraining order under the 4th section.”(r)

## SECTION IV.

### OF COMPULSORY PAYMENT INTO COURT.

The rule as laid down by Lord Eldon, and which has ever since been acquiesced in, is, that to call for payment of money into court, “the plaintiff must either be *solely entitled* to the fund or *have acquired in the whole of the fund such an interest, together with others, as entitles him on his own behalf, and the behalf of those others, to have the fund secured in court.*”(s) It is not indispensable that the plaintiff should be the person exclusively interested ; but if he have a partial interest, it is enough, provided all the other persons interested \*in the fund are before the court,(t) and the court may and occasionally will [\*865] make orders for payment into court, although some of the persons inte-

(o) See *Etty v. Bridges*, 1 Y. & C. Ch. Ca. 486. (p) Note (f), p. 860, *supra*.

(q) In *re Marquis of Hertford*, 1 Hare, 584 ; 1 Phil. 129.

(r) In *re Marquis of Hertford*, 1 Hare, 590.

(s) *Freeman v. Fairlie*, 3 Mer. 29 ; and see *Dubless v. Flint*, 4 M. & C. 502 ; *M'Hardy v. Hitchcock*, 11 Beav. 77.

(t) *Whitemarsh v. Robertson*, 4 Beav. 26 ; *Bartlett v. Bartlett*, 4 Hare, 631 ; but see *Ross v. Ross*, 12 Beav. 89.

rested in the money are not before it.<sup>(u)</sup> And where, under the new practice, the other persons interested are not necessary parties to the suit, payment into court may be obtained without service on them of the notice of motion;<sup>(v)</sup> but where the *cestuis que trust* had been served with a copy of a bill for the appointment of new trustees which prayed a transfer to the new trustees, the court held that they must be served with notice of a motion to transfer the fund into court.<sup>(w)</sup>

If the defendant admits himself to be a trustee, but it remains to be ascertained whether he is a trustee for the plaintiff or for other parties, the plaintiff may move upon his possible title, where all persons are before the court among whom there will be found some one who is entitled.<sup>(x)</sup> "In a contest as to the title to any particular property," said Lord Cottenham, "the court will, in some cases, take possession of the subject-matter of the contest for security until it adjudicates upon the right. Such cases generally arise when the property is in the hands of stakeholders, factors, or trustees who do not themselves claim any title to it. In ordering money into court under such circumstances, the court does not disturb the possession of any party claiming title, or direct a payment before the liability to pay is established."<sup>(y)</sup> Occasionally, where the fund is clear, and is divisible between the plaintiff and defendant in certain proportions, the court has ordered the defendant to pay into court the share only of the plaintiff.<sup>(z)</sup>

The merits upon which the motion is founded must be admitted by the defendant's answer, and no evidence to this effect can be adduced *aliunde*.<sup>(a)</sup> Thus, if money be standing in the joint names of several persons, as of three trustees, it cannot be ordered into court on the admission of the specific sum by one, though the others admit that a sum is standing in their joint names, and the plaintiff offers to read affidavits sworn by them, from which the amount of the sum would appear.<sup>(b)</sup>

And it would seem that not only must the plaintiff be able to read from the answer an admission of the defendant's receipt of the money, but also an admission of his own title, or probable title, *e. g.* as next of kin, heir-at-law, &c., and that if the defendant ignores the plaintiff's title, the money will not be ordered into court.<sup>(c)</sup>

The plaintiff cannot ask for payment of money into court upon the footing of an equity not alleged by the bill, but only stated by the answer. Thus, where the plaintiff filed a bill claiming one-fifth of the residuary

(u) *Wilton v. Hill*, 2 De Gex. Mac. & Gor. 807.

(v) *Marryat v. Marryat*, 23 L. J. Ch. 876.

(w) *Lewellin v. Cobbold*, 1 Sm. & Giff. 572.

(x) See *Dolder v. Bank of England*, 10 Ves. 355; but see cases note (c), p. 865.

(y) *Richardson v. Bank of England*, 4 M. & C. 171.

(z) *Rogers v. Rogers*, 1 Anst. 174; see *Score v. Ford*, 7 Beav. 336.

(a) *Beaumont v. Meredith*, 3 V. & B. 181, per Lord Eldon; *Richardson v. Bank of England*, 4 M. & C. 171, 175, per Lord Cottenham; *Dubless v. Flint*, 4 M. & C. 502; *Black v. Creighton*, 2 Moll. 554, per Sir A. Hart; and see *Green v. Pledger*, 3 Hare, 171. The 59th sect. of the 15th & 16th Vict. c. 86, directing the defendant's answer to be viewed merely as an affidavit in motions for injunction or receiver, &c., does not touch motions for payment into court.

(b) *Boschetti v. Power*, 8 Beav. 98.

(c) *Dubless v. Flint*, 4 M. & C. 502; *McHardy v. Hitchcock*, 11 Beav. 73.



estate of a testator asking relief, as in a case of an open account, and the defendant by his answer stated a deed amounting to a settlement of account under which he admitted a sum to be due from him, it was held that the plaintiff could not without amending his bill obtain payment into court of the sum so admitted to be due. *(d)*

It is not necessary that the defendant should acknowledge the fund to be in his hands at the time of the answer; for if he admit that he once actually received it, and state that he afterwards applied it in a way not authorized by the trust, the court will fasten upon the receipt and not allow him to discharge himself by pleading a breach of duty; as if a trustee admit that he had a fund in his hands, but says that he afterwards \*sold it out and did not re-invest it, *(e)* or paid it away improperly, *(f)* or lent it on personal *(g)* or other security, *(h)* not within [\*867] the terms of the trust. And no attention will be paid to the objection that the bill was for the very purpose of securing the fund, and therefore that the money ought not to be ordered into court until the decree. *(i)*

But if an executor (and the rule must apply equally to a trustee) admits in his answer that he has received a specific sum, but adds that he has made payments, the amount whereof he does not specify, in respect of the testator's estate, the court will allow him to verify by affidavit the amount of the payments properly made, and will order him to pay in the actual balance. *(k)*

Payment of money into court is, in general, confined to the cases of a defendant's admission of actual possession of the fund, or of a receipt not followed by any subsequent legal discharge, and is not ordered upon a mere admission of facts from which a liability may be inferred. *(l)* Thus, if a defendant admit that he has had a fund in his hands from a certain time, and it clearly appears from the answer that he is liable and will be decreed at the hearing to pay interest; yet the court will not order him to pay interest on motion, *(m)* unless he also admit that he has actually made interest, which amounts to a receipt. *(n)*

The case of *Rothwell v. Rothwell* *(o)* is no exception to the [\*868] \*rule, for there the defendant had covenanted with the trustees of his marriage settlement to pay 850*l.* within twelve months from the

*(d)* *Proudfoot v. Hume*, 4 Beav. 476.

*(e)* *Wiglesworth v. Wiglesworth*, 16 Beav. 272; *Phillipo v. Munnings*, 2 M. & C. 309; and see *Meyer v. Montriou*, 4 Beav. 346; *Futter v. Jackson*, 6 Beav. 424.

*(f)* See *Scott v. Becher*, 4 Price, 350; *Meyer v. Montriou*, 4 Beav. 343; *Nokes v. Seppings*, 2 Phill. 19.

*(g)* *Vigrass v. Binfield*, 3 Mad. 62; *Collis v. Collis*, 2 Sim. 365; *Roy v. Gibbon*, 4 Hare, 65.

*(h)* *Wyatt v. Sharratt*, 3 Beav. 498; *Costeker v. Horrox*, 3 Y. & C. 530; *Hinde v. Blake*, 4 Beav. 597; *Bourne v. Mole*, 8 Beav. 177.

*(i)* See *Rothwell v. Rothwell*, 2 S. & S. 217; *Wyatt v. Sharratt*, 3 Beav. 498; *Collis v. Collis*, 2 Sim. 365.

*(k)* *Anon.* 4 Sim, 359; and see *Proudfoot v. Hume*, 4 Beav. 476; *Roy v. Gibbon*, 4 Hare, 65.

*(l)* See *Richardson v. Bank of England*, 4 M. & C. 174; *Peacham v. Daw*, 6 Mad. 98.

*(m)* *Wood v. Downes*, 1 V. & B. 50.

*(n)* *Freeman v. Fairlie*, 3 Mer. 43; see *Wood v. Downes*, 1 V. & B. 50.

*(o)* 2 S. & S. 217; see *Richardson v. Bank of England*, 4 M. & C. 174.

marriage; and the covenant not having been performed, the children filed a bill against their parents and the trustees to have the money raised; and defendant admitting "that the 850*l.* had not been got in, but that it was still in his hands," the court ordered the payment into court, not on the admission of the debt, but "that *it was still in his hands.*"

However, in some cases the court orders payment into court upon motion of what is apparently a mere debt; as where an executor or trustee admits himself to owe a debt to the estate he represents, for here the person to pay and the person to receive being the same, the court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realized in the hands of of the executor or trustee.<sup>(p)</sup> Thus where A., B., and C., were appointed executors of a will, of whom A. and C. alone proved, and A. and B. were appointed trustees, and a bill was filed by A. for the administration of the trusts of the will, and B. by his answer admitted that he and his partner G. B. were indebted to the testatrix at the time of her decease, and that part of the assets had been lent to the partnership by C., and that the partners had paid some of the testatrix's debts, and that the sum of 1137*l.* 7*s.* 10½*d.* was due from the partnership to the estate on the balance of accounts, the court held, notwithstanding B.'s assertion to the contrary in his answer, that he must be deemed to have acted, and ordered him to pay the debt due from his co-partner and himself into court.<sup>(q)</sup>

The court will occasionally make an order for payment into the court at the hearing of the cause "*ex debito justitiæ*," though it might have hesitated to do so upon an interlocutory application by motion; as where a plaintiff having only a remote contingent interest in a fund claims at the hearing to have the fund brought into court.<sup>(r)</sup> And now that under [\*869] \*the new practice any material circumstances not in issue may be brought before the court by affidavit at the hearing, an order for payment into court will be made at the hearing, if proper, without any notice of motion for that purpose.<sup>(s)</sup>

The time to be given for payment of money into court will depend on the circumstances of the case. If it be money in the defendant's hands, it will be ordered in forthwith, and an immediate transfer may be directed of stock standing in the defendant's name; but in the latter case it will be borne in mind, that during certain periods of the year the transfer books are closed. Where the defendant had improperly lent a sum on personal security, but no insolvency was suggested or any danger as to the money, the court ordered it to be paid in on or before the first day of the following term.<sup>(t)</sup> In another case, where the defendant had lent 820*l.* upon a mortgage not authorized by the trust, the court allowed six

(p) *Richardson v. Bank of England*, 4 M. & C. 174, per Lord Cottenham.

(q) *White v. Barton*, 18 Beav. 192.

(r) *Governesses' Institution v. Rusbridger*, 18 Beav. 467.

(s) *Isaacs v. Weatherstone*, 10 Hare, Appendix, xxx.

(t) *Vigrass v. Binfield*, 3 Mad. 62; and see *Hinde v. Blake*, 4 Beav. 597; *Ray v. Gibbon*, 4 Hare, 65.

weeks, with liberty to apply for further time if the circumstances should then warrant the indulgence.<sup>(u)</sup>

Where a *distringas* or injunction has been previously obtained against the transfer of the stock, the court orders the transfer into court to be made, "notwithstanding the *distringas* or injunction."

## SECTION V.

### OF RECEIVERSHIP.

As the *cestuis que trust* or parties beneficially interested in an estate are in equity the owners of it, should they all concur in an application for a receiver and the trustee consent, the court will at any time make the order.<sup>(v)</sup> But the usual recognizances will not be dispensed with.<sup>(w)</sup>

\*And as each *cestui que trust* is entitled to have the fund properly protected, a receiver will be granted at his instance if it can [\*870] be shown that the trustee has been guilty of misconduct, waste, or improper disposition of the trust estate,<sup>(x)</sup> or that the fund is in danger from his being in insolvent circumstances,<sup>(y)</sup> or a bankrupt,<sup>(z)</sup> or that one trustee has misconducted himself, and the other consents to the order,<sup>(a)</sup> or is incapacitated from acting,<sup>(b)</sup> or that the executor is a person of bad character, drunken habits, and great poverty.<sup>(c)</sup>

And a receiver has been appointed where the executrix was a *feme covert*, and the husband, besides being in indifferent circumstances, was out of the jurisdiction, for in such a case, said the court, if the executrix waste the assets or refuse payment, the party aggrieved had no remedy, as the husband must be joined in the action.<sup>(d)</sup>

And a receiver has been ordered when four trustees had been named in a will and one died, and another was abroad, and the third had scarcely interfered in the trust, and the fourth submitted to a receiver by his answer.<sup>(e)</sup> In another case the three trustees *disagreed*, and a receiver was appointed.<sup>(f)</sup> The order was taken by arrangement between the parties, but the court had previously expressed its opinion that, unless the trustees could agree, a receiver *must* be appointed. And the court will grant a receiver at the instance of the *cestui que trust*, when the single trustee is, or all the trustees are, out of the jurisdiction.<sup>(g)</sup>

(u) Wyatt v. Sharratt, 3 Beav. 498; Score v. Ford, 7 Beav. 333.

(v) Brodie v. Barry, 3 Mer. 695; Beaumont v. Beaumont, cited Ib. 696; see Brownell v. Reid, 1 Hare, 435.

(w) Manners v. Furze, 11 Beav. 30; Tylee v. Tylee, 17 Beav. 583.

(x) Anon. 12 Ves. 5, per Sir W. Grant; and see Middleton v. Dodswell, 13 Ves. 266; Howard v. Papera, 1 Mad. 142; Richards v. Perkins, 3 Y. & C. 299; Evans v. Coventry, 5 De G. M. & G. 911.

(y) Scott v. Becher, 4 Price, 346; Mansfield v. Shaw, 3 Mad. 100; and see Anon. 12 Ves. 4; Middleton v. Dodswell, 13 Ves. 266; Havers v. Havers, Barn. 23.

(z) Gladdon v. Stoneman, 1 Mad. 143, note; Langley v. Hawk, 5 Mad. 46.

(a) Middleton v. Dodswell, 13 Ves. 266. (b) Bainbrigge v. Blair, 3 Beav. 421.

(c) Everett v. Prythergh, 12 Sim. 367, 368. (d) Taylor v. Allen, 2 Atk. 213.

(e) Tidd v. Lister, 5 Mad. 429. (f) Day v. Croft, May 2, 1839, M. R.

(g) Noad v. Backhouse, 2 Y. & C. Ch. Ca. 529; Smith v. Smith, 10 Hare, App. lxxi.



[\*871] But the court is not in the habit of granting a receiver, and so taking the administration out of the hands of the trustees, the natural curators of the estate, upon very slight grounds.<sup>(h)</sup> Thus it is no sufficient cause for a receiver that one of several trustees has *disclaimed*,<sup>(i)</sup> or is *inactive*, or *gone abroad*.<sup>(k)</sup> Nor is it a sufficient cause that trustees are in *mean* (not insolvent) circumstances,<sup>(l)</sup> or being trustees for sale have let the purchaser into possession before they have received the purchase-money, for the court will not *necessarily* infer this to be misconduct.<sup>(m)</sup>

When a receiver is appointed under the authority of the court, he is appointed for the benefit of all parties interested, and therefore will not be discharged merely on the application of the party at whose instance the order was made.<sup>(n)</sup>

However, when a receiver had been appointed on the application of the plaintiff, the tenant for life, on the ground of the misconduct of one of the trustees and the incapacity of the other, and afterwards three new trustees were appointed by the court, who, on a motion by the plaintiff to discharge the receiver, undertook to receive the rents and pass their accounts half-yearly before the master, in the same way as a receiver, the court said it was not proposed to deprive one party of the protection of the receiver, but merely to substitute the trustees in his place; that the tenant for life ought not unnecessarily to be charged with the costs of a receiver; that it was not intended to put the owner in possession; that if any objections were shown to the trustees the application would be refused, but in the absence of such objections it was a reasonable request, and the order for discharging the receiver was made.<sup>(o)</sup>

[\*872]

## \*SECTION VI.

### OF COSTS OF SUIT.

I. As between strangers on the one hand, and trustees and *cestuis que trust* on the other.

In these cases, the trustee is on no better footing than any ordinary plaintiff or defendant, for the circumstances of the trust cannot be allowed to affect the interest of a third person.<sup>(p)</sup>

Thus on a bill by a stranger for specific performance of a contract, the vendor or trustee for sale must, if he cannot make a title, pay the costs of the suit agreeably to the general rule.<sup>(q)</sup>

So where trustees or executors are brought before the court as necessary

(h) See *Middleton v. Dodswell*, 13 Ves. 268; *Barkley v. Lord Reay*, 2 Hare, 306.

(i) *Browell v. Reid*, 1 Hare, 434; but see *Tait v. Jenkins*, 1 Y. & C. Ch. Ca. 492.

(k) *Browell v. Reid*, 1 Hare, 435, per Sir J. Wigram.

(l) *Anon.* 12 Ves. 4; *Howard v. Papera*, 6 Mad. 142; and see *Hathornthwaite v. Russell*, 2 Atk. 126. In *Havers v. Havers*, Barn. 23, the court considered misapplication probable.

(m) *Browell v. Reid*, 1 Hare, 434.

(n) *Bainbrigge v. Blair*, 3 Beav. 423, per Lord Langdale.

(o) *Bainbrigge v. Blair*, 3 Beav. 421, 423, 424; and see *Poole v. Franks*, 1 Moll. 80.

(p) *Burgess v. Wheate*, 1 Ed. 251, per Lord Northampton.

(q) *Edwards v. Harvey*, Coop. 40; and see *Hill v. Magan*, 2 Moll. 460.

parties by a stranger, if the trustees or executors contest the claims of the plaintiff, and the plaintiff recover in the suit, they are not entitled to their costs; but if they submit the point to the court, they will be decreed their costs.<sup>(r)</sup>

If a plaintiff *fail* in his suit, but stands in so hard a case that he ought not to *pay* any costs, the court will not oblige him to pay the costs of a defendant because he happens to sustain the character of trustee.<sup>(s)</sup> In a bill of foreclosure against the mortgagor and his trustee to bar dower, the trustee is not entitled to his costs as against the mortgagor.<sup>(t)</sup>

Where the bill of a stranger is dismissed with costs, a trustee, who is a defendant, will not, as is usual between trustee and *cestui que trust*, be ordered his costs as between attorney and client, but only as between party and party.<sup>(u)</sup>

If a creditor file a bill against an executor for payment of a debt, the rule which prevails at *law* is not also the rule of *equity*, viz., that if the creditor recover he shall be entitled to \*his costs *de bonis testatoris*, and if there be none, then *de bonis propriis* of the [\*873] executor; for the consideration of costs in equity rests entirely in the discretion of the court.<sup>(v)</sup>

As the law formerly stood, if the assets were not sufficient to cover both the debt and the costs, the executor was not decreed to *pay* costs,<sup>(w)</sup> unless he had misconducted himself, as by having satisfied simple contract debts in preference to debts upon specialty.<sup>(x)</sup> But he was not entitled to retain his own costs out of the assets in preference to the claims of the plaintiff.<sup>(y)</sup> And if a bill had been filed by a specialty creditor, and the specialty debt had exhausted the personal assets, the executor could not have claimed to be reimbursed out of the real estate to the prejudice of the testator's heir;<sup>(z)</sup> for the executor, it was said, should have considered the risk before he applied for the probate.<sup>(a)</sup> But now the practice is that the executor shall have his own costs in the first place, even as against the plaintiff, for the court will not take the fund out of his hands until his costs are paid.<sup>(b)</sup>

## II. Of costs as between trustees and *cestuis que trust*, *inter se*.

The general rule is that a trustee shall have his costs of suit awarded him at the hearing either out of the trust estate, or to be paid by his *cestui que trust*.<sup>(c)</sup> And if there be a fund under the control of the

(r) *Rashley v. Masters*, 1 Ves. jun. 201, see 205.

(s) *Brodie v. St. Paul*, Ib. 326, see 334. (t) *Horrocks v. Ledsam*, 2 Coll. 208.

(u) *Mohun v. Mohun*, 1 Sw. 201; *Saunders v. Saunders*, 5 Weekly Rep. 479.

(v) *Twisleton v. Thelwel*, Hard. 165; *Uvedale v. Uvedale*, 3 Atk. 119; but see *Davy v. Seys*, Mos. 204.

(w) *Twisleton v. Thelwel*, ubi supra; *Morony v. Vincent*, 2 Moll. 461.

(x) *Jefferies v. Harrison*, 1 Atk. 468; and see *Bennett v. Atkins*, 1 Y. & C. 247; *Wilkins v. Hunt*, 2 Atk. 151.

(y) *Humphrey v. Morse*, 2 Atk. 408; *Sandys v. Watson*, 2 Atk. 80; and see *Adair v. Shaw*, 1 Sch. & Lef. 280.

(z) *Uvedale v. Uvedale*, 3 Atk. 119; and see *Nash v. Dillon*, 1 Moll. 237.

(a) See *Uvedale v. Uvedale*, 3 Atk. 119; *Humphrey v. Morse*, 2 Atk. 408.

(b) *Bennet v. Going*, 1 Moll. 529; *Tipping v. Power*, 1 Hare, 405; *Ottley v. Gilby*, 8 Beav. 603; *Tanner v. Dancey*, 9 Beav. 339.

(c) 1 Eq. Ca. Ab. 125, note (a); *Hall v. Hallet*, 1 Cox, 141, per Lord Thurlow; *Attorney-General v. City of London*, 3 B. C. C. 171; *Norris v. Norris*, 1 Cox, 183;

[\*874] court (but in general not otherwise, *(d)*) he will have his costs as between solicitor and client. *(e)* If it appear upon the pleadings or the court be otherwise satisfied that the trustee has sustained charges and expenses beyond the costs of suit, the court will at the same time order him his costs, charges, and expenses properly incurred. If the trustee be a solicitor, the court will not declare that the trustee shall have his costs out of pocket only, but will give him his costs as between solicitor and client in the usual way, and leave it to the taxing officer to deal with the effect of the order. *(f)*

Even where the trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon his paying the costs of the day, Lord Kenyon said, "The payment of the costs of the day makes the trustee *rectum in curiâ*; and as he would most unquestionably have been entitled to his costs if he had appeared at the original hearing, so he now stands in the same situation, and is therefore entitled to his costs." *(g)*

But if the decree has been *passed*, a trustee who has omitted to ask for his costs at the hearing cannot have the cause re-heard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition. *(h)*

If a person named as trustee be made defendant to a suit, and by his answer disclaim the trust, the bill will be dismissed as against him with costs; *(i)* but not with costs as between solicitor and client; for, having refused to accept the office, he stands in the light of any ordinary defendant; *(k)* and if his answer be unnecessarily long, he will only be allowed the reasonable costs of a disclaimer. *(l)*

\*If a person be a trustee of a deed void as against creditors, [\*875] or on other grounds, he is entitled to his costs if the plaintiff by praying a conveyance by the trustee elect to treat him in that character. *(m)* But if the deed contain a false recital, for the purpose of misleading *bona fide* creditors, the trustee, on a bill to set it aside, will not have his costs. *(n)*

2. If any particular instance of misconduct, or a general dereliction of duty in the trustee, *(o)* or even his mere caprice and obstinacy, *(p)* be

*Sammes v. Rickman*, 2 Ves. jun. 38, per Lord Chief Baron Eyre; *Rashley v. Masters*, 1 Ves. jun. 201; *Roche v. Hart*, 11 Ves. 58; *Maplett v. Pocock*, Rep. t. Finch, 136. *Landen v. Green*, Barn. 389; *Taylor v. Glanville*, 3 Mad. 176, &c.

*(d)* *Edenborough v. Archbishop of Canterbury*. 2 Russ. 112; but see *Attorney-General v. Cumming*, 2 Y. & C. Ch. Ca. 155.

*(e)* *Mohun v. Mohun*, 1 Sw. 201, per Sir T. Plumer; *Moore v. Frowd*, 3 M. & C. 49, per Lord Cottenham.

*(f)* *York v. Brown*, 1 Coll. 260.

*(g)* *Norris v. Norris*, 1 Cox, 183.

*(h)* *Colman v. Sarell*, 2 Cox, 206.

*(i)* *Hickson v. Fitzgerald*, 1 Moll. 14.

*(k)* *Norway v. Norway*, 2 M. & K. 278, overruling *Sherrat v. Bentley*, 1 R. & M. 655.

*(l)* *Martin v. Persse*, 1 Moll. 146.

*(m)* *Snow v. Hole*, V. C. of England, March 8, 1845.

*(n)* *Turquand v. Knight*, 14 Sim. 643.

*(o)* *Attorney-General v. Hobert*, Rep. t. Finch, 259; *Earl Powlet v. Herbert*, 1 Ves. jun. 297; *Caffrey v. Darby*, 6 Ves. 488; *Littlehales v. Gayscoyne*, 3 B. C. C. 73; *Ashburnham v. Thompson*, 13 Ves. 402; *Hide v. Haywood*, 2 Atk. 126; *Adams v. Clifton*, 1 Russ. 297; *Mosley v. Ward*, 11 Ves. 581; *Piety v. Stace*, 4

*(p)* See next page, for note *(p)*.



the immediate cause why the suit was instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behaviour has occasioned. And where two executors had kept large balances in their hands for a great length of time, and one of them had become insolvent, the court decreed *each* of them to be liable for the costs of the *whole* suit.(q)

But where a bill was filed charging the trustee with a breach of trust both as to realty and personalty, and the charge failed as to the former but succeeded as to the latter, the court said, it was scarcely possible to suppose that the trustee should be permitted to *have* his costs, but it would be injustice to make him *pay the whole costs*, as one part of the bill had failed.(r)

\*Trustees for sale had purchased in the name of a trustee at an undervalue, but *without any imputation of fraud, and by* [\*876] *auction*. As to so much of the suit as related to calling upon the trustees to submit to a resale, and the directions consequential thereon, the court gave relief against the trustees *with costs*; but as to the accounts that must have been taken had the sale been unimpeachable, the trustees were allowed their costs.(s)

If the suit was occasioned by the *mistake*, or some *slight neglect* of the trustee, the court will content itself with *not giving* him costs,(t) or will punish him with *payment of part* of the costs only,(u) or will even *give* him his costs.(v)

And where a suit was mainly occasioned by the breach of trust of a trustee, though he was decreed to pay the costs up to the hearing, yet he was held entitled to his subsequent costs relating to the ordinary taking of the accounts.(w)

3. If the bill filed did not originate from any necessity of inquiring into the conduct of the trustee, but in the course of the proceedings instituted upon other grounds, it appears the trustee has in some particular instance been guilty of a breach of trust, the court will not award against the trustee the costs of the *whole* cause, but only of so much of

Ves. 620; Seers v. Hind, 1 Ves. jun. 294; Fell v. Lutwidge, Barn. 319, see 322; Brown v. How, Barn. 354, see 358; Sheppard v. Smith, 2 B. P. C. 372; Haberdashers' Company v. Attorney-General, 2 B. P. C. 370; Franklin v. Frith, 3 B. C. C. 433; Whistler v. Newman, 4 Ves. 129; Stacpoole v. Stacpoole, 4 Dow. 209; Crackett v. Bethune, 1 J. & W. 586; Baker v. Carter, 1 Y. & C. 252, per Lord Abinger, C. B.; Hide v. Haywood, 2 Atk. 120; Wilson v. Wilson, 2 Keen, 249; Attorney-General v. Wilson, 1 Cr. & Phil. 1; Lyse v. Kingdon, 1 Coll. 184.

(p) Taylor v. Glanville, 3 Mad. 178, per Sir J. Leach; Jones v. Lewis, 1 Cox, 199; Earl of Scarborough v. Parker, 1 Ves. jun. 267; Kirby v. Mash, 3 Y. & C. 295; Thorby v. Yeats, 1 Y. & C. Ch. Ca. 438; Hampshire v. Bradley, 2 Coll. 34; Penfold v. Bouch, 4 Hare, 271; and see Burrows v. Greenwood, 4 Y. & C. 251.

(q) Littlehales v. Gascoyne, 3 B. C. C. 73.

(r) Pocock v. Reddington, 5 Ves. 800. (s) Sanderson v. Walker, 13 Ves. 601.

(t) O'Callagan v. Cooper, 5 Ves. 117; Mousley v. Carr, 4 Beav. 49; Attorney-General v. Drapers' Company, Ib. 71; Devey v. Thornton, 9 Hare, 222.

(u) East v. Ryal, 2 P. W. 284.

(v) Taylor v. Tabrum, 6 Sim. 281; Flanagan v. Nolan, 1 Moll. 84; Travers v. Townsend, Ib. 496; Attorney-General v. Caius College, 2 Keen, 150; Bennett v. Atkins, 1 Y. & C. 247; Fitzgerald v. O'Flaherty, 1 Moll. 347; Attorney-General v. Drummond, 2 Conn. & Laws. 98; Royds v. Royds, 14 Beav. 54.

(w) Hewett v. Foster, 7 Beav. 348.

APRIL, 1858.—44

it as connects itself with his misconduct, and as to the rest of the suit will allow him his costs.(x)

An executor, instead of accumulating a fund as directed by the will, had improperly kept the balance in his hands; but, as the amount of costs had in great measure been occasioned by the inquiry what rule the court ought to adopt with respect to \*the computation of interest, [\*877] it was thought hard under the circumstances to fix the executor with payment of costs even relatively to the breach of trust; and therefore the court gave no costs.(y)

As to one part of the suit, the trustee ought from his misconduct to have *paid* the costs, and, as to another, to have been *allowed* his costs; and the court by a kind of compromise, left each party to pay his own costs.(z)

Where the breach of trust is trivial, the court may overlook it altogether, and give the trustee his whole costs.(a)

4. If a trustee have a private interest of his own separate and independent from the trust, and oblige the *cestui que trust*, to come into a court of equity merely to have some point relating to the trustee's private interest determined at the expense of the trust, that is such a vexatious proceeding in the trustee, that, for example's sake, he will be decreed to pay the costs of the whole suit.(b)

5. If on a bill for an account the defendant says in his answer he believes the plaintiff is considerably indebted to him, and after a long investigation it proves the defendant is considerably indebted to the plaintiff, the trustee, thus daring the plaintiff to his account, will be decreed to pay the costs.(c) And if the balance be in favour of the trustee, but far below what he had stated in his answer, he will not be entitled to *have* his costs,(d) or at least not the costs of the account itself.(e)

A trustee will be fixed with costs if he wilfully misstate the accounts.(f) or if, by any chicanery in his answer, he keep the *cestui que trust* from a true knowledge of the accounts.(g) or even if he have kept the accounts [\*878] in a very confused \*manner.(h) And an executor will be liable to pay costs if he deny assets, and the contrary be established against him.(i)

Where a corporation filling the character of trustees for a grammar school by their answer pleaded ignorance of the claims of the charity, and the information was afterwards elicited from the documents scheduled to their answer, as the court inferred from such conduct a disposition to

(x) *Telbs v. Carpenter*, 1 Mad. 290, see 308; *Newton v. Bennet*, 1 B. C. C. 359; *Pride v. Fooks*, 2 Beav. 430; *Heighington v. Grant*, 1 Phil. 600.

(y) *Raphael v. Boehm*, 13 Ves. 592.

(z) *Newton v. Bennet*, 1 B. C. C. 362.

(a) *Fitzgerald v. Pringle*, 2 Moll. 534; *Bailey v. Gould*, 4 Y. & C. 221; see 225; *Knott v. Cottee*, 16 Beav. 77; *Cotton v. Clark*, 16 Beav. 134.

(b) *Henley v. Philips*, 2 Atk. 48.

(c) *Parrot v. Treby*, Pr. Ch. 254.

(d) *Attorney-General v. Brewers' Company*, 1 P. W. 376.

(e) *Fozier v. Andrews*, 2 Jones & Lat. 199.

(f) *Sheppard v. Smith*, 2 B. P. C. 372; and see *Flanagan v. Nolan*, 1 Moll. 86.

(g) *Avery v. Osborne, Barn*, 349; *Reech v. Kennegal*, 1 Ves. 123.

(h) *Norbury v. Calbeck*, 2 Moll. 461. (i) *Sandys v. Watson*, 2 Atk. 80.

obstruct and defeat the ends of justice, the corporation was decreed to pay the costs of the suit.(k)

And a corporation similarly circumstanced was punished in the same manner where, the court having directed the production of certain documents, it was afterwards discovered that a very material one had been suppressed.(l)

6. The costs of the suit will be cast upon the trustee, if, in his answer, he set up a title of his own, and make an ill defence;(m) and he will not be allowed to *have* his costs if he set up any trust different from what it actually is.(n)

An executor sued by the next of kin had put the plaintiffs to the proof of their relationship, and the fact not admitting a doubt the executor was fixed with the costs of the inquiry.(o)

7. It was laid down as a rule by Lord Thurlow, that "where he was obliged to *give interest against executors* as a remedy for a breach of trust, costs against them must follow of course;"(p) but Sir W. Grant said, "that was a proposition to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest, which would not be cases for costs;"(q) and the existence of any \*such rule has since been denied;(r) and where the trustee has not misconducted himself, but on a *cestui's que trust* bill [\*879] against him for an account has been decreed to pay costs, he has been allowed his general costs of suit, excluding the costs incurred in taking the account in which the trustee failed.(s) The meaning of Lord Thurlow probably was, that where the suit was occasioned by the misconduct of the trustee, and the charge against him was shown to be well founded by the court's fixing him with interest, the costs of the suit in that case would be consequential upon the relief.(t)

(k) *Attorney-General v. East Retford*, 2 M. & K. 35.

(l) *Borough of Hertford v. Poor of same Borough*, 2 B. P. C. 377.

(m) *Loyd v. Spillet*, 3 P. W. 344; *Bayly v. Powell*, Pr. Ch. 92; *Willis v. Hiscox*, 4 M. & C. 197; *Attorney-General v. Drapers' Company*, 4 Beav. 67; *Attorney-General v. Christ's Hospital*, Ib. 73; *Irwin v. Rogers*, 12 Ir. Eq. Rep. 159.

(n) *Ball v. Montgomery*, 2 Ves. jun. 191, see 199.

(o) *Lowson v. Copeland*, 2 B. C. C. 156.

(p) *Seers v. Hind*, 1 Ves. jun. 294; and see *Franklin v. Frith*, 3 B. C. C. 433; *Mosley v. Ward*, 11 Ves. 581.

(q) *Ashburnham v. Thompson*, 13 Ves. 404.

(r) *Tebbs v. Carpenter*, 1 Mad. 308; *Woodhead v. Marriott*, C. P. Cooper's Rep. 1837-38, 62; *Holgate v. Haworth*, 17 Beav. 259.

(s) *Fozier v. Andrews*, 2 Jones & Lat. 199.

(t) See *Mosley v. Ward*, 11 Ves. 582.



# TRUSTEE ACT, 1850.

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13° & 14° VICTORIE, CAP. 60.

*An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees. 5th August, 1850.*

WHEREAS an act was passed in the first year of the reign of his late majesty King William the Fourth, intituled "An act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling courts of equity to give effect to their Decrees and Orders in certain cases:" And whereas an act was passed in the fifth year of the reign of his late majesty King William the Fourth, intituled "An act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in trust;" And whereas an act was passed in the second year of the reign of her present majesty, intituled "An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees:" And whereas it is expedient that the provisions of the said acts should be consolidated and enlarged: Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all proceedings under the said acts or any of them commenced before the passing of this act may be proceeded with under the said recited acts, or according to the provisions of this act, as shall be thought expedient, and, subject as aforesaid, that the said recited acts shall be and the same are hereby repealed: PROVIDED ALWAYS, that the several acts repealed by the said recited acts shall not be revived, and that such repeal shall only be on and after this act coming into operation.

[\*881] \*II. And whereas it is expedient to define the meaning in which certain words are hereafter used: It is declared that the several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,)

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein: The word "stock" shall mean any fund, annuity or security transferable in books kept by any company or society established, or to be

established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein :<sup>(a)</sup>

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity,<sup>(b)</sup> in possession or in futurity, in any lands :

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands :

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry whether immediate or future, and whether vested or contingent :

The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late majesty King William the Fourth, intituled *An Act for the Abolition of Fines and \*Recoveries, and the substitution of more simple modes of Assurance*,<sup>(c)</sup> and including also surrenders [\*882] and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands :<sup>(d)</sup>

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being :

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being :

(a) See *Re Angelo*, 5 De Gex & Sm. 278.

(b) In suits where all parties beneficially interested are before the court, it is sufficient for the purchaser to take a conveyance of the legal estate, for the equities of the parties are bound by the order for sale ; *Re Williams's Estate*, 5 De Gex & Sm. 515. And see the analogous case under the prior act, *Goddard v. Macaulay*, 6 Ir. Eq. Rep. 221.

(c) See *Powell v. Matthews*, 1 Jur. N. S. 973.

(d) See *Rowley v. Adams*, 14 Beav. 130.

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage ;(*e*) but, with this exception the words "trust" and "trustee" shall extend to and include implied and constructive trusts, (*f*) and shall extend to and include cases where the trustee has some beneficial interest or estate in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person :

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo* :

The expression "person of unsound mind" shall mean any person not an infant, who, not having been found to be a lunatic, shall [\*883] \*be incapable from infirmity of mind(*g*) to manage his own affairs :

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a court of equity be deemed merely a security for money ;

The word "person," used and referred to in the masculine gender, shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

III. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the lord chancellor, (*h*) intrusted by

(*e*) As to the question upon the 1 W. 4, c. 60, whether the word "trust" included a "mortgage," see note (*x*), p. 836, *supra*.

(*f*) A vendor, after a contract, has been held, to be a trustee of shares in a joint-stock bank for the purchaser; *Re Angelo*, 5 De Gex & Sm. 278. But in cases of real estate, if not generally, at least where the alleged trustee may possibly dispute the trust, the constructive trust must first have been declared by the decree of the court; so that the infant heir of a vendor who has died intestate having contracted to sell real estate in his life time, is not a constructive trustee for the purchaser unless so declared by decree. *Re Carpenter*, 1 Kay, 418; *Re Burt*, 9 Hare, 289. *Re Wise*, 5 De Gex & Sm. 415, is distinguishable; and see *Propert's Purchase*, 22 L. J. Ch. 948.

(*g*) See cases under the 1 W. 4, c. 60, *Re Wakeford*, 1 Jones & Lat. 2; *Re Jones*, 6 Jur. 545; *Re Walker*, 1 Cr. & Ph. 147.

(*h*) It was doubted whether the lords justices, though they are in fact intrusted under the queen's sign manual with the care, &c., of lunatics, had power to exercise the jurisdiction given by the act to the lord chancellor intrusted, &c. *Re Waugh's Trust*, 2 De Gex, Mac. & Gor. 279; *Re Pattinson*, 21 Law J. Ch. 280. See now the 15 & 16 Vict. c. 87, s. 15, removing the doubt, and the 11th section of the Extension Act.



virtue of the queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.<sup>(i)</sup>

\*IV. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any [\*884] lands upon any trust or by way of mortgage, it shall be lawful for the lord chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said lord chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

V. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the lord chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said lord chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said lord chancellor may appoint.

VI. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the lord chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint.

VII. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust, or by way of mortgage, it shall be

(i) Under this section (and it is conceived that the same principle applies to the 4th and 5th sections,) if the lunatic be a *trustee*, the trust estate or the *cestui que trust* must bear the costs of the proceedings under the act. If he be a *mortgagee*, the costs will, as a general rule (though this result is contrary to principle,) come out of the lunatic's estate. Re Wheeler, 1 De Gex, Mac. & Gor. 436. But where, on the face of the mortgage deed, the lunatic mortgagee is a trustee for a third party, the costs must fall on the mortgagor. Re Lewes, 1 Mac. & Gor. 23. *Secus*, if the mortgagor have no notice of the fact that the lunatic is a trustee. Re Townsend, 1 Mac. & Gor. 686. And see under 1 W. 4, c. 60, Re Townsend, 2 Phil. 348, and cases there cited.

lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; <sup>(k)</sup> and the order shall have the same \*effect [\*885] as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate. <sup>(l)</sup>

VIII. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such land from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

IX. And be it enacted, that when any person solely seised or possessed of any lands upon any trust <sup>(m)</sup> shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate. <sup>(n)</sup>

[\*886] XI. And be it enacted, that when any person solely entitled to a \*contingent right in any lands upon any trust shall be out

(k) It is now settled, notwithstanding the doubts entertained at first (see *Re Howard's Estate*, 5 De Gex & Sm. 435,) that the court will make an order, vesting an estate on a purchase to the uses commonly called the uses to bar dower; but will not incorporate a declaration that no woman shall be entitled to dower, this being no part of the conveyance. The woman, therefore (if married on or before Jan. 1, 1834,) would be entitled to dower. *Re Lush's Estate*, 5 De Gex & Sm. 435; *Davey v. Miller*, 17 Jur. 908. So an order has been made to vest the legal estate in the devisees of a mortgagor, subject to a charge created by his will. *Re Ellerthorpe*, 18 Jur. 669.

(l) Tenant for life with remainder to an infant in tail. A vesting order as to the estate of the infant, with the consent of the tenant for life, will bar the entail and remainders over. *Powell v. Matthews*, 1 Jur. N. S. 973. See the Interpretation Clause as to the words "Convey," and "Conveyance."

(m) An heir who takes the trust estate by the disclaimer of the trustees, is a trustee within the section; *Wilks v. Groom*, 6 De Gex, M. & G. 205.

(n) As to the doubts entertained respecting the effect of the concluding words of this section and their solution, see *Re Watt's Settlement*, 9 Hare, 106; *Plyer's Trust*, ib. p. 220; *Smith v. Smith*, 3 Drewry, 72.

of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

XII. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery or cannot be found, it shall be lawful for the said court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

XIII. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

XIV. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

XV. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have [\*887] the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

XVI. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the



estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

XVII. And be it enacted, that where any person jointly or solely seised or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned persons, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.<sup>(o)</sup>

XVIII. And be it enacted, that where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by a person entitled to require the same, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or release such contingent right, or shall neglect or refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly [888] authorized agent of such last-mentioned person, \*it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right.

XIX. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands,<sup>(p)</sup> then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; that is to say,

(o) This and the following section have been repealed by the Extension Act (see sect 2,) and a simpler enactment dependent on "demand" and on "refusal, or neglect," substituted.

(p) The personal representative of a mortgagee who has not taken possession may obtain an order vesting the legal estate, which has descended to the heir, in him, notwithstanding the word "reconveyance" points in strictness to a conveyance to the mortgagor. Re Boden's Trust, 1 De Gex, Mac. & Gor. 57; 9 Hare, 820; overruling Meyrick's Estate, 9 Hare, 116.

When an heir or devisee(*q*) of such mortgagee shall be out of the jurisdiction of the Court of Chancery,(*r*) or cannot be found :

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid,(*s*) or a duly authorized agent of such last-mentioned person :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee :

\*And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

XX. And be it enacted, that in every case where the lord chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed,(*t*) shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order

(*q*) See the interpretation clause, giving an extended meaning to the word "devisee."

(*r*) See *Hutchinson v. Stephens*, 5 Sim. 498; *Ex parte Dover*, ib. 500, decided on the 1 W. 4, c. 60.

(*s*) See note (*c*), p. 837, for the decisions on the 8th section of the 1 W. 4, c. 60, the words of which are nearly the same. As to the instrument to be tendered in the case of copyholds, see *Rowley v. Adams*, 14 Beav. 130, where the question arose upon the 17th section, since repealed.

(*t*) The conveyance should contain a recital showing that it is made in obedience to the order of the court, and should be executed by the person appointed to convey in his own name; though the late vice-chancellor of England, in a case arising upon the 1 W. 4, c. 60, seems to have considered that the execution, by the person appointed to convey, of a deed purporting to be the conveyance of the trustee who refused, would, with a mere reference in the attestation clause to the order appointing the person to convey, be sufficient. *Ex parte Foley*, 8 Sim. 395.

of the lord chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act; and in every case where the lord chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies, and their officers and servants, for all acts done or permitted to be done pursuant thereto.

[\*890] \*XXI. And be it enacted, that as to any lands situated within the duchy of Lancaster or the counties palatine of Lancaster or Durham, it shall be lawful for the court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagee within the meaning of this act.

XXII. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery,<sup>(u)</sup> or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust,<sup>(v)</sup> it shall be lawful for the said court<sup>(w)</sup> to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any

(u) Where the trustee out of the jurisdiction is incapacitated from lunacy or infancy, the power of the court must be sought for in the sections applicable to cases of lunatics and infants, and not in this section. Consequently, in a case arising before the Extension Act (see 3rd section,) the court had no authority to make a vesting order with respect to stock held by an infant trustee out of the jurisdiction. *Cramer v. Cramer*, 5 De Gex & Sm. 312.

(v) The husband of an executrix is a trustee within the act. *Ex parte Bradshaw*, 2 De Gex, Mac. & Gor. 900.

(w) If the court be asked to transfer the stock to new trustees appointed under a power, it must first be satisfied of the fitness of the persons proposed, and all parties interested must be served. *Re Maynard's Settlement*, 16 Jur. 1084.



interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said court may appoint; and when any sole trustee(*x*) of any stock or chose in action shall be out of the jurisdiction of the said court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or \*to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons [\*891] the said court may appoint.

XXIII. And be it enacted, that where any sole trustee(*y*) of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, (*z*) for the space of twenty-eight days next after a request in writing(*a*) for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, (*b*) or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint. (*c*)

XXIV. And be it enacted, that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees.

(*x*) A. and B. being trustees, the master found that it was uncertain whether A. was living or dead, but that B. was living. Afterwards B. died. Held, that A. was not a sole trustee within the meaning of the 22nd section. *Re Randall's Will*. 1 Drewry, 401.

(*y*) Sole trustee may mean the whole number of the co-trustees. See interpretation clause. *Re Hartnall*, 5 De Gex & Sm. 111.

(*z*) A tenant for life is not a person *absolutely entitled* within the meaning of the act, except, perhaps, for the purpose of an application limited to the income only, nor is one of two trustees; *Mackenzie v. Mackenzie*, 5 De Gex & Sm. 338; more fully reported 16 Jur. 723. But persons duly appointed new trustees are "*absolutely entitled*;" *Ex parte Russell*, 1 Sim. N. S. 404; *Baxter's Will*, 2 Sm. & Giff. Appd. v.

(*a*) The case of a trustee refusing to obey the order of the court was not within this section; *Mackenzie v. Mackenzie*, 5 De Gex & Sm. 338. And so it was under 1 W. 4, c. 60; see note (*a*), p. 839. But see now sect. 4 of the Extension Act providing for this case.

(*b*) The court cannot, under this section, make any order as to dividends accrued due subsequently to the date of request. *Re Hartnall*, 5 De Gex & Sm. 111. See now sect. 4 of Extension Act.

(*c*) The recusant trustee need not be served under this and the following section. *Baxter's Will*, 2 Sm. & Giff. App. v.; and see cases under 1 W. 4, c. 60, note (*c*), p. 837.

XXV. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal \*representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint.

XXVI. And be it enacted, that where any order shall have been made under any of the provisions of this act vesting the right(*d*) to any stock in any person or persons appointed by the lord chancellor, instructed as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons, so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the lord chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this act, either by the lord chancellor, [*\*893*] \*intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their

(*d*) See note (*s*), p. 896, *infra*, and sect. 6 of the Extension Act.

own name or names, any action, suit or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

XXVIII. And be it enacted, that whensoever, under any of the provisions of this act, an order shall be made, either by the lord chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent<sup>(e)</sup> of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this act, an order shall be made either by the lord chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; <sup>(f)</sup> and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

XXIX. And be it enacted, that when a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts<sup>(g)</sup> of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or <sup>[\*894]</sup> \*under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.<sup>(h)</sup>

XXX. And be it enacted, that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands,<sup>(i)</sup> or for the partition<sup>(k)</sup> or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any

(e) There appears to be a conflict between the practice in the different branches of the court upon the question whether a vesting order will be made *without* the lord's consent, "*valeat quantum*;" see *Re Flitcroft*, 1 Jur. N. S. 418, cor. V. C. Wood; *Cooper v. Jones*, 2 Jur. N. S. 59, cor. V. C. Stuart. The consent need not be by appearance in court; *Ayles v. Cox*, 17 Beav. 585.

(f) See form of order appointing a person to complete the assurance of a copyhold estate. *Re Hey's Will*, 9 Hare, 221.

(g) A sale for payment of *costs* of suit was not within this act: *Weston v. Filer*, 5 De Gex & Sm. 608. But see now sect. 1 of the Extension Act, and *Wake v. Wake*, 17 Jur. 545.

(h) *Wood v. Beetlestone*, 1 Kay & John. 213.

(i) See *Ex parte Mornington*, 4 De Gex, Mac. & Gor. 537.

(k) In a partition suit, instead of giving an infant entitled to a share a day to show cause, the court may declare him a trustee of such parts of the property as are allotted to other parties. *Bowra v. Wright*, 4 De Gex & Sm. 265.



lands,(7) either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said court or the said lord chancellor might under the provisions of this act make concerning the estates, rights and interests of trustees born or unborn.

XXXI. And be it enacted, that it shall be lawful for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right [\*895] shall be vested shall be compellable to obey such \*directions and declarations by the same process as that by which other orders under this act are enforced.

XXXII. And be it enacted, that whenever it shall be expedient<sup>(m)</sup> to appoint<sup>(n)</sup> a new trustee or new trustees, and it shall be found inexpedient, difficult<sup>(o)</sup> or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees.<sup>(p)</sup>

(7) In a foreclosure suit by an equitable mortgagee, a decree had been made for payment, or, in default, for foreclosure and *conveyance by the mortgagor* of the legal estate. The mortgagor made default. The court refused, on motion to make the order of foreclosure absolute, to add a declaration that the mortgagor was a trustee for the mortgagee, and said that a separate application must be made; *Smith v. Boucher*, 1 Sm. & Giff. 72. As to the necessity for an express declaration in terms, see the cases on sect. 18 of the 1 W. 4, c. 60; note (l), p. 839, *supra*.

(m) If one of the trustees be a lunatic, so that the estate cannot be got from him without the aid of the court, though there is a power of appointment of new trustees, in such a case the court will appoint a new trustee and make the vesting order. *Re Davies*, 3 Mac. & Gor. 278. So where one of the two trustees appointed by a will is an infant, the court deems it expedient to appoint a trustee in his place. *Re Porter's Trust*, 2 Jur. N. S. 349.

(n) The court cannot, under the act, *remove* a trustee who is willing to act. *Re Hodson's Settlement*, 9 Hare, 118; *Re Hadley*, 5 De Gex & Sm. 67. And in a case where one of two trustees was residing out of the jurisdiction, but it did not appear whether such residence was likely to be permanent, the court refused to appoint a new trustee in his room. *Re Mais*, 16 Jur. 608.

(o) See *Re Humphry's Estate*, 1 Jur. N. S. 921, where the parties having the power of appointing new trustees were resident in India.

(p) The decisions were in conflict whether under this section the court could appoint new trustees in a case where there was no *existing* trustee, Vice Chancellor Parker holding the affirmative: *Re Tyler's Trust*, 5 De Gex & Sm. 56; and

XXXIII. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

XXXIV. And be it enacted, that it shall be lawful(*q*) for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the court shall direct; and such order \*shall have the same effect as if the person or persons who before such order [\*896] were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.(*r*)

XXXV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock(s) subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

XXXVI. And be it enacted, that any such appointment by the court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees

Vice Chancellor Turner the negative; *Re Hazeldine*, 16 Jur. 853. And see *Re Frosts Settlement*, 15 Jur. 644. All doubt for the future was removed by the 9th section of the Extension Act.

The court, in appointing new trustees under this section, does not limit itself necessarily to the number named in the original instrument of trust. Thus it has appointed two instead of one; *Tunstall's Will*, 4 De Gex & Sm. 421. But it never appoints a single trustee where there were originally more than one; *Ellison's Trust*, 2 Jur. N. S. 62; *Porter's Trust*, 2 Jur. N. S. 349.

As to the parties to be served, see note (*v*), p. 897, *infra*.

In addition to evidence of the necessary facts to bring the case within the act, the court, before appointing trustees, requires evidence by affidavit of the fitness of the proposed trustees, and a written consent by the trustees to act; *Battersby's Trust*, 16 Jur. 900. The trust property having greatly increased, the court, upon an application under the act, appointed two additional trustees, though the instrument of trust provided for two only. *Boycott's Settlement*, 5 Weekly Rep. 15.

(*q*) The late Vice Chancellor Parker was indisposed to make a vesting order in cases where a conveyance could be had; *Langhorn v. Langhorn*, 21 L. J. Ch. 860. But it is clear that the court has power to make, and according to the present practice it frequently does make, vesting orders, even where there is no incapacity in the person seised or possessed of the legal estate to convey to the new trustees; *Re Manning's Trust*, Kay, App. xxviii.

(*r*) The court has jurisdiction to divest the whole estate from the continuing and incapacitated trustee, and to vest it in the new body of trustees (including the continuing trustees,) as joint tenants; *Smith v. Smith*, 3 Drewry, 72, overruling *Re Watt's Settlement*, 9 Hare, 106; *Re Plyer*, *ib.* 220.

(*s*) The court had no power under this section to vest the right to the stock itself, but only the right to call for a transfer; and an order professing to vest the right to the stock was accordingly discharged. *Be Smyth's Settlement*, 4 De Gex & Sm. 499. But see now sect. 6 of the Extension Act.

under any power for that purpose contained in any instrument would have done.

XXXVII. And be it enacted, that an order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; (t) and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

XXXVIII. And be it enacted, that when any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the lord chancellor, intrusted as aforesaid, or from [\*897] the Court of Chancery, it shall be lawful for him to exhibit \*before any one of the masters of the High Court of Chancery a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate. (u)

XXXIX. And be it enacted, that any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the lord chancellor intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as such person may deem himself entitled to upon the facts found by the master.

XL. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the lord chancellor intrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the lord chancellor intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said court, or the lord chancellor intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof. (v)

XLI. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said court, or for the said lord chancellor, should it be deemed necessary, to direct a reference to one of the

(t) As to the proper person to petition in the case of sales by the court, see *Rowley v. Adams*, 14 Beav. 130; *Ayles v. Cox*, 17 Beav. 584.

(u) This and the following section have ceased to be of any use since the abolition of the office of master.

(v) In petitions for the appointment of new trustees, all the *cestuis que trust* ought, as a general rule, to be served. *Re Richards' Trust*, 5 De Gex & Sm. 636; *Re Sloper*, 18 Beav. 596; *Re Fellows' Settlement*, 2 Jur. N. S. 62. And the old trustees (if any) must appear; *Re Sloper*, *ubi supra*. But in special cases the court relaxes the rule. *Re Symth's Settlement*, 2 De Gex & Sm. 781.



masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said court, or for the said lord chancellor to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court, or before the said lord chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

XLII. And be it enacted, that upon the hearing of any such motion \*or petition, whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the court, or the lord chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act. [\*898]

XLIII. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this act. (w)

XLIV. And be it enacted, that whenever any order shall be made under this act, either by the lord chancellor intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the lord chancellor intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a redistribution of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this act, when the same shall appear to have been improperly obtained.

XLV. And be it enacted, that it shall be lawful for the lord chancellor \*intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any [\*899]

(w) See *Wood v. Beetlestone*, 1 Kay & Johns. 213.

lands, stock, or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted,<sup>(x)</sup> whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said court under any statute authorizing the said court to make an order to that effect in a summary way upon petition.

XLVI. And be it enacted, that no lands, stock, or chose in action, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.<sup>(y)</sup>

XLVII. And be it enacted, that nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.<sup>(z)</sup>

XLVIII. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the accountant-general, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said court; and it shall be lawful for the said court, [\*900] upon petition in a summary way, to order any \*money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

XLIX. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the court, and that he cannot be found, it shall be

(x) See now 16 & 17 Vict. c. 137, ss. 28, 32. Re Davenport's Charity, 4 De Gex, Mac. & Gor. 839; and see p. 718, *supra*.

(y) This section is a re-enactment almost *verbatim* of section 3 of the Escheat and Forfeiture Act. See now section 8 of the Extension Act, giving the court power to appoint new trustees in the place of persons convicted of felony.

(z) This is a re-enactment of sect 5, of the Escheat and Forfeiture Act.

lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use and benefit, or otherwise than as a trustee as aforesaid.

L. And be it enacted, that when any person shall, under the provisions of this act, apply to one of the masters of the Court of Chancery in the first instance, and adduce evidence, for the purpose of obtaining the certificate of such master as a foundation for an order of the said lord chancellor intrusted as aforesaid, or the said court of chancery, it shall be lawful for the said master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the master under this act shall be enforced by the same process as orders of the court made in any suit against a party thereto.

LI. And be it enacted, that the lord chancellor intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this act, or any of [\*901] \*them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said lord chancellor or court shall think proper.<sup>(a)</sup>

LII. And be it enacted, that upon any petition being presented under this act to the lord chancellor intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said lord chancellor, should he so think fit, to direct that a commission in the nature of a writ *de lunatico inquirendo* shall issue concerning such person, and to postpone

(a) See, as to the costs of an infant trustee, *Ex parte Cant*, 10 Vesey, 554: and as to those of an infant mortgagee, *Ex parte Ommaney*, 10 Sim. 298; *Miltown v. Trimbleston*, 1 Fl. & Kelley, 328: the first case decided under the 7 Anne, c. 19, the two latter under the 1 W. 4, c. 60.

As to the costs of a *lunatic* trustee or mortgage, see note (i), p. 883, *supra*.

The costs of applications for the appointment of new trustees come out of the *corpus* of the trust fund, *Re Fellows' Settlement*, 1 Jur. N. S. 62; *Re Fulham*, 15 Jur. 69; *Ex parte Davies*, 16 Jur. 882. And in the last-named case the court, though after some hesitation, declared that certain costs incurred under the act should, with interest at 4 per cent., form a charge on the inheritance. In *Re Primrose's Settlement*, 5 Weekly Rep. 508, the master of the rolls was of opinion, that he had no jurisdiction under this act to order respondents to pay costs. But compare the decision in *Re Woodburn*, 5 Weekly Rep. 649, under the Trustee Relief Act.



making any order upon such petition until a return shall have been made to such commission.

LIII. And be it enacted, that upon any petition under this act being presented to the lord chancellor intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said lord chancellor, or the said Court of Chancery, to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.<sup>(b)</sup>

LIV. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to her majesty (except Scotland.)

LV. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

LVI. And be it enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations, and colonies belonging to her majesty (except Scotland and Ireland.)<sup>(c)</sup>

[\*902] \*LVII. And be it enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the lord chancellor of Ireland intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

LVIII. And be it enacted, that in citing this act and other acts of parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

LIX. And be it enacted, that this act shall come into operation on the first day of November, one thousand eight hundred and fifty.

LX. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

(b) Thus a suit was directed where a father purchased in the name of his son, but without intending an advancement, and the court refused to declare the son, who was a lunatic, a trustee for his father without a suit. *Collinson v. Collinson*, 3 De Gex, Mac. & Gor. 409; and see *Re Burt*, 9 Hare, 289.

(c) The Lord Chancellor of Great Britain, sitting in lunacy, has no jurisdiction over lands in Ireland. *Re Davies*, 3 Mac. & Gor. 278.

# TRUSTEE EXTENSION ACT, 1852.

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15° & 16° VICTORIÆ, CAP. 55.

*An act to extend the Provisions of "The Trustee Act, 1850.  
[30th June, 1852.]*

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850 : Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same.

I. That when any decree or order shall have been made<sup>(a)</sup> by any court of equity directing the sale of any lands for any purpose whatever,<sup>(b)</sup> every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850 ; and in every such case it shall be lawful for the Court of Chancery, if the said court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser<sup>(c)</sup> or in such \*other person as the court shall direct ; and every such order shall have the same effect [\*904] as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

(a) A decree made before the passing of this act is within the operation of this clause, *Wake v. Wake*, 17 Jur. 745.

(b) The 30th section of the Trustee Act, 1850, applied only to decrees directing a sale for the payment of *debts* ; and consequently where the decree for sale had been made in order to provide a fund available for payment of costs, the court had no power to make a vesting order, *Weston v. Filer*, 5 De Gex & Sm. 608. This enactment remedies the inconvenience.

(c) Where lands are sold in several lots to different purchasers, the purchasers of the different lots may join in one petition, *Rowley v. Adams*, 14 Beav. 130. The purchaser is the proper person to apply, *Ayles v. Cox*, 17 Beav. 584 ; but the plaintiffs and purchaser may join if they think fit, *Rowley v. Adams*, *ubi supra*.

The costs of the petition fall upon the vendor, *Ayles v. Cox*, *ubi supra*.

II. That sections numbered seventeen and eighteen in the queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such a state as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.<sup>(d)</sup>

III. That when any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons conjointly entitled with the infant, or in him or them together with any other person or persons the said court may appoint.<sup>(e)</sup>

IV. That where any person shall neglect or refuse to transfer any [\*905] \*stock or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him,<sup>(f)</sup> it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint.

V. When any stock shall be standing in the sole name of a deceased

<sup>(d)</sup> Under the 17th & 18th sections of the Trustee Act, 1850, the power of the court arose only upon written refusal to convey, or neglect or refusal so to do after tender of a proper deed. The former contingency was of rare occurrence, and considerable difficulty was often experienced in bringing the case within the terms of the latter. See as to copyholds, *Rowley v. Adams*, 14 Beav. 130. See notes on section 23 of Trustee Act, 1850, and note <sup>(a)</sup>, p. 837, *supra*.

<sup>(e)</sup> In *Cramer v. Cramer*, 5 De Gex & Sm. 312, Vice-Chancellor Parker held that the Trustee Act, 1850, having conferred no general power in the case of an infant trustee of stock, the court had no authority to make a vesting order with regard to stock held by an infant trustee *out of the jurisdiction*. Hence this enactment.

<sup>(f)</sup> See the case of *Mackenzie v. Mackenzie*, 5 De Gex & Sm. 338; and of *Re Hartnall*, 5 De Gex & Sm. 111: the decisions in which probably suggested this clause.



person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint

VI. When any order being or purporting to be under this act, or under the Trustee Act, 1850, shall be made by the lord chancellor intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; (g) and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

VII. That every order made or to be made, being or purporting \*to be made under this or the Trustee Act, 1850, by the [\*906] lord chancellor intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the bank of England, or such company or association or person, to inquire concerning the propriety of such order, or whether the lord chancellor intrusted, as aforesaid, or the Court of Chancery had jurisdiction to make the same.

VIII. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability and had duly executed a conveyance or assignment of his estate and interest in the same.

IX. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for

(g) See the decision in *Smyth's Settlement*, 4 De Gex & Smale, 499, which doubtless was the cause of this and the next following section.

the said court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order.<sup>(h)</sup>

X. In every case in which the lord chancellor intrusted as aforesaid has jurisdiction under this act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in chancery as well as in lunacy, or be passed and entered by the registrar of the Court of Chancery.

XI. That all the jurisdiction conferred by this act<sup>(i)</sup> on the lord chancellor, intrusted by virtue of the queen's sign manual with the care [\*907] \*exercised, and performed by the person or persons for the time being intrusted as aforesaid.

XII. That this act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned act (except so far as the same are altered by or inconsistent with this act) shall extend and apply to the cases provided for by this act, in the same way as if this act had been incorporated with and had formed part of the said Trustee Act, 1850.

XIII. That every order to be made under the Trustee Act, 1850, or this act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

<sup>(h)</sup> See note (*p*), p. 895, *supra*, as to the doubt which led to this enactment.

<sup>(i)</sup> See *Re Waugh's Trust*, 2 De Gex, Mac. & Gor. 279. *Re Pattinson*, 21 L. J. Ch. 280. The doubts there raised, were, as respects the jurisdiction conferred by the Trustee Act, 1850, removed by the 15 & 16 Vict. c. 87, s. 15, (date of Royal Assent, 1st July, 1852).

## APPENDIX.

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### No. I.

Strode v. Winchester. Supra, p. 71.

THE following is a brief note of the case from the Registrar's Book :

Ferdinando John Paris, being desirous of leaving his fortune to Lucy Naomi Strode, but without the knowledge of her husband, who had married her against the wishes of the testator, fixed upon Elizabeth Gough, the mother of the said Mrs. Strode, to be the sole trustee, and *acquainted her therewith, and received a solemn promise from her*, that she would take care of every thing for the separate use of her daughter. Paris, by his will, gave all his real and personal estate to Mrs. Gough, and made her sole executrix ; and by a paper writing, which bore even date with and accompanied the will, he addressed Mrs. Gough as follows : —“I have given you the whole of what I have in the world, and I wish I had more to give in the same way. You know the unhappy reason why I could not leave you a partner in the donation, but I greatly trust you will answer my often declared design and intention, and therefore would not fetter you with any trust, nor with any co-executor ; and I beg you to answer my purpose most effectually, in full opinion whereof I have made my will in this manner, relying on your fidelity therein. One of my motives to this disposition is, the promise I made to my late wife in her last moments to take the best care I could of you and yours. I have other motives also, from your own great care and trouble taken for me ; and, lastly, the great and true regard which I have for yourself and that dear girl, who was my wife's favorite. Do not disappoint my expectation of you.” A mass of evidence was read relative to the intentions of the testator, and the conduct and the declarations of Mrs. Gough, and the court decreed, “that by virtue of the last will of the testator, and the letter accompanying the will, and the *evidence in the cause*, the devisee was and ought to be deemed a trustee of the real and personal estate, for the separate use and benefit of Mrs. Strode.”—Reg. Lib. 1766, B. fol. 515.

### No. II.

Abbot v. Lee. Supra, p. 189, 797.

“The substance of the plaintiff's bill appeared to be, that George



Cuthbert, the testator, having issue two sons, William and Edward, and two daughters, Jane and Mary, did, about May, 1681, make his [\*910] will, and therein, amongst other things, did devise to his daughter Jane 550*l.*, and to his daughter Mary the like sum of 550*l.*, and directed that those sums should be laid out by his executors in a purchase of lands, *at the discretion of his executors*, within one year after his decease, for the use of his said daughters and the heirs of their bodies lawfully to be begotten; and in case either of his daughters should die before marriage, that then 150*l.* of her money, or in case the money be laid out in lands, then lands of the value of 150*l.*, out of her share of the lands so purchased, should go to the surviving sister, and the other 400*l.* to his sons, equally to be divided between them and their heirs; and the said George Cuthbert, by his said will, did also devise unto his said sons all the lands in his said will particularly mentioned; and in case his sons died without issue, then he devised those lands to his daughters and the survivor of them and their heirs; and he gave the use of his household goods to his wife, and after her decease the same were to be divided amongst his children, *at the discretion of his executors*; and of his will he made Jane his wife (now the wife of William Leach,) and the defendant Lee, executrix and executor, in trust for his said sons and daughters. That after his decease, the executors executed the will, and possessed themselves of the real and personal estate, but did not lay out any part of the money in a purchase of lands. That both the sons, and Jane, one of the daughters, died in their minority unmarried, and the plaintiff married Mary, the surviving daughter, who also died without issue; and the plaintiff took out letters of administration to her, and thereby became entitled to her legacy of 550*l.* and to 150*l.* of Jane's legacy. That the defendant Cuthbert pretends that he is entitled to all the estate, both real and personal, of the said George Cuthbert, as his next heir-at-law, by the words of the said will, and that the defendant Lee ought to account to him, and not to the plaintiff. Wherefore, to have a discovery and an account of the testator Cuthbert's estate, and that the defendants, the executors, may account for and pay to the plaintiff the several legacies devised to the said Mary by the will of the said G. Cuthbert, and the plaintiff be relieved, is the scope of the bill. Whereto the counsel for the defendant William Cuthbert insisted that the defendant William Cuthbert by his answer confessed the will, and that the testator's sons and daughter Jane died unmarried, and that Mary, the plaintiff's wife, died without issue, and he believed the plaintiff was her administrator, but not entitled to her legacy, for that he the said defendant was entitled to her legacy, for that he the said defendant is entitled to the 1100*l.* given to Jane and Mary, he being heir at law to the testator and to his children; and that if the 1100*l.* had been laid out in lands, as it ought to have been, then the same would have descended to him, and that therefore he claims the same, but submits to the judgment of the court whether the plaintiff be entitled to any part thereof. Whereupon, and upon long debate of the matter, and hearing of what was insisted by counsel on either side, and upon producing of an order made in the said cause, whereby it was ordered that the plaintiff might

proceed to hear the cause against the defendant Lee only without prejudice in regard the defendant Leach and his wife, though duly served with process to appear, yet had not appeared, but sat in contempt to a serjeant-at-arms, and were insolvent and could not be found, the court declared, that the 550*l.* legacy devised to Mary, and \*150*l.* of [\*911] Jane's legacy, did belong unto the plaintiff as administrator to his wife, and that the defendant Cuthbert had not any right or title to the same as heir-at-law to George Cuthbert or his children, or otherwise; and doth therefore think fit and so order and decree, that the defendant Lee do account, &c., (the usual order,) and out of the money which shall appear to be in the said defendant's hands, upon such account, the said defendant is hereby ordered and decreed to pay unto the said plaintiff the aforesaid sums of 550*l.* and 150*l.*, or so much thereof as the same shall amount unto."—Reg. Lib. 1689, A. f. 177.

## No. III.

Cogan v. Stevens. *Supra*, p. 189.

November 24th, 1835.

Sir Christopher C. Pepys, master of the rolls,—“This case involves a question of great and general importance, and of principles which might be supposed to be of very general application; and so it would appear to be from the circumstance of several cases having come before me since the argument of the cause, involving the same question; and yet it appears I am called on to give the first judicial opinion on the subject. The question is simply, whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin or to the heir of the testator. The testator, Lewis Stevens, by his will, dated at Lisbon, 11th July, 1789, after describing himself as a native of Exeter, and enumerating the particulars of his property, which he stated to amount to 100,000*l.* sterling, proceeds thus:—‘As to the disposal of those worldly goods which I leave behind me, my order is, that after my funeral expenses are paid, and all my just debts, and 24,000 milreis to my dearly beloved wife, Mary Bryanna Bulkely, now Stevens, that the sum of 30,000*l.* sterling be laid out immediately by my executors hereunder mentioned, in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which shall belong to my widow during her natural life. And after her decease the said income shall belong to my dear brother William, or his children lawfully begotten; and if he dies without children, the said income shall belong to my brother Jedediah and his children lawfully begotten; and if he dies without issue, then this income shall belong to my brother John James and his children lawfully begotten; and if he dies without children, then this income shall belong to my dear sister Philadelphia and her children lawfully begotten; and if she dies without children, then

the income of this estate or estates, which shall be purchased and always run in my name, shall be employed in the establishment of a charity school for boys in the city of Exeter, for the purpose of teaching them to read, write, and cypher, and foreign languages, which boys shall be natives of the counties of Devonshire or Cornwall. And I hereby order my executors to purchase this estate or estates in my name, and register the same, and this my determination, in proper places, that the chamber of Exeter may take charge thereof in default of the regular succession above-mentioned, and erect the school as hereby directed, which school [912] shall be \*called Stevens's Charity School; and the regulations for its establishment I leave to the said chamber of Exeter, and my cousins Charles and Joseph Lyne, if they survive, with orders to set immediately about this useful establishment.' He then gave certain pecuniary legacies, and the residue of his fortune he gave and bequeathed in the following manner, dividing the same into fifteen parts. He gave three-fifteenths to his brother William, three-fifteenths to Jedediah, three-fifteenths to John James, three-fifteenths to Philadelphia, two-fifteenths to his cousin Charles Lyne, and one-fifteenth to Joseph Lyne. Then after the above-mentioned disposition was made, they were to receive and divide as the money came in, as his affairs went on liquidating; and he nominated his executors, his brothers William and Jedediah, and his cousin Charles Lyne, or in default of either of his said brothers, he nominated his brother John James, and in default of his cousin Charles Lyne, he nominated his cousin Joseph Lyne; and he declared that what he left should be divided out in full, as it was liquidated; and if any of the executors refused taking charge of the executorship, his share should be forfeited to the benefit of the others; that if any of his brothers or sisters should die before him, or either of his two cousins should die before him, that then the share of the deceased should be divided among the remaining five heirs of the residue. The will was proved by Jedediah Stevens in 1795, by John James Stevens in 1826, and afterwards by Charles Lyne, who took the name of Stevens, and is now the personal representative of the testator. The 30,000*l.* never was laid out in the purchase of land: it was invested in the public funds, and now consists of 30,996*l.* in the four per cents., of which fund the testator's widow received the dividends until her death, which took place in 1827, before which event all the devisees had died without issue, William in 1803, Jedediah the same year, Philadelphia in 1824, and John James in 1826, so that upon the death of the tenant for life all the limitations as to the estate to be purchased by the 30,000*l.* prior to the direction of establishing the school at Exeter have failed, and the question is, who is now entitled to the 30,000*l.*,—the plaintiff, who, on the reference made at the hearing of the cause, is found to be the heir, or the defendant, who claims it as part of the personal estate of the testator in the event which has happened? Upon *principle*, and upon analogy to several well-established rules in equity, it would appear that there is no doubt as to the proper solution of this question. The only difficulty arises from some few *cases* or *dicta* of the judges, which it is impossible to reconcile with these principles or these rules; and some of the cases pro-



ceed from authority so high, that, if not absolutely binding on the court, they ought at least to make it extremely cautious in pronouncing any judgment inconsistent with them. If a testator devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal or which altogether fail, the next of kin takes it, as in the case of an intestacy, as undisposed of. If a testator devises lands for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose, which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the \*will; and this whether the land be actually sold or not. But [\*913] here, it is said, the analogy between the cases of land and money ceases, and that if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal, or which partially fail, the next of kin has no such interest in the money, as cannot be applied to the purposes of the will; but if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? The proposition assumes the property in question, that is, a portion of the interest in the property, is not disposed of by the will, and the law gives to the next of kin all the personalty not disposed of. Is it from any incapacity in the next of kin to take property which exists in the form of land? That cannot be. In equity money may be considered as land, or land as money, according to circumstances. A man who has agreed to sell his land, and dies intestate, dies seised of the land—his property exists as land—it descends as land to the heir. The next of kin, so far from being incapable of succeeding to property that exists in the form of land, are entitled to the purchase-money to be paid in lieu of the land so contracted to be sold. So it is with respect to mortgages in fee, of which the mortgagee dies seised, so that it cannot be that his next of kin are to be excluded, because the property exists in the form of land. But if there be this difficulty in stating why the next of kin are to be excluded, there is at least as much difficulty in showing how the heir-at-law may be entitled, as regards the personalty. The proposition assumes the property was personalty of the testator at the moment of his death, and there was no *seisin* in him of any thing of any inheritable quality. Can the heir, as such, inherit what never was inheritable? Can he take from the ancestor what the ancestor never had? It cannot be necessary to pursue this any further. If the heir cannot take, as such, there is then one other character in which he can take: he must claim under the will. Doubtless an heir may take as devisee in such a case, but then he must show from the will itself a gift in his favour. He must show an intention that in the events which have happened, the heir should take; but this supposition the proposition itself excludes, because it assumes an intention to bestow the whole benefit on others; and there is not in this case, or in the case supposed, any intention expressed, or to be implied, as to the destination of the property in the event of the disposition made not taking effect. If indeed an heir claims as such, he is not defeated by the intention to disinherit, if mani-

festly any such intention for any reason fails to take effect. I am now considering the claim of the heir, not by virtue of that title which the law gives to him of inheriting all the property not effectually given away, but as a devisee under the will—but as the person designated by this testator as his devisee, and in the event that has happened. If the testator was simply to direct an investment of a sum in land, and declare no trust in it, the heir might with some plausibility contend the testator could have had no other object but to create or add to his real estate, and that it might be enjoyed in that line by whom that description of property is by law inheritable. But it is obvious, when the particular purpose of the investment is declared, and the particular persons are specified, as alone the objects of the testator's disposition, there is no place for any such contention. If, under such circumstances, the heir were to take as devisee, he would take in defiance of all the rules by which the rights of other persons claiming as devisees are regulated. He would take not [\*914] only without any words \*of gift, or any expression of intention in his favour, but against the true intent that others and not he should have the whole interest in the property. If the devise of personalty for a purpose, part of which fails, be to be considered as a devise to the heir to the extent and as far as the object fails, why is not a devise of land to be converted into money for purposes which partially fail, to be considered as a devise to the next of kin to the extent of the failing of the first object of the gift? The same expressions may be used in both instances; and yet in one the legal successor to land is to take, yet in the other the legal successor to money is to be excluded. Under the circumstances, and for these reasons, had the case come before me to be decided on principle and on authority independent of two or three cases to which I shall particularly refer, I should not have felt any difficulty in deciding against the claim of the heir. It remains to be considered whether I am bound by these cases to decide in his favour. An observation was made by Mr. Pemberton at the hearing, which removes much of the difficulty which would otherwise have arisen from the cases, namely, that no authority of an earlier date than *Ackroyd v. Smithson* ought to have much weight with me. The force of this observation will be felt, on adverting to what Lord Thurlow says in deciding that case. He says, 'I used to think, when it was necessary for any purpose of the testator's disposition to convert the land into money, that the undisposed land would be personalty.' Now this is precisely the argument used as to the conversion of money into land by Mr. Hodgson; and here I cannot but observe, that this subject of conversion has given rise to two of the ablest arguments ever addressed to any court—that by Lord Eldon on the one side in *Ackroyd v. Smithson*, and that by Mr. Hodgson on the other, in the present case—an argument, which has, since it has been delivered, been frequently mentioned at the bar in terms of the highest praise, and in which I gladly avail myself of this opportunity to express my entire concurrence. In that argument it was necessarily admitted, if all the purposes of a devise failed, the whole belongs to the heir (*qu. next of kin.*) But it was contended, that if the purposes are to be in part executed, and so that the right to have such an investment

of money in land effectually existed in any one to answer such partial purpose, that the land so purchased, after answering such partial purpose, belongs to the heir. So thought Lord Thurlow, as to lands directed to be sold, before the argument in *Ackroyd v. Smithson*. No wonder, then, that there should be found before that time traces of authority in favour of the heir's claim to money, as there was of the next of kin's claim to land: but the exclusion of the latter is now too well settled to be disputed, and the argument for the heir rests on a supposed difference between the two. But no such difference was supposed to exist before *Ackroyd v. Smithson*: why then should it exist now? If there be any substantial difference in principle, let it prevail, but if in principle there be no distinction, are not the decisions in *Ackroyd v. Smithson* and the subsequent cases, of higher authority than any decision which may have taken place before the principle was so thoroughly discussed and established as it was in that case? In deciding in favour of the next of kin, I am following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time. The case of *Leechmere v. Lord Carlisle*(*a*) was cited for the heir; but this and all other cases in which \*the conversion was in the lifetime of the testator, I consider as not bearing upon the case. Indeed, in one view, these cases may [\*915] be thought to bear against the claim of the heir. They proceed on this—that whereas, by the obligation to convert money into land in the lifetime of the settlor, the money had become land in the ancestor, whenever the property was so situated the heir was held entitled to it. In the present case, the heir claims that which unquestionably was personalty at the moment of the death of the ancestor. Of the other cases cited for the heir, some were in support of his right as such claiming by inheritance, others in support of his claim as devisee. I will consider the latter class first. *Smith v. Claxton*,(*b*) which does not appear to me to have much application. There land was directed to be sold for purposes, some of which failed: it was decided that the heir took what was not required for the purposes of the will; and the only question was, whether he took it as money or as land. This has no bearing on the question, whether in this case the heir or the next of kin of the testator are entitled. There the observations of Sir John Leach may be material, when some other of his decisions are to be observed upon hereafter. He says, ‘The heir-at-law is entitled because the real estate was land at the devisor’s death, and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. It is for this reason that the produce of an estate which the devisor directs to be sold can never be strictly part of his personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees.’ *Amphlett v. Parke*(*c*) came before the same learned judge first. He thought the case came within the authority of *Durour v. Motteux*,(*d*) and *Mallabar v. Mallabar*,(*e*) and

(*a*) 3 P. W. 211.

(*d*) 1 Ves. 390.

(*b*) 4 Madd. 484.

(*e*) Cas. t. Talb. 78.

(*c*) 1 Sim. 275.



expressed his regret he was there bound to decide, that in that case, as the real estate was directed to be sold, and the proceeds were directed to be taken as part of the personal estate, and to be applied, together with his personal estate, in paying personal legacies, a gift of the residue of the personal estate passed, by the death of the legatee, a legacy arising from the real estate. He says, 'it is only from deference to these two cases that I arrive at the conclusion in this case, that the testatrix had in her view the improbable intention, that the moneys arising from the sale of the real estate should, for purposes not foreseen by her, have the same quality as if at her death they had been part of her personal estate.' Sir John Leach adhered to this opinion when the case was brought before him in 1827, as reported 4 Russell, 75: but Lord Brougham reversed this decree, and decided in favour of the heir. Whatever may be the right decision in *Amphlett v. Parke*, the circumstances are so different from the present case, that it cannot be considered as bearing upon it. In that case the question was, whether the proceeds of the real estate, which were destined to the lapsed legacies, passed under the residuary clause. In the present case there is no residuary clause, but the heir claims under a direction to purchase land for purposes which fail. *Phillips v. Phillips*(*f*) comes nearest to the present. In that case there was a devise of land for sale and a direction that the proceeds should be deemed to be part of the personal estate, and should be subject to the disposition afterwards made of the personal estate. The proceeds of the sale and the personal

[\*916] \*estate were then given to trustees to pay the debts and legacies, and the residue of the proceeds and of the personal estate was to be divided into fifths, to be paid to five residuary legatees. The death of one of them occasioned a lapse as to one fifth. The question was, whether so much of it as arose from the proceeds of the land belonged to the heir or next of kin. Sir John Leach thought the next of kin entitled, resting his judgment on cases which had decided that the residuary clause might pass what was intended for legacies which lapsed or could not be carried into effect, considering the provision of the will before him as amounting to a direction, that the proceeds of the real estate should be considered as personal, not only for the purposes of the will, but for purposes never contemplated by the testator. To support that decision on his own principles, he must have considered the will as amounting to a direction that the proceeds of the land should be applied not only to the purposes of the will, but, in the event of any of those purposes failing, for the next of kin. It forms no part of the present purpose to consider whether that case can be supported on principle, or on any preceding authority. It is sufficient to observe, that it professes to be founded on a direction, that the proceeds of all the land should be deemed to be part of his personal estate, and it was merely a construction put on such a bequest: in the present case there is no direction that the money to be invested should be deemed to be part of the testator's real estate. If there had not been such a direction in *Phillips v. Phillips* Sir John Leach states that the rule established in *Ackroyd v. Smithson* would have prevailed. His judgment, therefore, in that case is no autho-

rity for the claim of the heir in this. In the next case of *Jessopp v. Watson*(*g*) he decided in favour of the heir, because he did not find in the will an expression equivalent to a direction that the proceeds of the real estate should for all purposes be considered as if it had been personal estate at his death. On principle, therefore, the heir has not the authority of that learned judge, because it cannot be said in this will there are any expressions equivalent to a direction that the money to be invested should be considered as if it had been real estate at the time of the testator's death. In *Robinson v. Knight*(*h*) the testator directed land to be purchased, and that it should be settled, after a previous limitation, to the use of his own right heirs, and the question was between the heir-at-law and the residuary devisee. This was a mere question of construction between the parties, each of whom had upon the will sufficient terms of gift, whereas in the present case there is an absence of any terms of gift in favour of either of the contending parties. In support of the claim of the heir as such, not as devisee, the case of *Hayford v. Benlows*(*i*) was cited, not on account of the point decided, which was merely that, under the will, the residuary legatee took clear of debts, which were held to be payable out of the real estate, but for the sake of certain expressions used by Lord Cowper in giving judgment. He says, 'if a sum of money could be devised in trust to be laid out in land, and the uses to which the land should go be not declared, if the money thus devised be considered as land, why should not the benefit of the money go to the heir-at-law as a resulting trust? It is on this, in the first place, to be observed, that this was not a point in the case, but the expression is merely a *dictum*. The decision was in 1716, and therefore \*long before *Ackroyd v. Smithson*, which was in 1780; and Lord Cowper through- [\*917] out considered the rule as to money directed to be laid out in land, and land directed to be sold, as identically the same. Had he therefore considered the rule as to the proceeds of land directed to be sold to be as it was established in *Ackroyd v. Smithson*, he could not have used this expression as to money directed to be invested in land. It is also to be observed, no case is cited as bearing on the proposition alluded to in the judgment. The case of *Leslie v. The Duke of Devonshire*(*k*) is that which creates the greatest difficulty. In that case the testator, by deed, created a trust of 60,000*l.*, which he had on mortgage, and certain freehold leases and leases for years. The 60,000*l.* were to be laid out in land, to be settled as to part on certain uses to his son and two daughters, and their children (it failed with them, all dying without issue,) the ultimate remainder to Joyce Leslie in fee. As to certain other parts, to certain other uses to his widow and children, which failed, and with ultimate remainder to Thomas Lyster in fee. And as to 8,500*l.*, part of the 60,000*l.*, due on a particular mortgage, and his freehold leases and leases for years, on trust, to secure certain annuities to his daughters, and the fee of the land to be purchased by the 8,500*l.*, and the absolute interest in the freehold leases to his son. In this deed there was reserved a power of revocation; and the testator by his will revoked the grant of two leases

(*g*) 1 M. & K. 665.    (*h*) 2 Eden. 155.    (*i*) Amb. 582.    (*k*) 2 B. C. C. 187.

for years, and of a mortgage, part of the 60,000*l.*, but not part of the 8,500*l.*, and he charged his annuities to his daughters on the 8,500*l.*, mortgage, and another of 6,700*l.*, not included in the settlement; and he introduced another annuity to another person; and then directed, that the said annuities being paid, the surplusage of interest of the two mortgages, or of the rents of the land to be purchased, should be paid to his son for life, and then should be settled in trust, after the manner, and under the same conditions, limitations, and restrictions, as his other estates were directed to be settled. All the testator's children died without issue, but the son devised all his real and personal estate to his wife; she died intestate as to her real estate, and the Duke of Devonshire, who was her heir, and who derived his title from the testator's son, claimed the 8,500*l.* and the 6,700*l.* To support this claim, it was endeavored to show the testator's son had been entitled to these sums as real estate. It was immaterial whether he was entitled under the deed, as devisee under the will, or as heir. His counsel made three points: first, whether the gift was void, and, as such, went to the personal representative; secondly, whether it was to be divided into portions between the classes of devisees; and, thirdly, whether it went to the third class, that is to say, to the son in fee; and they insisted on the third of these propositions. It is to be observed, that they did not claim it as having vested in the son as heir, on the supposition of the devise being void for uncertainty, although that would have been equally maintainable, but seemed to assume, if the devise was void, then the personal representative would take the mortgages, and, if the decision had been merely in favor of the duke's claim as deriving title through the heir of the testator, it would obviously have been referred to the ground taken in argument by his counsel, and would have been no authority in support of the claim of the heir in the present case; but, according to Mr. Brown's report of the [\*918] judgment, Lord Kenyon took no notice of the point urged, but \*decided in favour of the title of the heir, on the ground of intestacy, and this without time taken for consideration, without any one case being cited, or any argument addressed to that question. Possibly Lord Kenyon's view of the question was mistaken by the reporter: as it stands, it appears to be an authority for the claim of the heir. The character of the judge entitles every decision of his to the highest respect, but in this case the circumstance above mentioned detracts from the authority of the opinion expressed. The case of *Tregonwell v. Sydenham*(*l*) was also much relied on; but that case also is applicable only on account of certain observations of Lord Redesdale, and not from the decision itself. The testator devised land in strict settlement, subject to a certain trust for raising 20,000*l.*, which were directed to be laid out in the purchase of land to be settled to certain uses, which were void, as being too remote; and the decision was, that the 20,000*l.* belonged to the heir. This decision does not touch the present question; that was not personally directed to be invested in land, but land first directed to be converted into money and re-invested into land, and all the purposes for which this was to be done having failed, the heir took the land so directed to be converted



into money. Lord Redesdale does not advert to this circumstance, but is made to say, ‘It has been established in many cases, that where land is directed to be turned into money, or money is directed to be laid out in land, both shall be considered as that species of property into which they are directed to be converted. Considering the 20,000*l.* as land, the disposition not being capable of being carried into effect, who is to take? The heir-at-law must take. If the testator had directed 20,000*l.* to be paid out of the personal estate, and lands to be purchased, these lands, on failure of the intended purpose, would go to the heir-at-law; the personal representative could not take, as the money was converted into land.’ It is to be observed, Lord Redesdale, in this observation, considers the same rule as applicable to the conversion of land into money as money into land, and yet the observation he makes as to the latter, if applied to the former, would be directly at variance with *Ackroyd v. Smithson*. Unquestionably, however, if Lord Redesdale did use this expression, the heir-at-law in this case has his high authority in support of the proposition for which he contends. But I can consider them only as *dicta*, there being other and better grounds to support that judgment. The case of *Fletcher v. Chapman*(*m*) has been considered as conclusive in favour of the claim of the heir. It is so treated in Mr. Jarman’s edition of *Powell on Devises*, vol. ii. p. 74, and was so argued in this case. If I considered that case as a distinct decision of the point in question, I should, as the decision of the house of lords, have felt bound by its authority. That case, therefore, required my most anxious consideration, and I have had the registrar’s book examined, for the purpose, if possible, of throwing some light on the report. The particulars of that case, as taken from the registrar’s book, are as follows:—George Goodman, the testator, by his will directed 1,000*l.* to be invested in the purchase of lands, to be so settled as that William Goodman, his nephew, should have an estate therein for his life only, and in case William Goodman did not do such acts as should be necessary whereby to limit the said land so to be purchased as that he might only have an estate for life therein, and likewise to bar himself of all other claims and demands in, unto, or out of the estate of George Goodman, then he \*devised to the said William 40*l.* only. Jane, the testator’s widow, was his administratrix. She paid William Goodman [\*919] 300*l.* on account of the 1,000*l.*, and advanced him 200*l.*, which two sums he laid out in the purchase of land, and then died, leaving two children, George, who afterwards died, and the defendant, Jane Fletcher, both at that time infants. The defendant Cockerell was the guardian of these children, and on their behalf entered into an agreement with Jane, the administratrix of the testator, by which it was arranged that the 200*l.* advanced by her to William should go in further part of the 1,000*l.*, and she should pay to Cockerell the remaining 500*l.*, which was accordingly paid, whereon he conveyed certain land to Jane, the administratrix, and to the defendant Newton, as a security that the 300*l.*, the 200*l.*, and 500*l.* should be laid out and settled according to the intent of the testator. Elizabeth, the late wife of the plaintiff, Thomas Chapman,

(*m*) 3 B. P. C. Toml. ed. 1.

was the heir-at-law of the testator, and the other plaintiff, Roger, was Thomas Chapman's son. Jane, the administratrix of the testator, died, and there is no statement in the pleadings as to any representation of the testator's estate having been obtained after her death. The plaintiffs were the surviving husband of the heiress of the testator, and his son, and the defendants were Newton, the trustee, and Cockerell (who had entered into the arrangement, and who had received the 700*l.*, and who was also administrator to William Goodman,) and Jane, the only surviving child of William Goodman; and the object of the bill was, to have it declared the 1,000*l.*, or the land purchased with it, belonged to Elizabeth, the heiress of the testator, as against the children of William Goodman. On the part of the defendant Cockerell, it was insisted the whole administration to the testator had been granted to Gabriel Goodman, with Jane: he died in the lifetime of Jane, and they had agreed the testator's debts and legacies should be paid, and to that end the securities in writing concerning his personal estate should be deposited in the hands of the defendant Newton. He then stated a suit, after the death of William Goodman, to which Elizabeth Chapman, the heiress of the testator, was party, in which a decree was made in 1680, to take accounts of the testator's estate. He then stated the estate so conveyed by Cockerell to Jane, as administratrix to the testator, had been settled on Jane and George, the two children of William Goodman; the other part of the 1,000*l.* had been invested on mortgage; and insisted that Jane Fletcher, the only surviving child of William Goodman, was entitled. The defendant Newton, by his answer, represented himself solely as a trustee of the land conveyed by Cockerell, and submitted to act as the court should direct. By the decree it was declared, that, the testator having declared that William Goodman should have an estate for life only, the 1,000*l.*, or land purchased therewith, belonged to the testator's heir-at-law, and not to the children of William Goodman. It directed the payment of the 700*l.* received by Cockerell from Jane, the administratrix of the testator, and an account, and payment of the rents of three-fifths of the land purchased by William Goodman, and a conveyance of the three-fifths, and the other two-fifths of the rents of this land to be paid to the defendant, Jane Fletcher; the plaintiff, Thomas Chapman, to have the whole of the 700*l.*, and the interest of three-fifths of the land, for his life, and afterwards to his son, the other plaintiff. It is quite clear, in this case, there was no contest between the real and personal representative of the testator, George Goodman. There was no personal representative before the court. It was said in the argument [\*920] \*in the case now before me, that Newton represented in fact the personal estate, because it had been assigned to him. There is no trace of this in the pleadings of record: it is undoubtedly stated in Cockerell's answer, that by articles in 1773, it was agreed between Jane, the widow, and Gabriel, the administrator of the testator, the testator's debts and legacies should be paid, and to that end the securities and writings concerning his personal estate should be deposited in the hands of the defendant Newton. This was only to insure the arrangements between the parties, and gave Newton no interest in the property; and

he does not claim any. From this decree the child of William Goodman appealed, and Chapman, representing the heir of the testator, was respondent. It is reported in 3 B. P. C. 1. But here, also, it is obvious there was no question between the real and personal representative of the testator. Jane, his administratrix, had paid the 1,000*l.*, and no person representing his personal estate was in any way a party to the contest. It is a case in which the heir was declared entitled to the money directed to be laid out in land, not to any declared purpose which failed, but for the limited interest, that is, for the life of William Goodman; but it is not a decision that, even in that case, the heir was entitled against the personal representative. No such case was made by the pleadings, or argued, or decided, and, there being no party to raise that question, this case therefore decides nothing as to the present matter in contest. *Greaves v. Case*, as reported 1 Vesey, jun., 548, would appear to be an authority for the heir, but in the report of the same case, 2 Cox, 301, it is stated the plaintiff was both-heir-at law and next of kin, and therefore entitled in one character or the other: it was not discussed in what character he took, and the point decided was a different one. Many cases were cited against the claim of the heir, but as they were either to establish general principles, which I do not consider in dispute, or with reference to the point in the case, to which the opinion I have formed on this particular point makes it needless for me to advert, I do not think it necessary to examine them in detail. I may observe, no case was cited against the heir in which the point now contended for by him was directly raised and decided. It was argued, indeed, that *Abbot v. Lee*(*n*) was precisely this case: but it appears the decision, although against the testator's heir, was not in favour of his personal representative, but gave the 550*l.* and 150*l.* to the representative of Mary, the legatee, considering that her interest in these sums was absolute. There are, however, some of the cases cited for the defendant, which, although not precisely the case before me, are most important, as showing, that when the whole object of the bequest of money to be converted into land fails, the personal representative is entitled, and as showing the question of conversion of money into land, and land into money, has by the highest authority been considered as regulated by the same rules. Such are the cases of *Robinson v. Taylor*,(*o*) *Townley v. Bedwell*,(*p*) besides others, to which I need not refer. The result of the whole authorities seems to be, that before *Ackroyd v. Smithson* no distinction was recognized between the doctrine as applicable to a conversion of money into land, or land into money—that as to both an opinion prevailed, that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds \*were found to exist. This, as to land converted into money was corrected in *Ackroyd v. Smithson*; but no case has occurred in [*\*921*] which the point has been argued and determined as to money converted into land. I say argued and determined, because, if determined in *Leslie*

(*n*) 2 Vern. 284.(*o*) 2 B. C. C. 555; 1 Ves jun. 45.(*p*) 6 Ves. 194.



v. The Duke of Devonshire and Fletcher v. Chapman, it certainly was not argued; but there are undoubtedly *dicta* of very eminent judges, since that time, which seem to show an impression on their mind, that the principle of Ackroyd v. Smithson was not to be applied to a conversion of money into land. Those learned judges had not the benefit, which I have had, of hearing the point fully and most ably argued; and having, after the fullest consideration, come to the conclusion that that principle does apply to the present case, and as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as applicable to the two cases, by deciding against the claim of the plaintiff; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate, at the time of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given to another. One other point was made for the heir, to which now I will very shortly allude. It was said as the testator had directed the estate should be purchased and remain in his name, his heir must have been a trustee of it, and, if it had been so purchased and so vested in the heir, there would be no equity on the part of the next of kin, as against the heir, to convert this land into money. That proposition fails in all its parts: there is nothing to show the heir is to be a trustee: the heir might indeed have borne a different name: if he had been a trustee, he would have held it as a trustee, and not as heir. And the rule, that there are no equities between representatives, would have had no application; and if it had, it would have been fatal to the claim of the heir, who now seeks, after all the purposes of the will are answered, to convert to his own benefit, against the next of kin, what was money at the testator's death, and has ever since so remained. The argument of John James Stevens, the plaintiff, rests on the supposition that the 30,000*l.* ought to be considered as land as between the real and personal representative; and as my judgment is against the validity of such claim, the bill must be dismissed, but without costs. I have some reluctance in refusing to give the defendants the costs, because, in general, I think that those who try the experiment of a claim should pay the expenses of it if they fail, however reasonable the ground may have been for trying it; but this question is so involved in difficulty, from what has taken place and been said in courts of equity at different times, and arises so much from the act of the testator, from whom both claim, that I think it fair each party should bear their own costs."

\*No. IV.

[\*922]

Supra, p. 568.

*Appointment of new Trustee of Stock.*

This Indenture, made the                      day of                      between E. F. of                      and G. his wife (*the donees of the power,*) of the first part ; A. B. of                      (*the continuing trustee,*) and C. D. of                      (*the retiring trustee,*) of the second part, and I. K. of                      (*the new trustee,*) of the third part : Whereas, by an indenture of settlement bearing date the                      day of                      , and made or expressed to be made between, &c., being the settlement made in contemplation of the marriage then intended and soon afterwards solemnized between the said E. F. and G., his wife, after reciting that a sum of                      £. three per cent. consolidated bank annuities had been transferred into the joint names of the said A. B. and C. D. in the books of the Governor and Company of the Bank of England, It was witnessed, that for the consideration therein mentioned, it was thereby agreed and declared, that the said A. B. and C. D., and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of and interested in the said sum of                      £. three per cent. consolidated bank annuities, upon trust, from and after the solemnization of the said marriage, to pay the dividends, interest, and annual produce thereof unto the said E. F. and his assigns, for his life, and after his decease, unto the said G. F. and her assigns, for her life, and after her decease, upon the trusts therein particularly mentioned for the benefit of the issue of the said marriage; and by the said indenture now in recital it was provided (*recite power of appointment of new trustees limited to E. F. and G. his wife, and the usual direction for transfer of the trust fund, and declaration as to the powers of trustees :*) And whereas the said C. D. is desirous of being discharged from the trusts of the said indenture, and the said E. F. and G., his wife, are desirous of appointing the said I. K. to be a trustee in the place of the said C. D. ; And whereas the said sum of                      £. three per cent. consolidated bank annuities is intended to be forthwith transferred by the said A. B. and C. D. into the joint names of the said A. B. and I. K. in the books of the Governor and Company of the Bank of England : Now this indenture witnesseth, that in pursuance of the said desire on the part of the said E. F. and G., his wife, and by force and virtue and in exercise and execution of the power or authority by the said recited indenture limited to the said E. F. and G. his wife, and of every other power or authority in anywise enabling them or either of them in his behalf, they, the said E. F. and G. his wife, do and each of them doth by this deed or instrument in writing sealed and delivered by them in the presence of and attested by the two credible persons whose names are hereupon indorsed as witnesses to the sealing and delivery hereof by the said E. F. and G. his wife, (*q*) nominate and appoint the

(q) The instrument executing the power must of course be in conformity with the terms of the power.

said I. K. to be a trustee in the place of the said C. D. for the purposes of the said indenture, or such of them as are now subsisting and capable of taking effect ; And it is hereby agreed \*and declared that the [\*923] said A. B. and I. K., and the survivor of them, and the executors, administrators, and assigns of such survivor, shall stand and be possessed of and interested in the said sum of        l. three per cent. consolidated bank annuities, when and so soon as the same shall have been transferred into the joint names of the said A. B. and I. K., and of and in the dividends, interest, and annual produce thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations in and by the said indenture of settlement expressed and declared of and concerning the same or such of the said trusts, intents, and purposes, powers, provisoes, agreements, and declarations as are now subsisting and capable of taking effect. In witness, &c.

## No. V.

Supra, p. 568.

*Appointment of new Trustee of Chattels.*

This Indenture, made the        day of        , between A. B. of        (the surviving trustee) of the first part ; E. F. of        (party beneficially interested and sui juris)(r) of the second part ; G. H. of        (new trustee) of the third part ; and I. K. of        , (provisional trustee) of the fourth part. [*Recite creation of trust of chattels, real or personal, in favour of E. F. for life, with limitations over, and a power of appointment of new trustees to the continuing or surviving trustee, by deed or writing under hand and seal, with the usual direction for the transfer of the trust estate and the declaration as to powers.*] And whereas the said C. D. departed this life on or about the        day of        , leaving the said A. B. his co-trustee him surviving ; and whereas the said A. B. is desirous of appointing the said G. H. to be a trustee of the said recited indenture, in the place of the said C. D. deceased : Now this indenture witnesseth, that in pursuance of such desire, and by force and virtue, and in exercise and execution of the power or authority by the said recited indenture limited to the said A. B. and of every other power or authority in any wise enabling him in this behalf, he the said A. B. (with the full consent and approbation of the said E. F., testified by his being a party to, and executing these presents) doth by this deed or writing under his hand and seal, nominate and appoint the said G. H. to be a trustee in the place of the said C. D., deceased, for the purposes of the said indenture or such of them as are now subsisting and capable of taking effect. And this indenture further witnesseth, that in pursuance of the direction in this behalf in the said recited indenture contained, he the said A. B. (with the full consent and approbation of the

(r) Though not a donee of the power, any party beneficially interested, who is *sui juris*, may properly join in the appointment.



said E. F. testified as aforesaid) doth bargain, sell, and assign unto the said I. K., his executors and administrators, all and singular (*describe the chattels, real or personal, with the proper appurtenances,*) and all the estate, &c. To have and to hold the said (*chattels, real or personal*) unto the said I. K., his executors and administrators, (*or for all the residue and remainder now to come and unexpired of the said term of years*) upon trust, \*and to the intent that the said I. K., his executors or administrators, may forthwith assign the same (*or* [\*924] hereditaments for all the residue of the said term) unto the said A. B. and G. H., their executors, administrators, and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, in and by the said recited indenture expressed and declared, of and concerning the same or such of the said trusts, intents, and purposes, powers, provisoes, agreements, and declarations as are now subsisting and capable of taking effect. In witness, &c.

*Re-assignment to be indorsed.*

This Indenture made, &c., between the within named I. K. of the one part, and the within named A. B. and G. H. of the other part, Witnesseth, that in pursuance of the trust in the within written indenture in this behalf contained, he the said I. K. doth bargain, sell, and assign unto the said A. B. and G. H., their executors, administrators, and assigns, all and singular (*the chattels, real or personal, with their appurtenances*) by the within written indenture assigned to the said I. K., his executors and administrators, and all the estate, &c. To have and to hold all and singular (*the chattels, real or personal, with the appurtenances*) unto the said A. B. and G. H. their executors, administrators, and assigns, (*or for all the residue and remainder now to come and unexpired of the said term of*        years, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations in and by the within written indenture expressed and declared of and concerning the same (*or hereditaments*) or such of the said trusts, intents, and purposes, powers, provisoes, agreements, and declarations, as are now subsisting, and capable of taking effect. In witness, &c.

*Some add a covenant by I. K. against incumbrances.*

No. VI.

Supra, p. 569.

*Appointment of new Trustee of Freeholds by single Deed.*

This Indenture, made the        day of        , between A. B. of        (*surviving trustee*) of the first part; E. F. of        , (*party beneficially interested*) of the second part; G. H. of        , (*relessee to uses*) of the third part; and I. K. of        (*new trustee*) of the fourth part. [*Recite conveyance of freehold estates unto and to the use of A. B. and C. D., and their heirs, upon the trust therein mentioned, with a*

*power of appointment of new trustees to the continuing or surviving trustee, and the usual direction for transfer of the estate and declaration as to powers.]* And whereas the said C. D. departed this life on or about the       day of       , leaving the said A. B. his co-trustee him surviving. And whereas the said A. B. is desirous of appointing the said I. K. to be a trustee of the said recited indenture in the place of the said C. D. deceased. Now this indenture witnesseth, that in pursuance of such desire, and by force and virtue, &c. [*Insert appointment by A. B., of I. K., to be trustee in the place of C. D., as in Appendix, No. V.*] And this indenture further witnesseth, that in [\*925] \*pursuance of the direction in this behalf in the said recited indenture contained, the said A. B. (with the full consent and approbation of the said E. F. testified as aforesaid) doth by these presents grant and release unto the said I. K. and his heirs, all and singular [*describe the freeholds with their appurtenances,*] and the reversion, &c., and all the estate, &c., To have and to hold the said (*freeholds with their appurtenances*) unto the said I. K. and his heirs, to the use of the said A. B. and I. K., their heirs and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, in and by the said recited indenture expressed and declared of and concerning the same, or such of the said trusts, intents, and purposes, powers, provisoes, agreements, and declarations as are now subsisting and capable of taking effect. In witness, &c.

## No. VII.

Supra, 569.

*Appointment of new Trustee of Freeholds by two Deeds.*

This Indenture, made the       day of       , between A. B. of       , (*continuing trustee*), and C. D. of       , (*retiring trustee*), of the first part; E. F. of       , and G. his wife (*tenants for life*) of the second part; I. K. of       , (*new trustee*) of the third part; and L. M. of       , (*provisional trustee*) of the fourth part. Whereas, by indentures of lease and release, bearing date respectively, &c., and made or expressed to be made between, &c., (being the settlement made in contemplation of the marriage then intended, and soon afterwards solemnized, between the said E. F. and G. his wife) for the consideration therein mentioned, &c. [*Recite release to A. B. and C. D. and their heirs, to the use of E. F. and G. II. successively for life, with remainders over, and power of appointment of new trustees to the surviving or continuing trustee, with the consent of E. F. and G. II., during their lives, &c.*] And by the said indenture of release and settlement now in recital, it was provided, that in case the said A. B. and C. D., or either of them, or any trustee to be appointed as thereafter mentioned, or their or any of their heirs should die, or be desirous of being discharged from, or refuse, or decline, or become incapable to act in the trusts thereby declared before the same should be fully executed, it should be lawful for the said A. B. and C. D., and the survivor of

them, and the executors and administrators of such survivor, with the consent and approbation of the said E. F. and G. H., during their lives, and of the survivor of them, during his or her life, and, after the death of such survivor, at their or his sole discretion, by any writing or writings under their or his hands and seals, or hand and seal, to nominate and appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desirous of being discharged from, or refusing, declining, or becoming incapable to act as aforesaid; and that, upon such nomination and appointment, the said trust estates should, with all convenient speed, be conveyed and assured in such manner that the same might be legally and effectually vested in such new trustee jointly with the surviving or continuing trustee; or, in case there should be no surviving or continuing trustee, then in such new trustee or trustees only, to, for, and upon the \*uses, trusts, in- [\*926] tents, and purposes thereinbefore expressed and declared of and concerning the same; and it was thereby declared, that every such new trustee should in all things act in the said trusts, and with the same powers and authorities as if he had been originally appointed a trustee by the said indenture of release and settlement now in recital. And whereas the said C. D. is desirous of being discharged from the trusts of the said indenture of release and settlement, and the said A. B. is desirous, with the consent of the said E. F. and G. his wife, of appointing the said I. K. to be a trustee in the place of the said C. D.: Now this indenture witnesseth, that in pursuance of such desire on the part of the said A. B., and by force and virtue, and in exercise and execution of the power or authority in that behalf limited to him by the said indenture of release and settlement, and of every other power or authority in anywise enabling him in this behalf, he the said A. B., with the consent and approbation of the said E. F. and G. his wife (testified by their respectively being parties to and executing these presents,) doth by this deed or writing under his hand and seal, nominate and appoint the said I. K. to be a trustee in the place of the said C. D. for the purposes of the said indenture of release and settlement, or such of them as are now subsisting and capable of taking effect. And this indenture further witnesseth, that in pursuance of the direction in this behalf contained in the said indenture of release and settlement, and by force and virtue, and in exercise and execution of the power or authority by the same indenture for this purpose given to the said A. B. and C. D., or either of them, and of every other power or authority in anywise enabling them or either of them in this behalf, they the said A. B., and C. D. do and each of them doth by these presents revoke, determine, and make void all and every the uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations in and by the said indenture of release and settlement limited, expressed, declared, and contained, and now subsisting and capable of taking effect, of or concerning the freehold estates and hereditaments hereinafter described or referred to, and of and concerning their rights, members, and appurtenances, and do and each of them doth direct, limit, and appoint that the same freehold estates and hereditaments, with their appurtenances, shall henceforth go, remain, and be to



the use of the said L. M., and his heirs, upon the trust and to the intent hereinafter expressed. And this indenture further witnesseth, that in further pursuance of the direction in the said indenture of release and settlement, in this behalf contained, the said A. B. and C. D. do and each of them doth by these presents, grant and release unto the said L. M., and his heirs, all and singular (*the freehold hereditaments,*) and all other, if any, the hereditaments and premises comprised in the said indenture of release and settlement, with their rights, members, and appurtenances, and the reversion, &c., and all the estate, &c. To have and to hold the said (*freehold hereditaments,*) and all and singular other the premises hereby released or intended so to be, with their rights, members, and appurtenances unto the said L. M. and his heirs, to the use of the said L. M. and his heirs, upon the trust and for the intent hereinafter expressed. And it is hereby agreed and declared, between and by the parties hereto, that the said hereditaments and premises hereinbefore mentioned or referred to, with their appurtenances, are hereinbefore appointed and released to the use of the said L. M. and his heirs upon trust, that the said L. M. or his heirs may forthwith convey the same

[\*927] hereditaments and premises, with their appurtenances, unto \*the said A. B. and I K., and their heirs, to the uses upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, to, upon, for, with, under, and subject to which the said hereditaments and premises, with their appurtenances, would now, under and by virtue of the said indenture of release and settlement, stand and be limited, or subject, in case this present indenture had not been executed, and the said I. K. had been originally made a lessee to uses, in and by the said indenture of release and settlement, instead of the said C. D., and accordingly the name of the said I. K. had in the said indenture been inserted throughout, instead of the name of the said C. D. [*Covenant by C. D. against incumbrances.*] In witness, &c.

*Reconveyance to be indorsed.*

This Indenture made the                      day of                      , between the within named L. M. of the one part, and the within named A. B. and I. K. of the other part, Witnesseth, that in pursuance of the trust in the within written indenture in this behalf contained; he the said L. M. doth by these presents, grant and release unto the said A. B. and I. K., and their heirs, all and singular the hereditaments and premises, by the within written indenture appointed and released to the use of the said L. M. and his heirs, with their rights, members, and appurtenances, and all the estate, &c. To have and to hold the said hereditaments, and premises hereinbefore released, or intended so to be, unto the said A. B. and I. K., and their heirs, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, to, for, upon, with, under, and subject to which the same hereditaments and premises would now, under, and by virtue of the within recited indenture of release and settlement stand

and be limited or subject, in case the within written indenture, and these presents had not been executed, and the said I. K. had been originally made a relessee to uses, and trustee in and by the said within recited indenture of release and settlement, instead of the within named C. D., and accordingly the name of the said I. K. had in the same indenture been inserted throughout, instead of the name of the said C. D. In witness, &c.

*Some add a covenant by I. K. against incumbrances.*

### No. VIII.

Sands v. Nugee. Supra, p. 533.

July 5th, 1836.

The Duke of Roxburgh, by will dated November 5th, 1803, gave all his estates, real and personal, to John Wanchope\* and James Dundas upon trust to sell, &c., "with full power to each of the trustees before named or to be named by the testator, who should accept of the trust, to name and appoint any other person he pleased to succeed himself in the trust thereby created after his own decease, and also to the said \*nominees to name other persons to succeed to them respectively in the said trust after their death, and that from time to time, [\*928] and at all times coming, aye, and until the trust should be completely executed, and the purposes thereof fulfilled. And also with power to the said trustees named or to be named by the testator, or to be assumed, as said was, accepting and surviving, or their *quorum* aforesaid, to assume and appoint any person or persons they pleased as joint trustees in the trusts thereby granted in place of any former trustee or trustees named or to be named by the testator, and assumed as aforesaid, who should decline to accept, or who should leave Britain or go abroad, or who should have deceased without naming a successor or successors to himself or themselves in the trust thereby created, and which trustees so to be assumed should have as full and ample power as was given to the trustees thereby appointed."

The duke, a short time before his death, executed a deed of instructions in the nature of a codicil, in which he gave certain directions as to the application of the proceeds of the sale, and died in March, 1804.

Mr. Dundas *disclaimed both as trustee and executor*. Mr. Wanchope took out probate, and acted as trustee, and, in 1829, died, having, by will, dated in 1823, appointed John Spottiswoode, David Robertson, and Warren Hastings Sands to succeed him in the trusts of the duke's will, and devised and bequeathed to them all the trust estates.

Spottiswoode and Robertson disclaimed, and Sands alone proved Wanchope's will, and acted in the trusts.

Sands put up certain premises to auction, and by the sixth condition of sale it was provided that "every purchaser should accept and be satisfied with a conveyance from the trustee then acting in the execution of the

\**Qu.* Wanchope.

trusts of the said will and codicil, by the latter of which it was declared that purchasers should be effectually discharged and secured by the conveyances, releases, or discharges of such trustee."

Mr. Nugee became the purchaser, and signed the agreement, but afterwards objected to the title, on the ground, in the words of the joint opinion of two eminent conveyancers, "that the devise in the will of John Wanchope to *three* trustees was not a valid exercise of the power which authorized each of the trustees to appoint any other person he pleased to succeed himself in the trusts thereby created after his own decease, and that the power which followed, to appoint any person or persons they pleased as joint trustees, did not apply to the case which had happened. That the purchaser was not bound by the sixth condition of sale to accept and be satisfied with a conveyance from the acting trustee under the will of John Wanchope as the trustee then acting in the execution of the trusts of the will and codicil; for it could not be intended to exclude the purchaser from objecting that the party was not a trustee authorized to act in the trusts." Sands filed a bill for specific performance; and, the master having reported that a good title could be made "according to the contract," the defendant excepted to the report. Nugee was a willing purchaser; and the point arising upon the power was suggested to the court without being argued. The vice-chancellor was of opinion that Sands had been duly appointed under the power, and overruled the exception, with costs.

[\*929]

\*No. IX.

Supra, p. 707.

*Cases on Gifts to Relations.*

In *Thomas v. Hole(s)* a testator gave 500*l.* "to the relations of Elizabeth Hole, *equally to be divided* between them;" and Lord King determined, that, as the testator had directed the sum to be divided equally among them, he could not direct an unequal distribution, and so decreed the brothers and nephews of Elizabeth Hole to take *per capita*.

In *Stamp v. Cooke(t)* there occurs a *dictum* of Lord Kenyon which appears to militate against this construction. "If the testator," said his lordship, "had given to his next of kin, and stopped there, the statute would be the rule to go by; and although the nephews and nieces are not in fact so near as sisters, yet the fund would have been distributable *per stirpes* according to the statute." But the question to which his lordship's attention was directed was, whether an *only* child of a deceased brother, and an *only* child of a deceased sister, should, *per stirpes*, represent their deceased parents, or should be excluded altogether in favour of brothers and sisters of the testator still living, and who, as next or nearest of kin, would more nearly answer the description in the will.

In *Phillips v. Garth,(u)* where the expression was also "next of kin,"

(s) Cas. t. Talb. 251.

(t) 1 Cox, 236.

(u) 3 B. C. C. 64.



a different construction prevailed. A testator gave his residuary estate to his executors, "to be *equally divided* by them to and amongst his next of kin, share and share alike:" and Mr. Justice Buller held the words "next of kin" to mean the kinsmen within the statute,<sup>(v)</sup> and distributed the fund amongst the brothers and nephews *per capita*. Here, as in *Thomas v. Hole*, was the qualification "equally to be divided;" but Mr. Justice Buller did not ground his judgment upon that circumstance, but upon what he considered the established practice of the court. "Those," he said, "must take whom the statute has pointed out; but the question is, in what shares: if it had pleased the court originally to say the next of kin should take in the same manner as under the statute, I should not have objected to it; for it seems to me they should take *per stirpes*;" and then he cited a case, to prove that distribution *per capita* was a point which the court had now settled. Why he should have thought the objects might originally have taken *per stirpes* he does not declare, but he afterwards added a very substantial reason why they should not, for "it is agreed," he said, "if the testator had given to his next of kin by name, they must have taken *per capita*; then the question is, whether calling them next of kin is not equal to naming them."

It was observed by Sir J. Leach upon one occasion, that Lord Eldon had disapproved of the distribution made in *Phillips v. Garth*; but this remark will, upon reference to the passage alluded to, be found to be wholly destitute of foundation. A testator had given the residue of his estate "to be divided among his next of kin, as if he had died intestate." The widow claimed to be one of the next of kin, and it was argued for her, that otherwise there would be no meaning in the words "as if he had died intestate;" but Lord Eldon answered the [\*930] argument by saying, "There is another construction (that will give a meaning to these words.) I always had great doubt upon the case before Mr. Justice Buller, who thought those who were to take *per stirpes* as well as those taking *per capita* were included (in the expression 'next of kin.') Lord Thurlow doubted that upon this very technical reasoning, to which his lordship was much addicted in the construction of these instruments, that 'next of kin' being the only description (in the will) without the addition, which is in the statute, of those who represent them, the children of the deceased brothers and sisters ought not to take under that bequest. It is very difficult to say they would not have taken under *this* will (which contains the words 'as if I had died intestate:') my construction being that the next of kin should take the whole, as they would take under an intestacy."<sup>(w)</sup> The meaning of the passage therefore appears to be simply this, "I do not admit the argument for the wife, that the expression 'as if I had died intestate' would otherwise be nugatory; but for those words I think brothers and sisters only would take, notwithstanding the decision to the contrary in *Phillips v. Garth*: with the addition of those words, my construction of the will is, that

<sup>(v)</sup> Upon this point the case has been overruled by *Elmsley v. Young*, 2 M. & K. 780.

<sup>(w)</sup> *Garrick v. Lord Camden*, 14 Ves. 385.

nephews and nieces would be entitled equally with the nearest of kin.”(x)

We cannot cite a higher authority upon this subject than the opinion of Lord Thurlow. “The term ‘relations,’” observed his lordship, “must be confined to the statute; but the court has said in the same moment, that the claimants shall not always take in the *proportions* of the statute, but as the testator had directed; as where there have been brothers and brothers’ sons, these last took *not by representation*, but *per capita*.”(y)

And in conformity with this *dictum* was decided by his lordship the case of Rayner v. Mowbray.(z) A testator devised an estate to A. upon trust to sell and “to divide and pay the proceeds to and among all and every such person or persons who should appear to be related to the testator, *share and share alike*.” The testator left three sisters surviving and five nieces, the daughters of a deceased sister, and Lord Thurlow directed the distribution to be made among the eight next of kin *per capita*.(a)

In Pope v. Whitcombe,(b) which was heard before Sir W. Grant, a testator gave the residue of his estate to his wife for life, and directed her to dispose thereof (in an event which occurred) “amongst the testator’s relations in such manner as she should think fit.” The wife died without having executed the power, and the next of kin at the testator’s death were a brother and two nephews. The court, says the reporter, decreed one moiety to the brother, and the other to the representatives of the nephews. The authority of so great a lawyer as Sir W. Grant would almost have decided the question; but, on reference to the registrar’s book, it appears a very different order was made. The two nephews had died in the lifetime of the widow, and at her death the only surviving next of kin of the testator was the brother. The brother died and [931] \*appointed executors, and the court decreed the residuary estate “to the executors of the brother, the next of kin of the testator.” Pope v. Whitcombe therefore is no authority upon the point in discussion.

The bequest in Hinckley v. Maclarens(c) was, that the testator’s property “should be *equally divided* among his next of kin,” and Sir John Leach directed the distribution among the next of kin to be made *per stirpes*. A similar decree was afterwards made by him in the case of Elmsley v. Young.(d) But the decision in these two cases was *directly contradictory* to Thomas v. Hole, Rayner v. Mowbray, and Phillips v. Garth. His Honor seems not to have been apprised of the point determined in the two former cases; and, with respect to Phillips v. Garth, he laboured under the erroneous impression, that Lord Eldon had expressed his disapprobation of that case. In Withy v. Mangles, 4 Beav.

(x) And see Wright v. Atkyns, Coop. 119.

(y) Green v. Howard, 1 B. C. C. 33.

(z) 3 B. C. C. 234.

(a) For the mode of distribution which does not appear in the report, see Reg. Lib. B. 1791, fol. 183.

(b) 3 Mer. 689. See Finch v. Hollingsworth, 21 Beav. 112; 2 Sug. Pow. 650, 6th Edition.

(c) 1 M. & K. 27.

(d) 2 M. & K. 82.

358, 10 Cl. & Tin. 215, the limitation of personal property, was on the death of E. M., to her "next of kin." E. M. died, leaving a father, mother, and a child, and it was held that they took as joint tenants.(1)

## No. X.

Allen v. Sayer. Supra, p. 720.

"The substance of the plaintiff's bill appeared to be, that Thomas Brooke, Gent., deceased, was in his lifetime seised in fee of a certain messuage or tenement called Drewes, and of several lands and tenements thereunto belonging, lying in the parish of Wanting; and was also seised of a certain parcel of land and meadow in Sutton Courtney, in the county of Berks, of the yearly value of 10*l.* per annum: and, having no issue of his body (the plaintiff being his near kinsman,) did make his last will and testament in writing, and after his mother's and wife's decease did thereby bequeath all his real estate whatsoever, in the county of Berks or elsewhere (his debts being first paid,) unto the plaintiff, his heirs and assigns forever, lawfully to be begotten; and, for want of such issue, to the use of Joseph Brooke, his heirs, &c.; and did give unto his mother the sum of 30*l.* per annum, for her life, to be paid her out of his lands called Blackcrofts, and did (*inter alia*) give unto John Collins, and his uncle Robert Brooke, all his said real estate, together with his two horses, a colt, and corn in the barn, on trust that they should (if occasion should be) not only sell the said hay and horses towards the payment of his debts, but should also sell his shop of wares for and towards the same, together with his lands at Sutton and Highgarden aforesaid, in case his personal estate was not sufficient to pay his debts; and made his wife and another executrixes of his said will. That [\*932] \*shortly after making the said will the said T. Brooke died much indebted, more than his personal estate would amount to pay, by means whereof his wife did, as the executrix, refuse to act or intermeddle with the real (*qu.* personal) estate; and thereupon Anne Brooke, grandmother of the plaintiff, took upon her the burthen of the said will, and thereby became entitled and entered into the personal estate of the said testator, and out of her own estate, and otherwise, paid all the debts of the said testator; and about June, 1688, the said Anne died. That the said plaintiff, on the death of his grandmother, entered on the lands called Blackcrofts, and, as he is advised, ought to have held the said

(1) Two cases usually cited upon this subject have been omitted as irrelevant to the point. In *Masters v. Hooper*, 4 B. C. C. 207, the testator left two nephews and two nieces, and two great-nephews and a great-niece, and, as there is no representation under the statute beyond brothers' and sisters' children, the great-nephews and great-niece were excluded, and the distribution was made *per capita* among the nephews and nieces. Reg. Lib. 1792. B. fol. 209. In *Lowndes v. Stone*, 4 Ves. 649, a testator gave the residue of his property "to his next kin or heir at law, whom he appointed his executor." By "next kin or heir at law" was evidently intended some individual; but, as there was no one to answer the description, the result was an *actual intestacy*. The case does not appear in Reg. Lib.



messuage called Drewes, and all other the real estate of the said T. Brooke, and to have received the rents thereof accrued after the death of the said Anne the elder, his debts being paid out of his personal estate, and profits of his personal estate, and otherwise. That Peter Sayer, about June, 1688, did enter into the house of one — Gamon, where after the death of the said Anne Brooke, the deeds, writings, &c., of the estate of the said T. Brooke lay locked up in an iron chest, and did carry away the said chest, and possessed himself of all deeds, writings, &c., that were therein. And the said Peter Sayer, on the death of the said T. Brooke, did enter into the lands called Sutton lands, and prevailed with the defendant, Curtis, the tenant thereof, to pay his rent to him, on giving him a bond to save him harmless; and the said Anne the elder, being aged, did not in her lifetime make any effectual prosecution for recovery thereof; but the plaintiff is well entitled thereto by the will of the said Anne (*qu. T. Brooke*), and ought to have an account of the profits thereof since her death. That the said P. Sayer, observing that Collins and Brooke, in whom the estate in law of the said Sutton lands was vested, would not act, and the said plaintiff being then an infant of ten years of age, and his grandmother aged, and not willing to be engaged in a suit for the recovery thereof, the said Peter having gotten into possession as aforesaid, did, together with Elizabeth his wife, levy a fine *sur conu- zance*, &c., and did by some deed declare the use of such fine to be to him and his heirs; and afterwards proclamations were had according to the statute, and after five years passed, and no claim made within that time by the said trustees, whereby, at law, the plaintiff cannot have his remedy, the defendant threatening to set up the fine and nonclaim. That the said plaintiff ought to be relieved against such fine and nonclaim, the same being a breach of trust in the trustees in not making entry before permitting five years to pass after such fine. That in case the plaintiff cannot have satisfaction out of the estate of the said P. Sayer, yet, that the defendant, Curtis, the tenant of the said Sutton lands, ought to be accountable for the profits by him received since the death of the said testator, T. Brooke, for that he was acquainted with the plaintiff's grandmother's title, and for that purpose took security from the said P. Sayer to pay his rent to him. Therefore, that the witnesses to the will of the said T. Brooke may be examined *in perpetuam rei memoriam*, and to discover the deeds of the lands given by the will, and what other the said P. Sayer took out of the iron chest; and that the same, and all other deeds, may be delivered to the plaintiff; and that the said defendants may account for the profits of the said Sutton lands received since the death of the said T. Brooke; and that the fine and nonclaim may be set aside; and that the defendants may discover the personal estate of the said Peter Sayer,<sup>(1)</sup> and what settle-  
 [\*933] \*ment the said Peter Sayer made of his real estate towards the payment of his debts, and to be relieved, is the scope of the bill. Whereunto the counsel for the defendants (the infant children of Peter Sayer and the trustees for the children, and Curtis, the tenant) insisted

(1) He had died before the bill was filed.

that Margaret Brooke, the infant's great-great-grandmother, was, about thirty years since, seised in fee of the said Sutton lands, whereby the same (*inter alia*) after the death of the said Margery, descended unto Richard Brooke great-grandfather of the defendants, the infants; and the said Richard Brooke being seised in fee of the said premises, and having several children, viz., Richard, his eldest son, who died without issue, Thomas, the second son, under whom the plaintiff claims, and Margaret and Ann, his two daughters, the said Richard, on a treaty of marriage with Margaret, his eldest daughter, to one John Keepe, did agree to settle the lands in questions (*inter alia*) upon the said Margaret, and the issue of her body; and accordingly articles of agreement were executed between William and John Keepe on their part, and the said Richard Brooke on his part, whereby the said Richard did covenant to settle the reversion and inheritance of all the lands on the death of Jennings, the tenant thereof by curtesy which descended to him from the said Margery, upon the said Margaret for her life, remainder to the heirs of her body, or the issue of that marriage; and in pursuance of the said articles the said Richard did, by his indenture, settle the said premises on the said Margaret and her issue accordingly. That the said marriage soon after took effect, and the said Margaret, had issue Elizabeth Keepe, the only daughter and heir, who about 1676 married the said Peter Sayer. That about the year 1665 the said John Keepe died, and afterwards the said Margaret his wife died, whereby the premises descended unto the said Elizabeth, and the said P. Sayer, being so entitled in right of his said wife, did, after the death of the said Jennings, which happened about eighteen years since, enter into the said Sutton lands with other the said Margaret's estates, and, the said Peter being in possession, they did, in 1678, let the Sutton lands to the defendant Curtis, for five years, at 4*l.* per annum, and gave him a bond of 200*l.* for his quiet enjoyment thereof. That the said Peter Sayer, and his wife did, in Easter Term, 1678, levy a fine as in the bill, and that they held the same for five years, without any claim made by the plaintiff, and that the said plaintiff, *secundo Gul. et Marie*, brought an ejectment against the said Peter Sayer, and the defendant Curtis, for the recovery of the premises, and brought the same to trial at the Berkshire assizes, and set up a title under the will of the said Thomas Brooke, and, after a full hearing, a verdict passed in affirmation of the said Peter's title; and the said Peter, being minded to provide for the defendants Elizabeth, and Peter, and John, did, by deeds of lease and release, convey the said Sutton lands unto the said defendants Elizabeth, the grandmother, Moses Slade, William Button, and Antony Leaver, their heirs and assigns, in trust for himself for life, and after his decease to sell the same, and the money thereby raised to be equally divided amongst his said younger children; and by virtue of the said deeds the said defendants, the trustees, do stand seised of the said premises in trust for the defendants, the three younger children of the said Peter, who died about 2nd February, 1691. And the said defendants insist on the said marriage articles, fine, and nonclaim, verdict, and continued possession, in bar of the plaintiff's title to the said lands. And the counsel for the defendant, Richard Brooke, insisted, that he by

his answer saith, he is the surviving trustee named in the said T. Brooke's [\*934] \*will, and that he never acted therein, and disclaims all interest of, in, or into the said lands in question, and is ready and willing to convey and assign his interest therein, as the court shall direct, being indemnified by the decree of the court for so doing. Whereupon, and upon long debate of the matter, and reading the will of T. Brooke, the articles between John and William Keepe and Richard Brooke, dated the 19th December, 1656, and the proofs taken in the cause, and hearing what was insisted on by counsel on all sides, this court declared, that the said fine and nonclaim ought not to incur against the plaintiff, who was then an infant, and doth therefore think fit, and so order and decree, that a perpetual injunction be awarded to stay the defendants, the trustees of the said Peter Sayer, and all claiming under him, from proceeding at law for the said Sutton lands; and that the defendant, Robert Brooke, the surviving trustee named in the said T. Brooke's will, and the trustees of the said Peter Sayer deceased, do convey the said Sutton lands unto the plaintiff and his heirs, or unto whom he or they shall appoint, and for so doing they are hereby indemnified; and that the said defendants do come to an account before Roger Meredith, Esq., for the profits of the said premises received by them or the said Peter Sayer deceased, in taking of which account the said Master is to make unto the said defendants all just allowances; and what upon the said account shall appear to be due to the plaintiff for the rents and profits of the said premises received as aforesaid, the said defendants are hereby ordered and decreed to pay the same unto the plaintiff, or unto whom he shall appoint; but the defendants Jonathan Sayer, Leaver, and Button, are to be charged no further in reference to the profits received by the said Peter Sayer deceased, than they have assets of the said Peter. And it is further ordered and decreed, that the defendants do deliver to the plaintiff the deeds and writings of all the lands that belonged to the said T. Brooke, not comprised in the said articles." Reg. Lib. 1699, A. f. 502.



# INDEX.

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The pages referred to are those between brackets [     ].

- ABATEMENT**,  
of a trust, 621.
- ABATOR**,  
not bound by a use, 3.
- ABROAD.** See *Bankruptcy* (Assignment), *Jurisdiction*.  
Lands abroad (within the Queen's dominions) within Lord St. Leonards' Trustee Act, 835, note (s).  
See Trustee Act, 1850, ss. 54, 56, 901.  
Parties to suit, as to c. q. t. abroad, 849; as to trustee abroad, 847.  
Personal estate abroad, trust of, enforced in equity, 46.  
Real estate abroad, equities of, how far enforced, 47, et seq.  
account of rents, foreclosure, injunction against taking possession, relief against fraudulent conveyance, sale, 48.  
trusts of, when enforced, 53.  
Receiver appointed where trustees all out of jurisdiction, 870; see 871.  
Residence of c. q. t. abroad, 432, 453.  
of trustee abroad, 40; new trustees appointed, 711; see 576.
- ACCEPTANCE OF TRUST.** See *Disclaimer*.  
Compellable, is not, 232.  
Duties consequent on, 243, 244; and see 238.  
trustee must not rely on co-trustee, 243.  
must inform himself of state of trust, 244.  
should have inventory of chattels, 244.  
How made by Executor (see *Executor*) by voluntary interference with assets, 241.  
e. g. assigning lease, bringing action, selling assets, 241.  
(unless conduct can be clearly explained,) 242.  
by proving will, 239, 240.  
executor of executor administering to one testator must to the other, 234.  
who is also trustee cannot prove, and renounce trusts, even of real estate, 240.  
may claim legacy, though he renounce, 234.
- How made by trustee: (1) by signing deed; (2) by declaration; (3) by acting, 237.  
What acts constitute, 239, et seq.  
by deed, 238; trustee should see to recitals, ib.  
when presumed, 237, 242; not necessarily from taking possession of trust deed, 241.  
trustee of two trusts by same instrument having accepted one, deemed to have accepted the other, 240.  
provable by parol, 243.  
Made, after being, trust cannot be renounced, 289.  
Mistake, person assuming character of trustee by, accountable, 244.
- ACCIDENT**,  
no excuse for trustee, if it occur during misfeasance, 766.
- ACCORD**,  
no bar without satisfaction, 737.
- ACCOUNT.** See *Abroad*, *Allowance*, *Wilful Default*.  
Decree for merely, not within 1 & 2 Vict. 110, s. 18, 667, note (c).  
form of, 752, and see 765, 766.  
Laches, where plaintiff guilty of, re-

ACCOUNT, *continued.*

stricted to filing of bill, 751, 756, note.

account barred by between partners, 742.

Of Mesne Rents and Profits. See *Mesne Rents and Profits.*

extent of, in charities, 786, et seq: constructive trusts, 750, 752, note (1); express trusts, 752, note (1); see as to ignorance of trustee, 751; and as to his mistake, 790.

Settled opening against solicitor trustee, 550.

Trustee, against, who has purchased trust estate, 466.

who has renewed lease, 224.

## ACCOUNTANT,

may be employed by trustee, 556.

## ACCOUNTS,

whether c. q. t. may claim copies of, 599; see 428.

trustee should keep, of expenses, &c., 559, 599.

fixed with costs where confused, or if trustee misstate or suppress, 877, 878.

ACCUMULATION. See *Duration, Conversion* (2), *Thellusson Act.*

Application of income before conversion where accumulation directed, 813, et seq.

Trust for, must not lead to a perpetuity, 110.

bad, if possibly exceeding lawful limits, 111, 112.

but no danger of perpetuity where rents applicable as vested interest de anno in annum, 111.

ACKNOWLEDGMENT. See *Fines and Recoveries Act.*

What may prove trust, 63, 64.

ACQUIESCENCE. See *Time.*

Breach of trust in, its effect, 775, et seq., see 769.

Feme covert not bound by, 471, 777.

secus as to separate use without restraint, 471, 777.

qu. with restraint, 778.

fluctuating body by, as creditors or parishioners, 777; see 471.

infant, not bound by, 471, 777.

Constructive trusts in case of, 224.

purchase in names of stranger, 207.

Direct or indirect, 737.

Distinguished from waiver, ib.

In improper loan, by receiving interest, 776.

Requisites of, 777, 778.

Stat. of Limitation, does not interfere with its effect in equity, 743.

ACT OF PARLIAMENT. See *Bill in Parliament, Parliament.*

## ACTING,

Trustee, meaning of expression, 578, 591.

every trustee who has accepted office must be, 298; and see 243, 415, 449, 612.

## ACTION,

Brought as to trust estate, must be in trustee's name, 18, 269, 591; see 275.

c. q. t. giving indemnity, may require trustee to lend his name to, 718; see 591.

not where against purchaser without notice from trustee, 719.

Trespass of, on lunatic's realty defrayed out of his personalty, 827.

Trustee may bring, without having by writing accepted office, 243.

must not bring, &c., after decree, without sanction of court, 524.

ADMINISTRATION. See *Assets, Bond.*

Durante minoritate, 834, note (h).

Letters of, how obtained after succession of intestacies, 458, 459.

Mortgagee, how he proves in administration suit, 485.

Order at chambers, 856.

Separate property of feme covert under her will, 642.

ADMINISTRATOR. See *Executor, Relinquishment* (representative), *Trustee Act*, s. 6.

on same footing as to receipts as executors, 316.

de bonis non, 262.

how far safe to deal with administrator after interval from intestate's death, 458.

not properly a trustee upon renunciation of executor trustee, 240.

## ADMISSION,

To Copyholds (see *Copyholds, Customary Freeholds*), effect of, 249.

Fine to be paid by trustee, 272.

at what rate where co-trustees, 272.

how raised, 272, 402.

Of debt, trustees for creditors cannot make after accounts taken by court, 522.

Of trust by defendant, 72; see 63.

ADULT. See *Advancement, Infant.*

## ADVANCEMENT,

*Capital out of, of infant's legacy*, 518.

ADVANCEMENT, *continued.*

if no limitation over, 519.

or where cross limitations among children, 519.

power of, whether authorized by executory trust silent as to powers, 164, note (x), see 165.

*On purchase, in name of child, &c.,* 207, et seq.

child as to, where adult, 212, 213; infant, 209, 212.

joint names in, of father and child, 209.

of stranger and child, 210.

(but stranger quatenus his estate is trustee for father,) ib.

## Nature of Provision

as to copyholds for lives, successive, 210; see 214.

personal estate, doctrine applies to, 216.

partial or reversionary estate, ib., 209, 212.

whether doctrine applies, (1) where child already provided for, 211; (2) where father continues in possession, 212, 213.

Presumed, may be, for daughter, grandchild, illegitimate child, nephew, wife, 216.

and semble even for stranger where purchaser in loco parentis, ib.

Presumption, what evidence rebuts on part of child, 214.

whether parol declaration by father, 214, 215.

rebutted by fact that son is a solicitor, 216.

Purchase money, if not paid, a debt from the parent, 216.

ADVANTAGE. See *Claim, Lease.*

Trustee shall not derive from trust, 318, et seq.

as by buying up debts, from game on trust estate, presenting to living, being receiver, trading, &c., 318, 319.

application of rule (1) to attorney, auctioneer, broker, commission agent, factor, solicitor, 319, 320; (2) to executor, guardian, trustee, &c., 319, 320, 321.

charity lease should not contain covenant for lessor's private advantage, 505.

trustee cannot seek aid of equity for his own benefit, 323.

may assert his legal right, semble, 324.

Whether trustee may have on failure of c. q. t. See *Failure of c. q. t.*

ADVERTISEMENTS by trustees selling by auction, 422.

ADVICE OF COUNSEL, 234, 366, 595.

ADVOWSON. See *Presentation.*

Survivorship of, between co-trustees, 300.

Trust of, for parishioners, see *Parishioners*; and see 107, note (y), and 19 & 20 Vict. c. 50, authorizing sale of, ib.

Trust to present to within six months after vacancy, 527.

Trustee presents, but must observe direction of c. q. t., 269, 318.

AFFIDAVIT. See *Payment into Court* (compulsory), *Trustee Act*.

Material facts not in issue brought by, before the court at hearing, 869.

Necessary for distringas under 5 Vict. c. 5, s. 5, 861, 862.

restraining orders under 5 Vict. c. 5, s. 4, 860.

Trustees by, under Trustee Relief Act, 376, note (s), 378, note (y), 379.

"AGENCY, deed of," 483.

## AGENT,

Accountable to trustees only, not to c. q. t., 226, 561.

unless quasi-trustee deriving personal benefit, 459; by accepting delegation of trust, or fraud, 226, 562.

Auctioneer is agent for vendor and purchaser, 427; how after completion, ib.

Executor, acting by direction of, 459.

Lease, agent of trustee may not renew for his own benefit, 220, 225.

Lien, agent has not any upon trust estate for charges, 561.

though trust be to pay expenses in first instance, ib.

Party to suit, when necessary as, 844, 848.

Purchase by, in his own name not proveable by parol to be for another, unless part of consideration paid by employer, 204; see *Denial*.

Security, need not give, 295.

Trustee, after disclaimer may be, 235. may employ on proper occasions, 556.

*e. g.* accountant, attorney, bailiff, collector of rents, 556; of debts, 557.

paying to, should see that authority is genuine, 372.



**AGENT, continued.**

how authority may be given, 372.  
for sale, cannot buy as agent for another, 462.

may employ agent, 422.  
but not to buy for himself, 462.

**AGREEMENT.** See *Contract*.

Value for, to charge lands possessed at particular time, or to settle particular estate or property acquired during coverture, raises implied trust, 173, 174.

Voluntary, under seal, its effect, 93, 94, and see note (e).

**ALIEN,**

Chattels personal, alien enemy cannot hold, 28.

alien friend may, and may create trust, *ib.*

Devise to, and to British subject, upon trust, 39.

Husband, not entitled to curtesy of trust lands, 621.

Lands: may acquire lands by purchase but not by descent or operation of law, 28.

purchasing, may hold until office found, *ib.*

cannot sue nor be sued touching lands, 39; see *Trust, inf.*

Proceeds of sale of real estate, may take, 43, 807.

Trust, how far he can create, 28.

as to real estate, cannot compel its execution in his favour, 43; but see note (o).

forfeitable to crown, without previous inquisition, 43, 132, 677.

distinction between trusts perfected and in fieri, 43.

**ALIENATION,**

Charity estates, of. See *Charities* (Alienation).

Fettered by trusts, generally cannot be, 132.

Limitation until, or limitation over upon "alienation," &c., 135.

what assignment incurs forfeiture thereunder, 135, note (k).

Powers, whether trustee can exercise after alienation of estate, 534; and see 267, 297.

Restraint against anticipation as to separate property of feme covert, 123, et seq.; see *Feme Covert*, (2).

**ALLOWANCE,**

for costs; see *Costs*, c. xxix. s. 6, p. 872.

Expenses; see *Expenses*, c. xx. s. 2, p. 557.

Time and trouble; see *Trouble*, c. xx. s. 1, p. 545.

Just allowances to assignee, 557, note (z).

direction for, when inserted in decree for account, 752.

**AMERICA,**

property in, 47; and see *Jurisdiction*.

**ANNUITANT,**

how far he contributes to fine on renewal of lease, 223.

**ANNUITIES,**

£3 per cent. consols proper investment of trust money, 351.

**ANNUITY,**

trust money ought not to be lent upon, 341.

trustee of term for securing when a necessary party to suit, 842.

**ANSWER,**

In Chancery,

Limitation, Statute of, how pleaded by, 734, 738.

may serve as declaration of trust, 63; and see 72.

but plaintiff must read from it terms of trust, 64.

Feme covert, of, having separate property, 633.

Payment into court, when directed, on admission in answer, 865, et seq.

Suppression or chicanery in, visited with costs, 877, 878.

**ANTICIPATION, RESTRAINT AGAINST.** See *Alienation, Feme Covert* (2).

**APPEAL**, by trustee, from decree is at his own risk, 368.

**APPLICATION** of money paid on sale to trustees,

whether purchaser, &c., must see to, 430, et seq. See *Receipts*.

**APPOINTED,**

property under power when assets, 768, note (w); see 775.

**APPOINTEES,**

trustee for should see that power is duly executed, 596.

**APPOINTMENT.** See *Power, Resulting Trust* (charge).

of new trustees. See *New Trustees*. power of, authorized by "usual powers" in executory trust, 164.

**APPORTIONMENT,**

of fines for renewal, 395, et seq. See *Renewable Leaseholds*.

**APPROPRIATION,**

of legacy by executor permitted without suit, 517.

**ARBITRARY POWERS.** See *Powers*, 538, et seq., 694, et seq.

**ARBITRARY POWERS, continued.**

trustee appointed by court cannot exercise, 712.

**ARREARS.** See *Mesne Rents*, 750, 752, note (1).

Of interest or rent, recoverable under Limitation Act, 744; see 751, 754, note.

the whole in case of express trust, 748.

or, where there is a term under which trustee may obtain possession, 749.

what recoverable, where trustee ignorant of his true character, 751.

what recoverable in case of fraud, &c., 756, note.

Of pin-money, 644.

Of separate estate, 642.

**ARTICLES.** Marriage, construction of executory trusts in. See *Executory Trusts*, 146, et seq.

notice of, how far binding upon purchaser, 727.

parties to suit for specific performance of, 844.

**ASSETS.** See *Executor (Assets)*, *Failure of c. q. t., Feme Covert*, (Executrix), *Judgment*, c. XXIII. s. 11, p. 681.

Appointed estate, under general power is assets, 768, note (w).

secus where donee of power is feme covert, except where fraud, ib., and see 775.

copyhold, formerly not assets. See *Exception*, 661, note (1).

Equitable, what are, 686, 687; see 692.

land devised upon trust for payment of debts, 686; and see 488. separate property of feme covert, 642.

whether equity of redemption of term legal or equitable assets, 687, 688.

trust of chattels, id., 685, et seq. of fee, id., 688.

Equity of redemption, whether assets, 684, 685.

Money to be laid out in lands not considered personal assets, 796.

Trusts of chattels are assets, 681.

whether of freeholds before Statute of Frauds, 681; see 685.

the Act did not extend to complicated trusts, &c., 684, 685.

under late statute 3 & 4 W. 4, c. 104, 691, 692; see 796, and list of statutes.

**ASSIGN,**

bound, whether in the per or post by a trust, 19, 279, 280.

except purchasers for value without notice, 279, 725.

originally not bound by a use, 3.

when assigns can execute power of sale in mortgage, 419.

can execute trust, 266, et seq., 297, 450, 533, 712.

**ASSIGNEE.** See *Purchaser, Volunteer*.

of equitable interest, 729.

**ASSIGNEES OF BANKRUPT.** See *Bankruptcy*.**ASSIGNMENT,**

Equitable interest, of, how made, 600; and see 604 et seq.; and see *Deed, Notice*.

formerly not permitted, 5.

when, to whom, and how notice should be given, 612, 613; see 327.

Feme covert, by, of separate property, see 632.

Fund in court, of, what inquiries and notice proper, 613, 614.

Legal estate, of, effect of upon powers of trustees, 267, et seq., 297; see 533, 712.

Tenant in tail, by, 601, et seq.

Use, of a, not permitted, 4.

**AT HOME,**

money to be laid out on land, where so considered, 800, et seq.; see 823.

**ATTAINER.** See *Forfeiture*.

of c. q. t., 323, 674, et seq. of trustee, 287.

**ATTENDANT TERM,**

attended inheritance gained by disseisin, 288, note (1).

trust of followed devolution of freeholds, 131.

**ATTESTED COPIES,**

when given by assignees of bankrupts and trustees for sale, 425.

**ATTORNEY,**

Allowance, attorney, when trustee, has none for time and trouble, only for expenses out of pocket, 549 et seq.; see *Solicitor*.

Appointment of, or proxy, distinguished from delegation of trust, 297.

Breach of trust, advising or concurring in, 763, note (s).

Constructive trust in case of violating his duty, 226.

Infant cannot be in suit, 36; may, to deliver seisin, 36.

Trustee may employ, 556.

**ATTORNEY**, *continued*.

should not allow moneys to lie in the hands of, 295.

*Power of*. See *Infant*.

dividend, to receive, 594.

forged, 372; trustee should see to authenticity of, *ib*.

how to be qualified in assignment of chose in action by trustee, 426.

**ATTORNEY-GENERAL**,

Compromise with, allowed in case of charities, 789.

Information is in name of, 779.

Petition under Romilly's Act, his allowance of, 782.

he must be a party to proceedings under, 783.

may correct his judgment, 783.

**ATTORNTMENT** of tenant, whether it works disseisin, 721.

**AUCTION**,

trustee cannot purchase trust estate at, 461; and see 876.

trustees may sell by, 422, 423.

**AUCTION DUTY**. See 424.**AUDITOR**, 101. See *Receiver*.

"**AUTHORIZING AND EMPOWERING**,"

may raise a trust, 168.

**AUTHORITY**,

bare, to several, determines by death of any, 299.

to receive moneys, how given by c. q. t., 372.

**AVERMENT**,

Trust of, permitted at common law, 56.

not upon a bequest, 59; how far as against an executor, *ib*.

not upon a devise even at common law, 58.

not in contradiction to trust expressed or implied upon written instrument, 57; see *Consideration*, *Pension*.

not where deed is necessary to pass legal estate, 57.

Use of, 56, 57; see 6, note (1).

**BAILIFF**,

infant cannot be, 36.

mortgagee or trustee may employ, 556.

**BANK**,

Co-trustees, where safe to pay trust-moneys to their joint account at some bank, 330.

Failure of, where trustees liable for, 333, 336.

Notes treated as cash, 757; whether ear-marked, 274, 757, 758.

Trust-money may be deposited in

temporarily to trust account, 332, et seq.

not otherwise, 336; nor out of trustee's control, 334.

paid into, to trustee's private account, presumed to be traded with, 361.

how followed, 760.

may be transmitted through bank, 295.

but payment should be to trust account, 296, 333, 336.

**BANK OF ENGLAND**. See *Dis-tringas*, *Stock*, *Trustee Extension Act*, ss. 6, 7, p. 905, note (g).

Annuities, 351.

Costs of, 33.

Incorporated, when, 32, note (1).

Parties, as to making bank, 33, note (n), 859.

Stock, whether trustees may invest on, 341.

Transfer, bank will not usually allow unto more than four names, 41.

Trustee, bank cannot be, 32.

**BANKER**,

not accountable for sale of stock by executor's order, even where mis-application probable, 459.

**BANKRUPT**. See *Bankruptcy*.

Property of, up to certificate vests in assignees, 29.

Trust, bankrupt may create of surplus after payment of debts, *ib*.

Trustee, a bankrupt is not absolutely disqualified to be, 40.

his bankruptcy, ground for appointment of receiver, 870; and comp. 711.

**BANKRUPTCY**,

"Alienation," clause divesting property on, does not extend to bankruptcy, 135.

Assignees, action against, in whose name it must be, 275.

in case of factor, *ib*.

bankrupt trustee of, when they may have contribution against co-trustee, 773.

interest, charged with, for balances improperly retained, 359.

just allowances to, 557, note (z).

taking legal estate, bound by trust, 280; see 276.

may not generally purchase bankrupt's estate, 465.

what trust estates they take, see *Trust Estate*, *inf.*, 273, et seq.

see *Maintenance*, *inf.*

Assignment, by trader, of whole property, an act of, 477.



**BANKRUPTCY, continued.**

so, of all but colourable part, or necessary stock in trade, 477.  
 even where trust for all creditors, or notwithstanding proviso avoiding it, or not intended to be acted on, 477, 478.  
 or where bankruptcy the object of it, 478, 479.  
 but good, (1) where no existing debts, (2) as between parties, (3) as concerns bona fide purchaser, 478.  
 upheld when facilitating arrangement with creditors, 478.  
 becoming valid under late Bankruptcy Act, 479, 480.  
 creditors acquiescing in, cannot treat it as act of, 479.  
 if not enforceable, is not an act of, 479.  
 executed abroad, 479.  
 by trader, of part of property, not an act of, 477, note (*w*), 480.  
 unless he contemplated bankruptcy, 480.  
 Certificate under, bars trust debts, 772; but bankrupt trustee should see proof made, *ib.*; see 29.  
 District Courts of, their jurisdiction in charities whose income under 30*l.*, 718, note (*b*), 784.  
 Equity to settlement, of feme covert as against assignees, 369, 370.  
 Limitation over, on, or until, 135, et seq.  
 trader cannot so limit over his own property, 136.  
 except to extent of portion received with wife on marriage, *ib.*  
 Maintenance, trust for at discretion of trustees, how far assignees take under, 133, 134.  
 New trustee may be appointed on bankruptcy of trustee, 276, 711.  
 how under Bankruptcy Act, 714, 715.  
 Order and disposition, of bankrupt, 277.  
 trust chattels, in hands of bankrupt executor, factor, or trustee, are not within, 277, 278.  
 secus, where executor has assumed to be absolute owner, 277.  
 as to c. q. t. absolutely entitled and bankrupt, 278.  
 as to c. q. t. tenant for life and insolvent, 594.  
 Parties in suits, assignees can sue, &c., without presence of creditors, 843.

Proof under, where estate amalgamated with that of bankrupt, 276.  
 for breach of trust, against estate of bankrupt trustee, with interest, 771.  
 where stock improperly sold, 357, 772.  
 money laid out on mortgage, 772.  
 investment in improper securities, 772.  
 bankrupt trustee interested in trust fund, set-off made, 772.  
 bankrupt trustee one of several co-trustees, 772, 773.  
 effect of release given to one co-trustee, 773.  
 where co-trustees severally bankrupt, 773.  
 by mortgagee, 485.  
 made by trustee, except where trust is simple, 269.  
 generally all co-trustees must make, 298.  
 bankrupt trustee, how far liable in equity, if he does not make, notwithstanding certificate, 773.  
 Trustee of. See *Proof*, sup., c. xi. s. 2, p. 273.  
 ground for appointment of receiver, 870.  
 trading as such, liable to, 272.  
 Trust estate, on clear trust, does not pass to assignees, 274.  
 though tortiously converted, if capable of being identified, 274, 275.  
 or if money payable at future day, 275.  
 whether legal estate passes to assignees when bankrupt has beneficial interest, 276.  
 or where trust doubtful, *ib.*, and see *Proof*, sup.

**BAR,**

to equitable relief, 731, et seq.  
 See *Limitation of Suit*.  
 in charitable trusts, 786, et seq.

**BARGAIN AND SALE,**

for nominal consideration would not now be enforced by way of constructive trust, 96.

**BENEFICE.** See *Adowson, Presentation*.**BENGAL,**

Government notes, "lands" within Lord St. Leonards' Trustee Act, 835, note (*q*).

**BEQUEST.** See *Legacy, Legatee*.

Personal estate of, how made accord-

**BEQUEST, continued.**

ing to Statute of Frauds, 65; how under present law, 80.

passed proceeds of land subject to trust for conversion, 807.

**Residuary.** See *Residuary, Bequest*.

**"BESEECHING,"**

may raise a trust, 168.

**BILL IN CHANCERY.** See *Information*.

Appointment of new trustees, bill or claim for, 583.

not necessary where suit pending, *ib.*

as to cases provided for by Trustee Act, 713, 714, 840.

by Bankruptcy Act, 714.

by Charitable Trusts Act, 718, notes (b) and (c); and see *New Trustees*.

Declaration of trust, whether sufficient to prove, 63, note (u).

Filing, where co-trustee should file, 317.

trustee may file where equities doubtful, 367, et seq.; see also 376, note (r); and see *Special Case*.

Prayer of, omitting to pray for interest, 359.

for account of rents, 752.

**BILL IN PARLIAMENT,**

application for, by trustees, 516, and see p. 499.

opposition to, by trustees, 515.

**BILL OF EXCHANGE,**

distinguished from money and bank notes, 758.

followed in equity when, *ib.*

whether trust money may be transmitted, by, 295, 296.

**BONA VACANTIA,** 198, 324. See *Crown*.

**BOND,**

Administration bond, 458; Cohabitation bond, 138, note (x).

Given by trustee for due execution of trust, 290.

Indemnity of, see 721: whether trustee should take, 367.

on appointment of new trustee, 580, 581.

Judgment, on effect of obtaining, 659, 660, and note (b).

Penalty in, creditor cannot claim beyond, 491.

**BREACH OF TRUST.** See *Bond, Payment into Court, Receiver*.

*Charities*, remedy for breaches of trust in, 502, 778. See *Charities*.

*Generally*, co-trustee allowing may be removed, 711.

duty of in case of, 317.

Receipt of trustee known to contemplate, 331; of executor, 458.

after breach of, 450.

Retire, trustee should not, in favour of one who contemplates, 580.

Sale cannot be enforced in breach of, 415.

Solicitor wilfully advising or concurring in, liable to be struck off the roll, 763, note (s).

*Liability incurred in certain cases* by allowing destruction of contingent remainders, 409.

by neglect of trustee to enforce covenant, 765; to insure, 764; to purchase stock, 764; where trustees have discretion of investing on stock or real security, 355, 764; to renew, 392.

by purchasing trust estate, 465, 469.

when tortious sale by trustee of land, 763; of stock, 356; and see *Bankruptcy*, Proof in.

trustee liable even where loser by breach, 765.

not excused by accident in case of misfeasance, 766.

cannot set off gain in one trust fund against loss in another, 766.

not charged with imaginary values, or more than he received, except where great negligence, &c., *ib.*

*Nature of liability,*

a simple contract debt, 238, 765.

unless trustee accepted under hand and seal, *ib.*; but deed must contain words equivalent to covenant and be executed by trustee, 239; and see note (y).

where co-trustees, joint and several, 767, 772.

*Protection against,*

c. q. t. may have administration of trust confided to proper number of proper persons, 710, 711. may compel trustee to observe duty, 718, et seq.

may restrain trustee from breach of duty, 723.

*Remedy for,*

(a) By following trust estate into hands of stranger, c. xxvi. s. 1, p. 724.

into hands of purchaser with notice or volunteer, 725. See *Purchaser*, 724, et seq.

**BREACH OF TRUST, continued.**

- not in case of disseisor, 287.
- case of charity, 726.
- notice of doubtful equity, 727.
- purchaser without notice. See *Purchaser*, 725, et seq.
- purchaser of equitable interest or chose in action, 729.
- time within which estate may be followed, 729. See *Limitation*.
- (b) By following property substituted for trust estate, c. xxvi. s. 2, p. 753.
- where conversion tortious, c. q. t. has lien as against trustee, or those who represent him in right, 756.
- case of assets employed in trade, 760.
- Bank notes, bills, &c., 757, 758; see 759.
- land. See *Money*, inf.
- money, 757, 758.
- invested by trustee in land, 762; see 757.
- where trust money is only part of purchase money, c. q. t. has lien for trust money and interest, 763.
- where the entirety of purchase money, c. q. t. may take the land itself, sensible, 763; see note (q).
- mixed with trustee's money, c. q. t. has lien on the whole, 759.
- paid into bank to simple account with trustee, 760, 761.
- (c) Personal, c. xxvi. s. 3, p. 763.
- against corporation, 763; corporations, co-trustees, 767, 768; see 773.
- person assuming office of trustee, 765.
- trustee, 763, et seq.; for destroying contingent remainder, 406, 409, and see 410; improper lease, 507: improper sale, 415, 428; improper purchase by trustee, 465; neglect to renew, 392.
- representative of deceased trustee, 765.
- unless trustee has distributed assets under sanction of court, 765.
- legatees or next of kin of deceased trustee where assets distributed, 765.
- trustee primarily liable, but

has his remedy against c. q. t. gaining by breach of trust, 392, 768, see note (w).

account of mesne rents and profits when against trustee, 752; see 224, 466.

by proof in bankruptcy, against bankrupt trustee, 357, 771, 772.

in case of co-trustees, 773.  
And see *Bankruptcy*, Proof in.

by stopping partial interest of c. q. t. who concurs in breach, 771; and see 353, 392, 846.

(d) how barred.

by conduct of c. q. t.

by acquiescence, 471, 775, et seq.; concurrence, 773, et seq.; confirmation, 472, 777; release, 777. And see *these titles* and *Limitation of Suits*.

**BROKER, 319.**

of trustee, improperly disposing of Exchequer bills, 342, note (t).

**BUILDING LEASES.**

of charity estates, duration of, 510.  
with consent of commissioners, 504, 511.

**BUY IN.**

assignees of bankrupts and trustees for sale not authorized to, 423.

**BUY UP. See Mortgagee.**

trustee cannot buy up incumbrance for himself, 318.

**BYE LAWS.**

power of making, will not authorize deviation from original intention of charity, 498.

**CANAL SHARES.**

bequeathed in succession, converted, 812.

**CAPRICE,**

court does not act on, 699.

of c. q. t., trustee not dismissed from, 712.

of trustee, 583, 875.

**CATHOLIC.**

Roman. See *Papistry Acts*.

**CESTUI QUE TRUST. See Charities, Costs, Estate Tail, Feme Covert, Infant, Lien, Liability, Parties, Tenant for Life.**

Account, right of c. q. t. to have.  
See *Accounts*, *Mesne Rents and Profits*.

Acquiescence of. See *Acquiescence*, 471, 775, et seq.

Actions by c. q. t. See *Actions*.

Assignment, how c. q. t. may make,



CESTUI QUE TRUST, *continued.*

- of equitable interest, c. XXIII. s. 1. 600.
- c. q. t. may assign even a possibility, and without intervention of trustee, 600; and see *Assignment, Notice.*
- Bequest by, 617.
- Breach of Trust. See *Concurrence, Protection, and Remedy, inf., and Breach of Trust.*
- Chattels, c. q. t. entitled to possession of trust chattels during his interest, 593, 594; case of chattels in possession of bankrupt, c. q. t. for life, *ib.*; see 277, 278. whether c. q. t. may let them for hire, 594.
- Concurrence of, 771, 773, 846. See 353, 392, and *Concurrence.*
- Confirmation by, 472, 777. See *Confirmation.*
- Consent of. See *Consent.*
- Conveyance, when c. q. t. should join in, 427. See 881, note (a). when and how c. q. t. may require trustee to make, 595, 596; and see 600, *Conveyance.*
- Devise by, 615, et seq.
- Dividends, c. q. t. usually put in possession of, by power of, attorney, 594.
- Ejectment, c. q. t. cannot recover real estate in, 591. unless surrender can be presumed, *ib.* must bring his action in name of trustee, 591.
- Estate of, under simple trust, c. XXII. s. 1, 585. special trust, c. XXII. s. 2, 597; and see *Special Trust, inf.* properties of. See *Trust.*
- Failure of. See *Failure.*
- Fraud of, 39, 774. See *Fraud.*
- Ignorance of, 472, 737. See *Ignorance.*
- Inquiries to ascertain cs. q. t., 598. of c. q. t. trustee must answer, 427, 599.
- jus habendi and jus disponendi of, 585, 595.
- Laches of. See *Laches.*
- Pernancy and profits of trust estate, c. q. t. entitled to, 585, et seq.
- Possession of chattels by c. q. t. See *Chattels, Dividends, sup.* of real estate by c. q. t. where trust simple, c. q. t. will be put in possession, 585. cases where other interests affected, 586, et seq. of c. q. t. subject to a charge, 586. of feme covert entitled for separate use, 590; see 589. c. q. t. entitled to, in equity only, 590. is at law tenant at will, 590; see *Ejectment, sup.* Privileges of to be juror, 592. if in possession to vote for corner, 269; but *qu.*, 592, 593. to sport; to vote for member of Parliament, 593; see 270. Protection of, c. q. t. may compel trustee to observe acts of duty, 718, et seq. may enforce trust, 597. may have proper trustees, 710, 711. See *New Trustees.* trust money paid into court in what cases, 864, et seq. receiver appointed, in what cases, 869, et seq. in case of tenant for life refusing to renew, 722. may restrain trustee from breach of duty, 723. security ordered from trustee, 723. may have contingent interest secured, 723; see 865, 868. Real estate of. See *Ejectment, sup.* Release by. See *Release.* Remedy of, for breach of trust. See *Breach of Trust, Mesne Rents. Payment into Court, and Receiver, and Protection, sup.* by following trust estate into hands of stranger, c. XXVI. s. 1, 724, et seq. by following property into which trust estate has been converted, c. XXVI. s. 2, p. 753. personal against trustee, &c., c. XXVI. s. 3, 763. for tortious conversion, 825. See *Conversion.* Share, aliquot, c. q. t. of, 850, 865. Simple trust, c. XXII. s. 1, 585. Special trust, c. XXII. s. 2, 597. each c. q. t. entitled to enforce to extent of his interest, 597. where trust lawful, 599. where one c. q. t., or all unanimous, special trust becomes a simple trust, 597. special trust proceeds until c. q. t.'s election know, 598; and see *Special Trust.*

**CESTUI QUE TRUST, continued.**

Title deeds, how far c. q. t. has right to custody of, 591, 592.

Trustee, whether c. q. t. may be, 40.

Who may be c. q. t., c. XII. s. 3, 41; and see *Alien, Crown*.

Vouchers, c. q. t. may inspect, but pays for copies of, 428; see 599.

Will, c. q. t. may dispose of his equitable interest by, 615, et seq.

**CHAMBERS,**

administration order at, 856.

jurisdiction of chancery judges at, in case of charities—with income over £30, 718, and note (b), or of City of London charities, 784.

**CHANCELLOR,**

his jurisdiction over lunatics and idiots, how derived, 835, note (p); see 827. See as to jurisdiction of lords justices under Trustee Act, 883, note (e).

may in certain cases be visitor, 495.

**CHANCERY,**

alone has jurisdiction of trusts, 19.  
its jurisdiction over corporate bodies, 493, 495.

**CHAPEL,**

Endowment of, how transmissible at law, 105.

Minister of, in case of dissenters, may be dependent on will of congregation, 498.

how elected, where no directions in deed of endowment, *ib.*

in possession, retained till cause heard, *ib.*

tenant at will, of trustees, *ib.*

Trusts of, trustees cannot change, 496.

Trustees of, how appointed where no direction in deed of endowment, 498.

**CHARGE,**

Debts or legacies of in will, raises implied trust in devise, &c., 173.

where it implies power of sale, 251; see 248, and 440, et seq. See *Receipts* (Charge of Debts.)

Devise by trustee in general terms, its operation on, 263.

does not prevent legal fee in mortgage from passing under "securities" for money, 264.

on devise distinguished from exception from devise, 191, et seq.

Distinguished from partial declaration of trust, 179; and see *Resulting Trust*.

Duplication of, 167.

Limitation, late statute of, mere MAY, 1858.—48

charge not an express trust within, 746.

secus as to charge, coupled with duty, 746, 747.

not barred by, whilst secured by unbarred term, 747.

Power to, not a usual power, 165.

**CHARGING ORDER**, under 1 & 2 Vict. c. 110, 669, 671. See *Judgment*.

**CHARITABLE TRUSTS ACT.** See *Charity Commissioners*, 504, 511, 784.

Amendment Act, 785.

**CHARITABLE USES,**

Frauds, Statute of, within, 61.

Purchaser without notice from purchaser with, bound by, 726.

Statute of, commission under, 779.

**CHARITIES.** See *Information, Mortmain, Visitor*.

Account, 786, et seq. See *Remedy*, *inf.*

Administered by trustees, where, 492.

Alienation, of charitable property by trustees, not permitted, 502.

whether absolutely, or for reserved rent, 503.

or by granting long, renewable, or reversionary terms, *ib.*

permitted under special circumstances, 503, 515, 782; see note (w).

and leases, sale, or exchange can now be made with consent of commissioners, 504.

Alteration of scheme or purpose, not permitted, 495, 496.

notwithstanding power to make bye-laws, 499.

trust originally intended will be preserved, 497; and see 499, 711.

but letter may be contravened, where spirit of trust preserved, 499.

act of of parliament necessary for total alteration, 499.

how application for act authorized, 499, 785.

Breach of trust, by retainer of Charity Funds, 502. See *Information, Remedy*, *inf.*

Commissioners of inquiry into, 783, 784; see 779.

Construction of trusts for, 495, et seq. for "chapel," 495, 496, 497; "repairing and rebuilding," 501.

"free grammar-school" "free-

CHARITIES, *continued*.

- school," (see 3 & 4 Vict. c. 77,) 499, 500.  
 loans, 502.  
 "master, finding a," 501.  
 "minister," 498.  
 "poor, relief of," 501.  
 rates, in aid of, 496.  
 "repairing," 496, 501.  
 salaries, where augmentation allowed, or reduction ordered, 502.  
 "worship of God," where executed in favour of established form of religion, 497.  
 where in favour of dissenters, *ib.*  
 species of religious worship *prima facie* determined by trust deed, 497; and see 499.  
 and if not defined, then by usage; and see 7 & 8 Vict. c. 45, s. 2, 497; see also 495, 497, 499, 711.  
 Duties of trustees for, c. XVIII. p. 492.  
 See *Alienation, Alteration*, *sup.*  
 Incorporated, government of corporation belongs to visitor, 492; and see *Visitor*.  
 management of revenue subject to chancery, 493.  
 new donations distinguished from original endowment, as respects visitorial power, 494.  
 Investment of accumulations, whether in purchase of land, 504.  
 on mortgage, 504, 505.  
 of moneys arising from sale or exchange with consent of commissioners, 504.  
 Limitation, Statute of, as to Charities. See *Remedy*, (b), *inf.*, 749, 750, 786.  
 Leases of Charity Lands, Charitable Trusts Acts, how to be made under, 504.  
 consideration for, fines, rents, &c., 505, *et seq.*  
 should be adequate, when granted, 506; see 507.  
 whether fines might have been taken for, 506.  
 direction by founder that rent should not be raised, not taken literally, 507.  
 tenant who dealt fairly not turned out, 507.  
 allowance to tenant for permanent improvements, 511.

- granted at undervalue, who shall compensate charity, 507.  
 covenants for trustee's private advantage, should not contain, 505.  
 duration of building leases should not exceed 60 or 90 years, 510; see now, 511.  
 husbandry leases, should not exceed 21 years, 508; see now, 511.  
 for years determinable on lives, have been sanctioned, 509, 510; but see 543.  
 so, for lives on payment of fines, 510.  
 governors cannot lease to, or in trust for, one of themselves, 505.  
 relation of trustees to, unadvisable, 505, 507.  
 Mesne rents and profits. See *Remedy*, (b), *inf.*  
 New trustees, appointment of, 498, 711, 716; see 718; and *note* (b).  
 direction to appoint when reduced to a given number, 527.  
 Payment of stock, &c., held on trust for, to official trustees, by order of commissioners, an indemnity, 382.  
 Realty, conveyance of, upon trust for, what formalities necessary under 9 Geo. 2, c. 36, 504; see 132.  
 where charity may take lease stamped with trust for conversion, 808.  
 Remedy for breach of trust.  
 (a) Mode of, c. xxvi. s. 4, 778.  
 ordinarily by information, 779; where by bill, 779, *note* (1).  
 relators joined on account of costs, 779.  
 commissions under Statute of Charitable Uses, 779.  
 by petition under Romilly's Act, 779.  
 construction of act, 780; cases within, 781, 782.  
 proceedings under, 782, 783.  
 under Charitable Trusts Act, 784.  
 by equity judge at chambers, where income above 30*l.* per annum, or charity within City of London, 784.  
 by District Court of Bankruptcy and County Court, where income less than 30*l.* per annum, *ib.*  
 appeal from, when allowed, 784.  
 previous consent of charity



CHARITIES, *continued*.

- commissioners to proceedings, when required, 785.
  - (b) Extent of, 786, et seq.
  - Account of mesne rents, what directed, 789; see 788.
  - Compromise with attorney-general, when allowed from hardship, 789.
  - Corporation property, how attached, 791.
  - Inconvenience, how far applicable as a bar, 787, et seq.
  - Limitations, Statute of Charitable Trusts not within, 786.
  - whether within late stat., 749, 750, 786.
  - Mistake, trustees acting from, not made to account, 790.
  - Parish, no retrospective account against, 791.
  - Presumption, how far it applies, 787.
  - corporation compared with individuals, 790.
  - Rents. See *Lease*, sup., *Resulting Trusts*, inf.
  - Resulting Trusts, how far legacies to charities result, 191, et seq.; see 193, 194, note (v).
  - not presumed on gift in favour of charity, but with no object, &c.; but court directs application, 198.
  - increased rents applicable as original gift, 198.
  - exception to this rule, 199.
  - Schemes for, under Romilly's Act, 782.
  - new, approved provisionally by commissioners, 785.
  - Trustees of, entertaining opinions contrary to founder, removed, 711.
  - majority of, binds minority, 298.
  - Court sometimes appoints part of number to act as quorum, 299.
  - Trusts for, synonymous with public trusts, 23.
- CHARITY COMMISSIONERS,
- Advice, may give, and persons acting under, indemnified, 785.
  - Attorney-General, they may certify cases for his interference, 784.
  - Exchange of lands, may authorize. See *Investment*, inf., 504.
  - Inquiries, may make, 784.
  - Investment of moneys arising from sale or exchange by, 504.
  - Leases, may authorize building, &c., 504.

- trustees of charities must have sanction of, for lease longer than 21 years, 511.
  - New trustees, appointment of, their sanction required for, 718.
  - Official trustee of charity lands, who is, 786.
  - of charity funds, 785; see 382.
  - Proceedings, before taking, their consent where necessary, 784, 785.
  - Sale of lands, may authorize. See *Investment*, sup., 504.
  - Scheme, new, may provisionally approve (to be submitted to parliament), 499, 785.
- CHARTER, charities by, 492.
- CHATTELS. See *Administration*, *Chose in Action*, *Executor*, *Deed*, *Failure of c. q. t.*, *Forfeiture*, *Investment*, *Money*, *Policy*.
- Assets in hands of executor, 261, et seq., 681, 685. See *Executor*.
  - Custody of, c. XIII. s. 2, 332.
  - Devolution of, to administrator, or executor of trustee, 260; see 279.
  - Disclaimer of, 236.
  - Execution, taken in, 647, 648, 662.
  - whether for debt of trustee, 261, 280; and see *Execution*.
  - Executory trust of, in articles, how construed, 149, et seq.
  - in wills, ib., 158, et seq. See *Executory Trusts*.
  - Interest, where trustees take under a charge, 251; and see 257.
  - under devise, subject to late Wills Act, 259.
  - limitation to A. and his heirs for certain duration, 255.
  - Limitation, how far chattels capable of, at law by deed, 104; by will, ib.
  - chattels may be subjected to, by way of trust, 104.
  - limited by way of trust to A. and his heirs, are personal estate, 131.
  - cannot be entailed, ib.; and see *Executory trusts*.
  - Personal, c. q. t. entitled to possession of, 593.
  - money, notes, &c., distinguished from other chattels, 758.
  - trust of, not within Statute of Frauds, 61.
  - once created by parol, not affected by subsequent parol declaration of settlor, 61.
  - but in case of will, see 66.
  - voluntary settlement of, good against purchasers, 93.

CHATTELS, *continued*.

secus as against creditors if settlor indebted, ib.

Real, of feme covert. See *Feme Covert*.

prerogative probate, when required for, 261.

trusts of, within Statute of Frauds, 61.

voluntary settlement of, void against purchaser, 93.

Reputed ownership of, 277, et seq.; see 593.

Special trusts and uses, chattels are subject to, 4, 5.

Tenant for life of, 594.

Trusts of. See *Limitation*, sup. of chattels, are not affected by Statute of Uses, 7.

CHILD. See *Illegitimate, Infant*.

purchase in name is prima facie an advancement, 207. See *Advancement*, 2.

CHOSE IN ACTION, 85, 86. See *Feme Covert*.

assignment of, by trustee, power of attorney how to be qualified on, 426.

notice by purchaser of, how it gives priority, 605, et seq. See *Notice*.

purchaser of, from trustee, holds subject to same equity as trustee, 729.

trust, once considered in the nature of, 9; secus, afterwards, 11.

trustee of, should reduce into possession if possible, 326.

## CHURCH,

devise of tithes, &c., how carried out in equity, 104; and see *Advowson, Chapel*.

CHURCHWARDENS and Overseers. See *Overseers*.

## CIRCUITY,

Court of equity avoids, 749, 755, note; and see 94, 660, 661.

CLAIM. See *Bill in Chancery*.

adverse to c. q. t., trustees should not make, 325; see 878.

## CLERK,

election of, 107. See *Parishioners*.

CO-EXECUTOR. See *Co-trustee, Executor*.

## COHABITATION,

bonds, 138, note (x).

## COLLATERAL,

equitable powers may be, 525.

## COLLECTOR,

trustees may employ, of debts, 557; of rents, 556.

## COLONIES,

Enactments passed at home, when

they are bound by, 62.

Lands in, within Lord St. Leonards' Trustee Act, 835, note (s), and see Trustee Act, 54, 56.

Trust may be usually enforced of personal property in, 47.

how far, of real estate in, 47, et seq.

COMMISSION. See *Trouble*.

Executors in the East Indies, whether they may charge, 547; see note (v).

Mortgagees, Trustees, &c., cannot charge, 546.

secus as to trustees for absentees of estates in West Indies, 546.

may be allowed to trustee by settlor, 550.

may be stipulated for with c. q. t., 551.

or with court before acceptance of trust, 553, et seq.

## COMMISSIONERS,

charity. See *Charity Commissioners*.

## COMMITTEES OF LUNATICS,

may not charge for time and trouble, 546.

have no interest, and therefore office does not survive, 299.

cannot make repairs without previous order, 524.

## COMMON LAW,

Courts, have no jurisdiction of trusts, 19, 261; see 249, note (u).

*qu.* whether they can notice breach of trust, 37, note (u), 581.

Trusts at, c. v. s. 1, 56.

## COMMON,

Tenancy in. See *Joint tenancy, Tenancy in Common*.

COMPANY. See *Parties*, 847, *Trustee Extension Act*, ss. 6, 7.

Conversion of shares in, where bequeathed in succession, 812.

Public, does not usually take notice of trusts of shares, &c., 858.

Restraining order under 5 Vict. c. 5. s. 4, applicable to shares in, 860, 863.

## COMPENSATION,

from person who benefits by breach of trust, 392, 768, 771; see 353, 846.

in case of charity, lease at undervalue, 507.

## COMPLICATED,

where account is, relief in equity on legal title, 753, note.

trust whether within Lord St. Leonards' Trustee Act, 836, note (x).

Statute of Frauds, s. 10, 695; 12 Vict. c. 110, s. 11, 669.

## COMPOUND INTEREST,

when charged, 362, 363, 397.

- COMPOUNDING**,  
with creditors, whether trustee thereby unfit for office, 711, note (*g*).  
debts, powers of trustees as to, 520, et seq.
- COMPROMISE**,  
with attorney-general, in accounts of charitable trusts, 789.
- COMPULSORY**,  
payment into court, c. xxix. s. 4, p. 864. See *Payment into Court*.
- CONCEALMENT**,  
of breach of trust, will make co-trustee liable, 317.  
of fraud, prevents bar to equitable relief, 734, 743; see 754, note.  
of right to estate, account carried back to accruer of title, 756, note.
- CONCURRENCE**,  
c. q. t. by, estopped from proceeding against trustee, 773.  
secus where c. q. t. a feme covert or infant, 774; except in case of fraud, ib.  
or as to feme covert, who has separate estate without restraint, 775; conf., 778.  
or where c. q. t. acts in ignorance, 774.
- CONDITION**,  
legacy for charity charged on devise by way of, creates resulting trust, 193.
- CONDITIONS OF SALE**,  
what, trustees for sale may impose, 423.
- CONFIDENCE**,  
in person explained, 2; see 22, 530.  
not so strictly applied as to uses, 10.  
in what sense a trust said to be, 15.  
words expressing testator's confidence may raise a trust, 168.
- CONFIRMATION by C. Q. T.**  
of breaches of trust, general requisites of, 472, 777, 778.  
feme covert cannot make, except as to separate estate, without restraint, 471, 777; conf. 778.  
by widow, of promise made during coverture, 776.  
infant cannot make, 471, 777; see 776.
- CONSENT**,  
by c. q. t. to breach of trust, effect of, 768, 769.  
feme covert of, required by trust, 348.  
investment to be made with, 340.  
purchase to be made with, 807.
- CONSIDERATION**. See *Charities* (Leases).  
Generally  
family differences, reconciling, a good consideration, 94.  
necessary, is not to support a confirmation, 472.  
what sufficient for release or waiver, 737.  
is not for a trust perfectly created, 81. See *Voluntary Assurance*.  
will, consideration is implied by, 58, 167.
- Meritorious, agreement or imperfect trust founded on, how far enforced, 94, et seq.  
not against settlor though under seal, 94; see note (*e*).  
creditors of settlor, or purchaser from him, 99.  
whether against heir or volunteer of settlor, ib.; see note (*t*).  
extends to creditor, child, wife, 95; see 796.  
cannot be urged by parent against his child, 95, note (*f*).
- Nominal, 177, on bargain and sale, 96.
- Valuable, where it exists trust not averable, 57; trust enforced, 81.  
to whom consideration of marriage settlement extends, 406.  
may be proved aliunde as against third persons where deed apparently voluntary, 477.
- CONSOLS**,  
£3 per cent. proper investment of trust money, 351; see 813.
- CONSTRUCTION**,  
Devise, of, to uses, 258.  
Instrument of, is question for court, 73, 74.  
Legal estate, as to, taken by trustee, c. xi. s. 1, 246, et seq.; and see *Légai Estate*.  
Powers of, 527, et seq. See *Powers*.  
Trusts of, governed by same rules as construction of legal estate, 141.  
for charities. See *Charities* (Construction), 495, et seq.  
executory in marriage articles, 147, et seq.  
in wills, 153, et seq. See *Executory trusts*.
- CONSTRUCTIVE TRUSTS**. See *Trade*.  
Bankruptcy of trustee, how affected by, 276.  
Cases of agents, factors, &c., 225;



**CONSTRUCTIVE TRUSTS, *continued*.**

see 217, 220; but see, as to agent, 226, 459.

attorney violating his duty, 226.

decree for sale, person to convey under, 839, note (l); see 834, note (n), 836, note (x), 837, note (b), and see 882, note (f), 894, note (l).

equitable waste, 225.

holder of title deeds how far constructive trustee for remainderman, see 227, 228; see 591.

notice of trusts, constructive trustee by means of, 228.

on renewal of leases by executors, trustees, &c., 217.

mortgagee, 218; but see 221.

tenant for life, or other having partial interest, 218.

yearly tenant, 219; how far by tenant at will, or by sufferance, 219.

what circumstances, will not vary rule, 220; and see note (f).

expenses of renewal by tenant for life, 222.

how far annuitants should contribute to fine, 223.

trustee's lien for, 222.

mesne rents and profits and sub-fines, trustee accounts for, 223; see 224.

renewal, right of, trustee cannot sell, 220.

reversion, how far trustee purchasing, a constructive trustee, 225.

terms of assignment, from trustee to c. q. t., 223.

volunteers and purchasers with notice from trustee, remedy against, 224.

Distinguished from implied trusts and trusts by operation of law, 140, note (1).

Relief as to, barred by laches, 224, 742; see 750.

Statute of Limitations, 729, 730, 746.

Statute of Frauds, how far it affects, 228, et seq., 762.

distinction between trust arising on a will and on a conveyance, 230.

**CONTINGENT INTEREST. See Possibility.**

equitable, c. q. t. may assign, 600.

owner of, entitled to have it secured, 723; and see 868.

cost of, filing bill for, 368.

lands in, disposable under 8 & 9 Vict. c. 106, 817, note (n).

**CONTINGENT REMAINDERS, Effect of Fines and Recoveries Act, 411; of 8 & 9 Vict., c. 106, 156, 412.**

Freehold, where legal, must be supported by particular estate; secus in trusts, 104.

Trustees for preserving duties of, c. xv. 404; see note (a), Waste, inf.

1. Until eldest son has attained 21, obligation to preserve remainders imperative, 405, though settlement voluntary, 406.

Court will not sanction destruction, 407; exceptions to rule, 407, 408.

remedy for destruction of, 406.

extended only to those who claim as purchasers, 406.

issue, during life of parent, cannot sue as "heir," 407.

2. After eldest son has attained 21, the trustees become "honorary trustees," and the destruction of the remainders is a matter of discretion, 408.

Court will exercise discretion for trustees, 409.

punishes fraudulent exercise of discretion, ib.

allows destruction on eldest son's marriage, ib.

does not allow destruction without cogent reason, ib.

a fortiori not for culpable object, as payment of father's debts, ib.

but trustee not necessarily liable because court would not have so acted, 410.

whether any distinction between will and settlement, 410, 411.

Trustees for preserving limitation to, how usually framed, and object of, 404.

"and their heirs," whether it can be cut down, 253, et seq.

whether necessary since 8 & 9 Vict. c. 106, 156, 412, 413.

a special trust not within Statute of Uses, 247.

Receiver, trustee for preserving, may be, 319.

Waste, duty of trustees to preserve, to prevent, 408.

**"CONTINUANCE OF TRUST," power during, 531.****CONTRACT. See Agreement, Covenant, Specific Performance.**

**CONTRACT, continued.**

- by feme covert as to separate property, 633.
- under Fines and Recoveries Act, 634, note (n).
- private, trustees may sell by, 422.
- purchase, for, of fee by A., if A. die, executor pays price, but heir entitled to purchase, 799.
- sale, for, raises implied trust, 174.
- of land by A., if A. die, fee descends to heir, price belongs to executor, 799.

**CONTRIBUTION,**

- charities founded by means of, their trusts, how expounded, 497.
- co-trustees, amongst, on breach of trust, 768; as to costs, 767.
- none where fraud, 768.
- secus in favour of assignees of bankrupt trustee, 773.
- how worked out, 845, 846.
- rule of, in renewable leaseholds, 395, 398, et seq. See *Renewable Leaseholds*.

**CONTROL,**

- how far court will control powers, 538. See 696, *Powers*.
- trustee must not put trust property out of his own, 334, et seq.

**CONVERSION.** See *Gavelkind, Reduction* (into possession).

*Implied, in cases of personal property given in succession,*

- (a) where investment not wasting, but not authorized by court, 812; see 352.
- e. g. foreign bonds or stocks, shares in canals, insurance, railway companies, &c., ib.
- secus where money invested on mortgage unless beneficial to call it in, 354.
- where stock other than £3 per cents. specifically bequeathed, 354.

India, assets in, as to, 355.

- (b) where property is wasting, as leaseholds, long annuities, &c., 808; see 352.

secus where intention that property should be enjoyed in specie, 809, et seq.

- e. g. by specific bequest of leaseholds or stock, 809, et seq.
- by mention of rents or dividends, 809, et seq.
- by direction to convert, &c., at period subsequent to testator's death, 809, 810.

Income accruing before conversion, application of proportion of tenant for life after testator's death, 813, et seq.

where accumulation directed, and investment, he takes income from end of first year, 813.

where investment directed, he takes from testator's death, if funds then invested, otherwise from investment, if made in first year, 814.

before conversion, he takes reasonable fruit of property, 814; see 815, note (x).

he must refund if he take undue proportion, 353.

and if he is insolvent, semble trustees liable, ib.; and conf. 768.

rule where property incapable of immediate conversion, 815, 816.

where discretion given to trustees as to time of conversion, 815.

as to rents of devised estates, 816.

*Land to be converted taken as money,* 807. See *Resulting trust*.

e. g. alien may take proceeds, 807; bequest of personal estate, it passes by, ib.; not bequeathed, it goes to personal representative, ib.; is not subject to probate duty, ib.

charity, where it may be taken by, 808; but see note (m).

elect, party entitled may, to take as land, 598, 816. See *Election*.

how election presumed or expressed, 823, 824.

imperative, conversion must be, 808; and see note (n).

judgment, whether subject to, 653.

mortgagee selling under power of sale, who entitled to surplus proceeds, 808.

option to purchase, whether exercise of, effects retrospective conversion, 808; but see note (p).

*Money to be laid out on land, taken as land,* 793, et seq. See *Resulting trust*.

e. g. subject to curtesy, 793; quære, whether to dower, 794, 795.

devised by description of "lands," 796; not (formerly) by infant's will, ib.; conf. 816.

but formerly bequeathed by

CONVERSION, *continued*.

- unattested will operating by election, 824, 825.
- escheat, not subject to, 795.
- hotchpot, not brought into (formerly,) by child receiving orphanage share, 797.
- judgment, bound by, 796.
- personal assets, not accounted, and (formerly not liable to simple contract debts, 796.
- heir of A. on whom lands were to be settled, when entitled to money, 797, et seq.
- (a) entitled as against stranger.
  - e. g. bequest by stranger to purchase and settle on A. and his heirs, and A. dying before purchase, 797; and see note (y).
  - deposit of money in hands of trustees (whether by A. or stranger,) &c., ib.
  - covenant by stranger on marriage of A. &c., ib.
- (b) entitled as against A.'s executor (e. g. under covenant by A. on his own marriage) where at A.'s death third person has equitable interest, 798.
- otherwise not so entitled, i. e. where money "at home," 800.
- money considered "at home" if received from trustees, 804; see 823.
- entitled under bequest by A. to purchase with limitation to A.'s heirs, 805.
- quære, whether so entitled under voluntary covenant to lay out money on land, 805.
- elect, party entitled may, to take as money, 816. See *Election*, 598.
- how election presumed or expressed, 823, 824.
- imperative, conversion must be, 806; and see 797, note (y).
- considered so, where uses declared exclusively applicable to real estate, 806.
- notwithstanding power to invest on personal security, 806.
- mere direction to convert at "request," &c., 807; unless where "request," &c., intended to be substantial ingredient, ib.

*Tortious, of trust estate by trustee,*

does not affect rights of c. q. t., 825.

case of infant c. q. t. See *Infant* (Conversion), 829.

lunatic c. q. t. See *Lunatic* (Conversion), 825.

right of c. q. t. to follow substituted property, c. xxvi. s. 2, 753. See *Follow*.

CONVEYANCE. See *Grant, Trustee Acts* (Interpretation clause), and 889, note (t).

equitable estates, usual form of, 600; precautions in 604, et seq.

expense of, from old to new trustee, when borne by trustee, 711. See *New trustees*.

parties to, when c. q. t. should join in, 427; and see 881, note (b).

when trustee to bar dower, 596.

person to make, under decree, a constructive trustee, 839, note (l). See *Trustee Act*, s. 29;

*Trustee Extension Act*, s. 1; and see 882, notes (f) (g).

to require, under Lord St. Leonard's Trustee Act, 837, note (a). See *Trustee Extension Act*, s. 2.

by trustee at direction of c. q. t., 595, 596; of assignee of c. q. t., 600.

whether compellable to convey in parts, 595; and see note (p).

by what description; not bound to convey fee simple to tenant in tail, ib.

liability for refusing, 595.

## CONVICTION,

of felon, &c., 28. See *Forfeiture, Trustee Extension Act*, s. 8.

## COPIES,

of vouchers, whether c. q. t. entitled to, 428; of accounts, 599.

## COPYHOLDS,

Admission operates retrospectively, 249.

fine on, paid by trustees, 272; at what rate, where co-trustees, 272.

charged on trust estate how raised, 402.

of trustee under mandamus, 324.

Customary freeholds, copyholds distinguished from, 283, 616, note (1).

Descent of, trust descends to customary heir, 45.

Devise of legal estate in, formerly devisable by will unattested and unsigned, 45, note (a).



**COPYHOLDS, continued.**

- whether by nuncupative will, 60, note (1).
  - so equitable interest, 45; even where legal interest not so, 45, 46, 616; and although no preceding surrender, 616.
  - copyholds now subject to late Will Act, 60, note (1), 617.
  - Dower Act does not affect, 621, 627.
  - Freebench, 260; equitable interest in copyholds is not subject to, 621.
  - For lives, how they devolve under 1 Vict. c. 26, s. 6, 203.
  - how far purchase of, in name of stranger, raises resulting trust, 203.
  - how far, in name of child, 210, see 214.
  - Lord bound by entry of trust on court roll, 283.
  - Resulting trust. See *For Lives*, sup.
  - Surrender, estate passed by, remains in surrenderor until admission of surrenderee, 249.
  - on what principle supplied in equity, 96; and see *Devise*, sup.
- CORONER,**
- trustee in possession votes for, 269.
  - c. q. t. in possession votes for, 269; but see 592, 593.
- CORPORATION.** See *Overseers, Parties*.
- Breach of trust by, 763; see 767, 31.
  - property how attached for, 791.
  - Bye-laws, may make, but not so as to defeat object of foundation, 498.
  - C. q. t., may not be, of lands, without license from crown, 43, 131; see 31.
  - Civil, might, before Municipal Corporation Act, alienate their property and create trusts, 25.
  - secus now without consent of lords of treasury, 25, 31.
  - are now trustees of their property, 31.
  - visited by crown through Court of Queen's Bench, 495.
  - Costs, instances where visited with, 505, 877.
  - Distinction between corporations, and individuals as to presumption of notice, 790.
  - Ecclesiastical, bound by restraining statutes, 25.
  - Eleemosynary, where crown visitor of, visitatorial power committed to lord chancellor, 495.
  - Trustee, a corporation, may be, 10;

of personalty, and how of realty, 31.

Use, cannot stand seised to, 2.

**COSTS,***Generally,*

- As between party and party—
  - where trustee defendant to bill by stranger which is dismissed, 872.
  - where trustee disclaims, 235, 874.
- As between solicitor and client—
  - allowed in matters between c. q. t. and trustee where fund in court, 874.
- doubtful construction, case of, 368.
- See *Contingent Interest*.
- extra, trustee who has been paid between party and party, where allowed, 558.
- cs. q. t., and trustees defending in same interest, one set of costs allowed, 857.
- as to husband of feme covert who sues for separate property, see 858.
- co-trustees of, severing defence, 857.
- contribution to, between, 767.
- disclaiming trustee of, 235, 874.
- excessive, how moderated, 558.
- executors in creditor's suit entitled to, in preference to plaintiff, 873; rule at law different.
- See of Trustees (b), inf.
- interest on, not allowed, 558.
- lien of trustee for expenses, 560; see 558.
- lunatic mortgagee or trustee, 883, note (i).
- new trustees of, appointing, 582, et seq; and see 711, and Trustee Act, 1850, s. 51, 901, note (a).
- recovered, how, by trustee, as against c. q. t. or trust estate, 873; see 558, 560.
- relators, joined in information for, 779.
- sale under decree, petition for vesting order, &c., 903, note (b).
- solicitor, his costs when trustee, 874; and see *Solicitor*, as to c. q. t. obtaining taxation against 558, note (f), 561, note (r).
- specific performance, in suit for, 872; see 421.
- trust to pay, how construed, 564.
- Trustee Relief Acts, under. See *Trustee Relief Act*, (Costs).

COSTS, *continued*.

void deed, trustee of, where entitled to costs, 875.

*Of trustees, &c., in suits between trustees and cs. q. t.*

Executor (fixed with costs).

denying assets when they exist, 878.

improperly retaining balances, 875, 876; and see 359.

putting next of kin to proof of relationship, 878.

qu. whether, when interest given against them, 878, 879.

(a) Trustee allowed, 367, 368, 873. to be paid out of trust fund or by c. q. t., 873; see 558, and conf. 562, 563.

and where fund in court, as between solicitor and client, 873; not appearing at hearing, and decree nisi against him, may pay costs of day, and have cause reheard, 784.

secus, after decree passed, ib.

(b) Trustee deprived of or fixed with costs, or portion.

accounts, keeping confused or misstating, 877.

answer, severing improperly, 857.

appointing new trustee after bill filed sometimes pays extra costs, 544.

convey, refusing to, at c. q. t.'s direction, pays costs, 595; see 600.

denying falsely plaintiff's claims, pays costs, 878.

ignorance, falsely pleading, pays costs, 878.

instituting suit for his private ends, pays costs, 877; see 325.

leasing charity lands with covenants for private advantage (deprived of costs), 505.

misconduct, guilty of (pays costs or portion thereof), 875; what where misconduct discovered in progress of suit, 876; what where misconduct causes administration suit, ib.; what where doubtful point of law, ib.; where proved in part, 875.

trivial, 877; purchase of trust property at auction, 875; see 461.

mistake, committing, sometimes pays portion of, sometimes deprived of, sometimes allowed, 876, 877.

neglect, as to proceedings caused by trustee's neglect, 558; see 876.

neglecting to make inventory, deprived of costs, 244.

purchasing trust estate improperly, pays costs, when, 469.

retaining balance. See *Executor*, sup. 502.

retiring, from caprice, pays costs, 583; but see 584.

setting up title of his own, or trust different from existing one, pays costs, 878; see 325.

*Trustees of, in suit between trustees and strangers*, 872, et seq.

trustee on same footing as ordinary plaintiff or defendant, 872; see 421.

made defendant as necessary party and contesting plaintiff's claim, is not entitled to costs if plaintiff successful, ib. secus when trustee submits point to court, ib.

case where plaintiff fails in suit, ib. See *Generally*, sup.

and see as to frame of suit, 856, et seq.

CO-TRUSTEES. See *Solicitor*.

Answer, they should generally join in, 857; or in suing, ib.

Affidavit of, on payment into court under Trustee Relief Act, 376, note (s).

Breach of Trust, each is responsible to c. q. t. for whole liability and costs, 767; exception, ib.

each is liable for concealing or permitting, 317.

co-trustee permitting, liable to be removed, 711.

Contribution between, 767, 768; and see 845.

Disagreeing, court will exercise power, 696.

receiver appointed, 870.

Duties, may not delegate discretionary power to co-trustee, 297.

may not lend trust money to co-trustee, 338, 345.

may not permit trust money to remain in hands of co-trustee, 306, 309, 330; and see 314, 315.

may not passively trust co-trustee even though a professional person, 243, 244; see 290.

Indemnity clause, its effect as to co-trustees, 317.

Joint, their office is, 298; see *Survivorship*, inf.

e. g. they must jointly give receipts for principal moneys (generally), 298, 448, 449.

CO-TRUSTEES, *continued*.

but any one may receive dividends or rents, 299.

they must all prove in bankruptcy (generally), 298.

they must join in conveying, 299.

but in public trusts majority binds, 298.

and court sometimes allows a part to form a quorum, 299.

Liability, one is not liable for the acts or defaults of another, 302.

nor for joining pro forma in receipts, 304.

unless where money improperly raised, 306.

and see *Breach of trust*, sup.

Parties, how they must join in suing and defending, 857.

necessary, see 841, 845, et seq. See *Parties*.

Payment to, safe to pay into a bank to their joint account, 330.

Survivorship of office, 299, 300, note (f), 419, 849.

notwithstanding power to appoint new trustees, 301; and see 419.

## COUNSEL,

advice of, 366, 595; as to disclaimer, 234.

trustee allowed fees paid to, 558.

## COUNTY COURT,

Judgment of, enforced in equity, 663.

Jurisdiction of, in charities whose income under £30, 718, note (b), 784.

appeal from, to Chancery, when, 784.

COURT, 19, 20. See *Chancery, Common Law, Spiritual, New trustees, Powers*.

assignment of fund in, 613, 614.

COVENANT. See *Action, Advantage, Lease*.

"Grant, bargain, and sell," under Yorkshire Registry Acts, has force of covenant for title, 596, note (r).

Form of, in conveyances, &c.

by devisees of lessor who has covenanted for renewal, 425, note (k).

executors of one who has agreed to take a lease, ib.

mortgagees and trustees for sale, 425; for production of deeds, ib. on assignment of lease, 426; see 223.

Not to sue, or bond compared with release, 773.

To stand seised, extended to brother, child, cousin, nephew, or wife, 96.

required a deed, 95.

to use of stranger in blood, not enforced in equity, 94.

To settle property, 174, 762. See *Demerara*.

acquired during coverture, 174.

To transfer stock, liability of trustee for not enforcing, 765.

Trustee by, a breach of trust is a specialty under, 238, 765.

Voluntary, carries consideration at law, 93.

not specifically executed in equity, 94, note (e).

by A. to purchase lands to be settled on A. and his heirs, qu. whether A.'s heir takes under, 805.

COVERTURE. See *Feme Covert*.

CRASSA NEGLIGENTIA, 337. See *Neglect*.

## CREATION OF TRUST,

By act of a party.

Formalities required for, c. v. 56.

See *Averment; Frauds, Statute of; Wills, Statute of; Transmutation of Possession*.

Object proposed by, c. vi. 103. See *Lawful, Unlawful trusts*.

Parties to, c. iii. p. 24. See *C. q. t. Settlor, Trustee*.

Property, what may be subject of, c. iv. 45. See *Property*.

CREDITORS. See *Assets, Debts*.

Acquiescence, when bound by, in purchase by trustees, &c., 471; see 737, 777.

Confirmation, where bound by, 473.

Execution, creditors taking out, may purchase goods sold under, 465.

taking trust estate under, bound by trust, 280.

Separate property of feme covert, their remedies against, 640, 642.

Trust, their rights cannot be defeated by means of, 132, et seq.

Voluntary settlement, by one largely indebted, is void against, 93.

for, whether they can enforce its execution, 101; see 481.

CROWN. See 779, *Chancellor*, 835, note (p), *Forfeiture; Frauds, Statute of; Pension*.

Alien's trust of real estate, crown, how entitled to, 43, 132. See *Alien*.

Bonum vacans where c. q. t. dies intestate and without next of kin, crown takes residuary personality, 198, 324.

but executor where appointed takes as against crown, 59, 324.



**CROWN, continued.**

C. q. t., crown may be, 42.

Prizes, taken in war, vest in, 25.

grant of, to trustees for distribution  
revocable until distribution, 25,  
101.

Trust, how it may create (of private  
property), 24, 25.

declaration of, by or to crown, 59.  
mode of enforcing against crown  
doubtful, 30.

Use, can declare, by letters patent, 59.  
cannot stand seised to, 2.

Visitor, where, 495.

Will of sovereign, 25.

**CURTSEY,**

Admitted of, an equity of redemption  
or trust, 621.

unless where husband an alien, ib.  
and if feme covert had equitable  
seisin, 622.

notwithstanding trust for separate  
use, 623.

of money to be laid out on land,  
622, 793.

why curtesy and not dower of a  
trust, 625; see 12.

Not admitted of, a use, 4.

Tenant by, bound by a trust, 11,  
260, 279; not by a use, 3.

**CUSTODY,**

of trust chattels, c. XIII. s. 2, 332.

**CUSTOM,**

Of Kent. See *Infant* (Feoffment).

**CUSTOMARY FREEHOLDS,**

Distinguished from copyholds, 284,  
616, note (1).

Lord taking by escheat, whether  
bound by entry of trust upon court  
roll, 284.

Trust of, must be devised according  
to the Statute of Frauds, 616.

**DAUGHTERS,**

Advancement for, presumed, 216.

Included under "heirs female,"  
"heirs of body," or "issue," in  
articles, 149, 156.

how the limitation will be execut-  
ed, 149.

**DEBTS,**

*Generally.*

destruction of contingent remain-  
ders held justified by payment  
of debts, 408.

executor may not sell to pay his  
own debts, 456, qu. if he be spe-  
cific or residuary legatee, 456;  
or jointly with others, 457.

specialty and simple contract. See  
*Specialty, Simple Contract.*

trust to pay surplus power of re-  
ceipts, unless debts scheduled,  
435, 436.

trustee may appoint collector, 55;  
compound, 520; may not buy  
up for himself, 318.

*Trusts for Payment of*, c. XVII. 474,  
et seq.

Created by act inter vivos, 474, et  
seq.

(a) person not trader may create  
of all or parts of property for  
all or some creditors, 474, 475.  
unless where fraudulent within  
Insolvent Act, 475.

or where actual fraud, 476.  
voluntary trust by, whether revo-  
cable or valid, 476.

must be strictly fulfilled, 476.  
trust apparently voluntary may be  
shown aliunde to be founded on  
value, 477.

(b) trader may not assign whole  
property upon, 477. See *Bank-  
ruptcy* (Assignment), and 479.  
where assignment unimpeachable  
under late Bankrupt Act, and  
when trustees may safely act  
under, 479, 480.

may assign part of property upon,  
480; and see 477, note (w).

Irrevocable, trusts, are where by  
way of security to, or arrange-  
ment with creditor, 481.

voluntary trusts, how far revoca-  
ble, 101, 476, 481, 483.

Created by will, 474; and see 485.

*Trustees for payment of their Duties*,  
c. XVII. 474.

Debts, what payable.

(1) in trust created by deed, debts  
owing at date thereof, (2) by  
will, debts owing at death of  
testator, 483, 484; unless where  
contrary intention, ib.

construction of "all debts then ow-  
ing by him and which affect the  
estates thereby conveyed," 484.  
creditors who come in within a  
certain time, clause is direc-  
tory, 486.

but creditor who repudiates  
deed, cannot afterwards take  
benefit of it, ib.

where trustees have discretion  
to admit creditors' claims,  
486.

infant, debts contracted by, for  
necessaries, 485.

Limitation, Statute of, debts bar-  
red by, at date of deed, or of

DEBTS, *continued*.

testator's death, not revived by trust, 484; see p. 520, statute will not run afterwards, 484; as to trust by will of personalty, see 485.

mortgagee of, with covenant, or other creditor, with specific lien, 485, 486.

Interest on, bond creditors cannot receive more than amount of penalty, 491.

specialty debts carry interest to time of payment, even though released by creditors' deed, 491.

simple contract on debts not allowed under trust, 490.

as to rights of creditors after decree under 46th Order of Aug. 1841, 490, note (g).

exception to rule, 490.

unless creditors have stipulated for it, 491.

Order of payment.

creditors paid before legatees, 487.

all creditors paid *pari passu*, in absence of contrary directions, 488.

whether trustee and executor may pay his own debt first, 488.

Resumption by trustees of property after parting with it, 487, 522.

## DECLARATION,

Principle of rejecting, when not testamentary (as to wills), 65. See *Wills, Statute of*.

Trust of, how made at common law, 56. See *Averment*.

how under Statute of Frauds, 62.

See *Frauds, Statute of*, and see *Voluntary Assurance*.

## DECREE,

Judgment, decree has effect of, under 1 & 2 Vict, c. 110, s. 18, 667.

Sale for, persons to convey under, are constructive trustees, 839, note (l); see 834, note (n), 836, note (x), 837, notes (a) and (b), 882, note (f), 894, note (l), and 903, note (c).

Suit in, paralyzes powers of trustees, 523, 524, 544.

## DE DONIS, Statute of.

Estate *pur autre vie*, not within, 603, note (1).

Trust, not within, 603.

DEED. See *Infant, Lunatic*.

Acceptance of trust, whether it should be by, 238.

Chattel interest in land (other than copyholds,) assignment of, unless by deed void at law, 600, note (d).

Disclaimer should be by, 233.

Equitable interests usually assigned by, 600.

Parties to, where good as between though void as against others, 478.

Voluntary, does not preclude evidence aliunde of valuable consideration, as against persons not parties, 477.

Will contrasted with, 66; and see 104, 230, 251, 253, 410.

instance of deed in form testamentary in character, 67, note (s), 77, note (w).

DEFENDANT. See *Costs*.

how c. q. t. and trustees ought to be brought on the record as defendants to suit, 855, et seq.

where legal process lost through default of, equity aids, 755, note.

## DEFECTIVE EXECUTION OF POWERS,

upon what principle aided in equity, 96, 97.

## DEFINITION,

of a trust, 15.

of a use, 2.

DELAY. See *Laches*.

## DELEGATION,

Appointment of attorney or proxy, distinguished from, 297.

Conveyance of trust estate does not transfer powers, 266, 267, 297.

Discretionary trust of, actually void, 296.

though to co-trustee or co-executor, 290, 291.

Executors by, distinguished at law and in equity, 296.

Of office of trustee, not permitted, 290, 291.

unless by settlor's direction, 291.

or when trustee acts as agent, and cannot legally retain money, 292.

or where moral necessity for it, e. g. transmission of money, 293, et seq.

case of power to give receipts, 449.

Trustee for sale may not delegate trust, but may employ agent, 422.

DELIVERY, of deed. See *Infant (Deed)*.

Of money voluntary, whether any resulting trust upon, 178.

DEMERARA. See *Jurisdiction*.

Covenant to settle lands in, not binding against purchaser with notice, 51.

Mortgage of lands in, gives no lien unless perfected according to law of colony, 49.

**DEMURRER.** See *Statute of Frauds*.  
defendant may avail himself of Statute of Limitations by demurrer, 734; whether when bill charges fraud, 735; not in case of presumption, 738.

**DENIAL**, false by answer, &c. See *False*.

**DEPOSIT.** See *Mortgage* (Equitable).

on sale by auction, 427.

**DESCENT.** See *Heir*.

Broken by devise upon trust, case of, 680.

Half blood may now inherit, 680.

Proceeds from sale of gavelkind lands, 680.

Trusts of, c. xxii. s. 10, 680.

Trusts, descends as legal estate, 680.

though there be *lex loci*, ib.

so in copyholds, 45, 680.

possessio fratris of, 618, 680.

**"DESIRE,"**

may raise a trust, 167.

**DEVASTAVIT** of executor, how it affects co-executor, 304, 316.

Trustee, improperly releasing debt, liable for, 521.

**DEVISE.** See *Copyholds*; *Customary Freeholds*; *Frauds, Stat. of*; *Wills, Stat. of*.

Consideration, a devise implies, 58, 167.

General words, where legal estate in trustee, passes under, 262, et seq., see note (1).

not when charge of debts or direction to sell, 263.

complication of limitations, or devise to A. for life, or in tail with remainders, 264.

devise to woman for separate use, 264.

passes where estate contracted to be sold, 268; by devise of "my real estates" "to A. and his heirs for his and their own use, &c.," 264; devise to two as tenants in common in fee, 264; to woman for her own use, 264.

Implied by the word "trustee," 250.

Mortmain, devise upon secret trust in, whether void at law, 78, 79, and see 73.

"Securities for Money," mortgage in fee passes under, 264.

Several to, good as to one, void as to another, 73.

to alien and British subject, upon trust, 39.

Trust, devise of, 615, et seq.

in copyholds, 615; in customary freeholds, 616, 617; in freeholds, 615, 617.

Trustee, whether he ought to devise trust estate, 265, 266; see *General Words*, sup.

Void, is not, merely because devisee means to execute unlawful trust, 73.

**DEVISEE,**

Debtor of, liable to specialty creditor, 239; now to simple contract debts, ib., note (c).

Devise on, without any reference to trust, devisee takes beneficially, 68.

even though testator leave unattested declaration of trust, ib.

exceptions in case of charge of debts, &c., 69; in case of fraud, 70; in case of engagement to execute unlawful trust, 71; but see 72, 73.

Renewing lease, where devise subject to debts, &c., holds for benefit of all parties, 218.

Secret trust, devisee must discover, 70, 71, 73.

Trusts, whether devisee can execute where trust confided to trustee, "his assigns," 266, 267.

Trustee, devisee of is bound by trust, 279.

**DEVOLUTION.** See *Descent*.

Equitable Estate of. See *Trust*.

Legal Estate of in trustee. See *Legal Estate*.

**DIRECT TRUSTS,**

c. vii. s. 1, p. 140. See *Express trusts*.

**DIRECTION** to employ A. as auditor, whether it raises a trust, 101.

trustee required to do an act at direction of c. q. t. 542.

**DIRECTORY,**

Clause in will for settlement of chattels, 158, et seq.

Powers, 527.

**DISABILITY,**

Persons under, when barred by late Limitation Act, 744; see 720, 755, note.

Trustee of, statutes remedial of; see *Trustee Acts*.

**DISAGREE.** See *Co-Trustees*.

**DISCHARGE,**

of trustee from office, 290; c. xxi. p. 565; see *Relinquishment*.

**DISCLAIMER,**

Costs of disclaiming trustee, 234, 874.



**DISCLAIMER**, *continued*.

Counsel, trustee may take opinion of as to disclaimer, 234.

Deed should be by, not by way of conveyance, 233; but see note (l), and 419, 534.

Effect of, 237; as to parties, to suit, 847; as to personal contracts, 237; on powers, 237, 532, 534; as to receipts, 449.

after, trustee may act as agent to the trust, 235.

may purchase trust property, 462.

Equity in, by answer, or at bar, 234; see *Costs*, sup.

by deed, 233.

by evidence of conduct, but this is imprudent, 235.

Failure of trustee through disclaimer relief of c. q. t. against, 693.

Feme covert, by, 236.

Law at what disclaimer will divest legal estate, 235, et seq.

as to chattels by parol, 236.

as to freeholds by deed, 236, of special occupant, ib.

by parol (semble), 236; by matter of record, 235.

under the stat. of uses, 236.

Protector of settlement by, under Fines and Recoveries Act, 237.

Receiver, when appointed in consequence of, 870, 871.

Who may disclaim, whether heir of trustee, 232.

whether trustee who (1) accepts one devise can disclaim another, 234; (2) disclaims trusts of will, can accept bounty under same will, ib.

trustee having accepted, cannot renounce, 289; and see *Acceptance*.

**DISCOVERY**,

of secret trusts when enforced, 70, 72, 73; see *Devisee*, *Heir*.

**DISCRETION**. See *Discretionary trusts*, *Feme Covert*, *Infant*.

of trustees, as to creditors' claims, 486; contingent remainders, 408; conversion, 806, 808, 815; maintenance, 542, see 697; objects of charity, 542; objects of trust, 701, 705; renewal, 386.

**DISCRETIONARY TRUSTS**, 21, 22.

See *Powers*, *Imperative*.

court, how far it controls, 538 et seq.; and see 487, and *Powers*, 542.

delegation of void, 296; even to co-trustee, 297; whether exercisable

by trustees appointed by court, 450, 712.

limited to trustees, their heirs and assigns, 267.

for sale, purchaser cannot question exercise of, 417.

**DISSEISIN**,

may be of a trust, 618, et seq.

outstanding term attended, inheritance gained by, 288, note (1).

**DISSEISOR** not bound by a trust, 18, 287, 288; and see 747, or by a use, 3.

**DISSENTERS**. See *Chapel*.

court will execute trust for, if not contrary to law, 497.

how trusts of funds contributed by, are expounded, ib.

**DISTRESS**,

effect of as to confirmation, 473; laches, 471; release, 778; waiver, 737.

**DISTRIBUTION**,

Trust Fund, of, c. XIII. s. v. p. 365, et seq.; see *Release*, *Trustee Relief Acts*.

under power of selection, 705, 706, note (n).

**DISTRINGAS**,

c. XXIX. s. 3, p. 858.

Origin of, 859.

Restraining Order under 5 Vict. c. 5, s. 4, and practice as to, 860, 863.

applies to stock shares in the bank or any other company, ib.

special grounds necessary to obtain it, ib.

Writ of, under 5 Vict. c. 5, s. 5, and practice as to, 860, et seq.

applicable only to stock transferable at the bank, 863.

effect of, and how and when discharged, 862, 863.

employed sometimes for general safeguard, 863.

**DIVIDENDS**,

where c. q. t. is tenant for life of, often received by power of attorney, 594.

**DOMICILE**,

Personal estate follows the person, 47.

Person domiciled abroad generally not a fit trustee, 40; see 574, 576, 710.

**DOUBTFUL EQUITY**,

Purchaser, whether bound by notice of, 727, 728.

Where it exists, trustee should decline to act without sanction of court, 368; will be allowed costs

**DOUBTFUL EQUITY**, *continued.*

of application, 368; c. q. t. plaintiff, who fails to establish claim, allowed costs; secus, in case of contingent interest, ib.

**DOWER**,

Attached to legal estate in feoffee to uses, 3.

to legal estate in trustee, 260.

but dowress bound in equity by trust, 11, 18, 279.

formerly not to trusts or equity of redemption, 12, 621, and why, 625.

whether to money to be laid out on land, 793, 794.

not to a use, 4.

Dower Act, 626, 795; does not apply to copyholds, 621, 626.

Dowress may recover in equity on legal title, 755, note.

Trustee, when he should join in conveyance, 596.

of equity of redemption, his costs in foreclosure suit, 872.

**DRUNKEN**,

where executor and in great poverty, receiver appointed, 870.

**DUPLICATION**,

of charges, 167.

**DURATION**,

of private trusts limited to a life or lives in being twenty-one years (otherwise of public trusts, 23), see 103, 111.

trust exceeding this limit void in toto, 111.

**DURESS**,

effect of, as to acquiescence, confirmation, or release, 778; see 473, 737.

**DUTIES OF TRUSTEES.** See *Bill, Co-trustees, Executors, Investment.*

Acceptance of office, consequent on, 243, 244.

Advantage trustee must not derive from trust, 318.

Answer: 1, as to joining in, 856; 2, as to submitting disputed point to court, 872.

Breach of trust on, by co-trustee, 317; see *Co-trustee*.

Care, trustee should take same, of trust property as of his own, 332.

Charities for; see *Charities*.

Chattels, personal of, c. XIII. p. 327.

Contingent remainders, for preserving, c. xv. p. 404; see *Contingent Remainders*.

Control, trustee must not place trust premises out of his own control, 334.

Convey, when trustee must convey at direction of c. q. t., 595, 596; see 600.

Custody of trust chattels, as to, c. XIII. s. 2, p. 332.

Debts, for payment of, 483; see *Debts*.

Delegation, trustee must not make of trust, &c., 290; see *Delegation*.

Dispute the trust, trustees must not, 325; see 878.

Distribution of trust fund, c. XIII. s. 5, p. 365.

Expenses, to keep account of, 559; to control, see 558.

Impartial, should be, as between c. q. t., 414; conf. 340, 421, 574, 597.

Information, to furnish to, c. q. t., 427, 599; to court, as to trust, 375.

Insurance, as to, 332, 516; see 764.

Investment, as to, c. XIII. s. 3, p. 337; see *Investment*.

in bank must be trust account, 332, 336.

Lend to co-trustee, trustee must not, 345; nor leave money in hands of, see 309, 316, and *Control*, supra.

Mix, trustee must not, trust premises with his own, 337; or stranger's, 350.

Notice, trustee of equitable interest should give, to holder of legal estate, 326; see 605.

Outstanding property and choses in action, to call in, 326, 328; see 765.

Renewal of leaseholds, c. XIV. p. 383; see *Renewable Leaseholds*.

Repairs, 513; see 827, (and conf. 524), and 830.

Sale for, c. XVI. p. 414; see *Sale*.

Speculate, trustee must not with trust property, 319; see 362.

Suit by trustee, 317, 368; or trustee concurring in, 756.

Trade, trustee must not employ trust money in, 340, 361, et. seq.; see 760.

Trustee may be compelled to perform duties, 718; see 597, 723.

**EARMARK**,

meaning of term as applied to money, &c., 275, 757, 758.

**EAST INDIA COMPANY**,

securities of, 355; see 835, note (q).

**EAST INDIES**,

whether executors in, may charge commission, 547; and see note (n).

EAST INDIES, *continued.*

lands in, within Trustee Acts, 835, note (s); see 901.

ECCLESIASTICAL COURTS, have no jurisdiction of trusts, 19, 261.

EDUCATION. See *Poor*.

EJECTMENT. See *Actions*.

cannot be brought by c. q. t., unless surrender presumed, 591.

may by trustee even against c. q. t., 591.

ELECTION, *by c. q. t., as to land to be converted into money, and vice versa.*

By whom made,

Feme covert cannot elect, 816.

but as to money to be laid out in land, bound by consent in court of equity, 817.

under Fines and Recoveries Act can dispose of estate, or interest in land, or money to be laid out in land, 817.

even contingent interests by 8 & 9 Vict. c. 106, s. 5, 817, note (n).

reversionary interest in money to arise from sale of land, 818.

or semble in legacy raiseable out of land, *ib.*, and note (l).

when tenant in tail, see *inf.*

Infant, cannot elect, 816.

Lunatic, cannot elect, *ib.*

Remainderman in fee, may elect, so as to bind real and personal representatives, *inter se*, 818.

but subject to right of prior owner to call for conversion, 818.

actual conversion by prior owner would defeat intended election, *semble*, 819.

Tenant in common, &c.,

cannot singly elect against sale of his share of land to be sold, 819.

may singly elect to take as money his share of money to be laid out, 819.

Tenant in tail might elect by suit as to money to be laid out in land:—1. Where remainder limited to himself, 819; 2. With consent of remainderman, 820.

or even without suit, 820, 821; and *semble*, even since Fines and Recoveries Act, 822; but see 823.

by petition, under 39 & 40 Geo.

MAY, 1858.—49

3, c. 56, 821; and notes (i) and (l).

under Fines and Recoveries Act may dispose of land, or money to be invested in land, 822.

Trustee, his act shall not alter c. q. t.'s estate, 825, *et seq.*

How made, by express declaration, 823; as to a will, see 825.

even by parol, as between real and personal representatives, 824.

excepted out of Lord St. Leonard's Trustee Act, 839.

Presumed, 823; (whether knowledge of c. q. t. necessary), 824.

(a) where land to be converted; e. g. by c. q. t., granting lease, reserving rent to himself and his heirs, 824; keeping land unsold, 823; entering into possession, and taking custody of title deeds, *ib.*

(b) where money to be converted; e. g. by c. q. t. changing securities, &c., 824; receiving the money, 823; see 804; not by mere receipt of income, 823; from c. q. t.'s will (formerly even unattested), 825.

Until made, special trust proceeds, 598.

*of clerk by parishioners*, 107-110; see *Parishioners*.

*of member of parliament*, c. q. t. may vote for, 270, 593.

ELEGIT. See *Judgment*.

Equitable interest, it binds, 649; formerly held otherwise, 12.

what portion of trust estate might formerly be taken in execution under, 658 *et seq.*; and see 659, note (y).

*of equity of redemption*, 660. *of trust in nature of mortgage*, 661.

entirety under 1 & 2 Vict. c. 110, s. 11, 666.

when *elegit* must be sued out before application to equity, 662; and see note (i).

Estate by, in trust for feme covert, 630.

Origin of, 647.

Remedy of at law by possession, 658, note (v), and see 659, note (y).

as to trust estate under Statute of Frauds, 664, *et seq.*

under 1 & 2 Vict. c. 110, 669.

tenant by, not bound by a use, 3; is by a trust, 280.



## ENTAILS,

Equitable, barred how, 602, 604.  
 customary estates in, depend on  
 custom to entail legal estate, 46,  
 and see note (e).  
 history of, 601, et seq.

## "ENTREATING,"

may raise a trust, 167.

EQUITABLE ESTATES. See *Merger*.

assignment of how made, 603;  
 precautions in, 604 et seq.  
 compared with legal, 44, 103, et  
 seq. 140, 141.  
 purchasers of when bound by  
 trusts, 729; see 725.  
 a series of, 596; see 848.

Mortgage. See *Mortgage, Equitable*.

## Powers,

distinguished from legal, 525.  
 collateral or annexed to estate,  
 526.

Waste, 225; and see 514.

EQUITY. Bars to claims in, 731; see  
*Limitation, Mesne Rents*.

Courts alone have jurisdiction of  
 Trusts, 19.

can act in personam, 47; and see  
*Jurisdiction*.

Doubtful, 367, whether purchaser  
 bound by, 596, 848.

Redemption of; see *Mortgage, Mort-  
 gagee; Mortgagor*.

barred by lapse of time when, 733.  
 chattel, of a, may be taken under  
 equitable fi. fa. 649.

copyholds of where formerly liable  
 as assets, 661, note (1).

distinguished from a trust, 284.

forfeitable for treason, 677.

judgment creditor entitled to sale  
 of entirety, 660.

subject to curtesy, formerly not to  
 dower, 12, 621, and see 626.

Settlement to, see *Feme Covert*.

Trustees of mere equity, 596, 848.

ESCHEAT. See *Failure of c. q. t.*

Copyholds not properly subject to  
 escheat, 283.

lord bound by trust entered on the  
 roll, ib.

qu. if in case of customary free-  
 holds, 284.

Equitable interest not subject to, c.  
 xxiii. s. 9, p. 678, see 14.

Law of, now altered by late statute,  
 285, et seq.

Lord may redeem mortgage term  
 created by person whose estate  
 has been escheated, 285; subject  
 to debts of such person, ib.

does not take mortgage in fee

on mortgagor's death intestate  
 without heirs, 679.

whether formerly bound by a trust,  
 14, 18, 280, et seq.; not by use, 3.

Money to be laid out on land not  
 subject to, 795.

## ESTATE,

*Pur autre vie*, see *Pur Autre Vie*.

Trustee, what he takes at law, c.  
 xi. p. 246, and see *Legal Estate*.

## ESTOPPEL. 305.

EVIDENCE. See *Affidavit; Frauds*,  
*Stat. of; Parol; Trustee Acts*.

EXCHANGE. See 894, *Charity lands  
 of, with consent of commission*,  
 504.

Power of sale and exchange a "usual  
 power," 164; see 166.

whether it authorizes partition, 417.

## EXCHEQUER,

Court of, whether it could relieve c.  
 q. t. as against royal trustee, 30.

transfer of equity jurisdiction to  
 court of chancery, 859.

## EXCHEQUER BILLS,

whether government security, 342,  
 note (t).

## EXECUTED TRUSTS,

what, 144, et seq.

how construed, 141. See *Executory  
 trusts*.

## EXECUTION,

Chattels of by fi. fa. 646. See *Judg-  
 ment*.

from what time chattel interests in  
 lands are bound by, 647.

of trust chattels. 648, 662; of  
 stock, 648, 669, et seq.

for debt of trustee, 261.

Creditor, taking trust chattel in,  
 bound by trust, 283; whether he  
 can by execution levy debt upon  
 property subject to voluntary trust  
 for debts, 476.

Defective of powers of, upon what  
 principle aided in equity, 96.

EXECUTOR. See *Foreign, Infant*,  
*Relinquishment* (Representative).

Acceptance of office, what acts con-  
 stitute, 241, 242; and see *Accept-  
 ance*.

having once acted cannot re-  
 nounce, 289.

notwithstanding he has not proved,  
 290; see 838, note (d).

may renounce probate and claim  
 legacy, 234.

executor of executor administer-  
 ing to one testator must to the  
 other, 234.

Assent of, to bequest, 243, 454.

EXECUTOR, *continued.*

Assets personal in hands of executor, a species of trust property at common law, 261.

e. g. cannot be taken in execution for executor's debt not forfeitable for felony, &c., 262.

vest in executor's executor, 260.

not in executor's administrator, 262; and see *Feme Covert*, (executrix).

Agent acting under executor's direction, 459.

Co-executor. See *Co-trustee*, *Powers*, inf.

compared with co-administrator, 316.

with co-trustee, 310; see 317.

duties, he must not depend on mere representation of co-executor, 315.

especially where testator long dead, ib.

should call in debt owing from co-executor to testator's estate, 329.

should not leave money in hands of co-executor, 316; see 314.

whether executors may place money in bank payable to either co-executor, 336.

liability depends on acting, not mere joining in act, 312.

answerable for putting assets into sole hands of co-executor, 314.

how far for devastavit of co-executor, 289, 304, 316.

not generally answerable for acts or defaults of co-executor, 310.

whether for joining in receipts pro forma, 310, et seq.

not for joining in nugatory acts, 311; or in acts ex necessitate, 315; e. g. indorsing bill of exchange payable to two personally, or transfer of stock, ib.; unless act be with improper view, ib.; see as to liability at law, 296.

survivorship of office, 300; of powers, 536.

Charge, he may not, for time or trouble, 546.

where entitled to commission for administration in East Indies, 547, note (*n*).

Costs allowed to executors in creditor's suit, 873.

executors, who are necessary par-

ties in suit by stranger, unsuccessfully contesting his claim, pay, 872; and see *Costs*.

Covenants, what may be required from executors of one who has agreed to take a lease, 425, note (*k*).

by executors of lessee on assignment, 426.

Decree after, he may not pay debts or invest assets without sanction of court, 524.

Devastavit. See *Co-executor*, sup., *Liabilities*, inf.

Duties of. See *Liabilities*, inf.

he should not allow assets to remain on personal security, 329.

but not liable if legal proceedings would be useless, ib.

may allow assets to remain on mortgage, 329.

should not allow outstanding debts which carry interest, 358.

after payment of debts, &c., must account for surplus, or chargeable with interest, 358.

and no excuse that he did not use the money, 359.

but not so charged during first year from testator's death, 364.

must not trade with assets, 360, 361; and see 340, 364.

Indemnity, what he may require as to leaseholds, 426, and see *Indemnity*.

Liabilities. See *Co-executor*, *Duties*, sup.

whether answerable to creditors when not to legatees, 313, 314.

for devastavit, 296; conf. 521. See *Co-executor*, sup.

whether for paying debts barred by statute, 520.

whether for omission to insure, or for robbery, 332. See *Insurance*.

Lunatic, &c., see *Trustee Act*, s. 6.

Mortgage. See *Powers*, inf.

Next of kin, executors are trustees for, of undisposed residue, 59.

where no next of kin executors take beneficially as against the crown, 59, 324.

Powers of, to deposit mortgage, or sell personal estate and to give receipts, 453, et seq.; see 457.

even without concurrence of co-executor, 453; or when specifically bequeathed, 454; but see 458.

except where fraud, &c., 455, et seq. e. g. sale at nominal price or undervalue, 456

EXECUTOR, *continued.*

sale or pledge to secure executor's private debt, 456.

even where executor joint specific or joint residuary legatee, or subject to a charge, 457.

secus, where he is sole specific or sole residuary legatee, 456.

case where executor's creditor has express notice of unpaid debts of testator, 457.

sale, &c., for executor's private advantage, 457.

sale, &c., of chattels specifically bequeathed where purchaser has notice that testator's debts have been discharged, 458.

sale, &c., where misapplication probable, 458.

how far safe to deal with executor after long interval from testator's death, 458.

who may impeach fraudulent sale, &c., by executor, 459; and see *Decree*, sup.

Purchase, executor may not purchase assets, 465.

Receipts. See *Co-executor*, *Powers*, sup.

Receiver appointed where husband of executrix out of jurisdiction, 870.

Renewal, of lease by, 219, 220.

Survivorship. See *Co-executor*, sup.

Trading with assets, 360, 361; see 340.

Trust, whether it can be averred against executor, 59.

Trustee, executor of bound by trust of chattels, 279.

specifically bequeathing trust property, qu. whether executor with specific legatee can execute trust, 267, conf. 297.

when executor converts himself into a trustee, 243.

EXECUTORY BEQUESTS, see 104.

EXECUTORY TRUSTS, see 144, 158, 727.

*Construction of, in Marriage Articles*, see 146, 152, note (c).

Chattels, "heirs of body" applied to, construed limitation to eldest son as heir, and if no son, to daughters, as co-heiresses, 149.

notwithstanding death of son or daughter in parent's lifetime, unless contrary implication, ib.

agreement to settle on same trusts as real estate, what limitations it authorizes, 150-152.

Joint tenancy in articles construed tenancy in common, 152.

Real estate "heirs of body," or "issue," applied to, construed first and other sons in tail as purchasers, 147, remainder to daughters, as tenants in common in tail with cross remainders, 149, (except where express provision for daughters by articles,) ib.

exceptions—where husband's property limited to heirs of body of wife, 148; quære, however, since *Fines and Recoveries Act*, ss. 16, 17.

where articles, by limitation of part of estate, to parent for life, remainder to first and other sons in tail or otherwise negative this construction, 148.

"heirs female" construed daughters, 149.

Words supplied in, articles, 153.

*Construction of, in Postnuptial Settlements*, 164.

*Construction of, in Wills*, 153, et seq.

Chattels, how executory trusts as to, construed, 158, 163.

semble, that chattels bequeathed as heir-looms, with real estate, vest absolutely in first tenant in tail, though he die an infant, 163.

but a limitation over on tenant in tail dying under 21, is lawful, and may probably be inserted where testator manifests distinct intention, 163.

Real estate (a) heirs of the body, construed to give estate tail to A., e. g. in trust "for A. and the heirs of his body," 153.

"for A. and the heirs of his body and their heirs," 153.

"for A. for life and after his decease to the heirs of his body," 153.

estate "directed to be settled" upon A. and her children, and if she died without issue, 153. upon A. for life, remainder to his heirs male and the heirs male of every such heir male, &c., 154.

executory trust for A., and trustees not to give up their estate till proper entail was made to the heir male by him, 154.

devise to A., with direction that estate should be entailed on heir male, how construed, 154.



**EXECUTORY TRUSTS, continued.**

(b) heirs of the body construed first and other sons, &c., where intention shown, 154.

as by directing settlement to A., for life, "without impeachment of waste," or with "limitation" to preserve "contingent remainders," 154, 155.  
on feme covert for life for separate use, 155.

or by direction to settle on A. and the heirs of his body as counsel shall advise, &c., 155.

where testator directs settlement, but formally declares limitations, 157.

*Generally*, daughters included in "heirs of body," or "issue," 149, 156.

Duplication of charges, 167.

Gavelkind lands, as to, 157.

"Heirs of the body," and "issue" distinguished, 155.

Limitation to trustees to preserve whether now inserted, 156, see 408, 418.

Notice of, 727.

Powers, what may be inserted, 164, et seq.; "usual," *ib.*; proper, 166.

Protector, special, whether court will insert under Fines and Recoveries Act, 156.

Rectification of settlement, 148, note (g); and see *Settlement*.

**EXONERATION.** See *Contract, Mortgage*.

**EXPECTANCY,**

voluntary assignment of, whether it creates a trust, 92; see *Voluntary Assurance*.

**EXPENSES.** C. xx. s. 2, p. 557. See *Costs, extraordinary outlay*.

Allowance for, to trustees, 557, even where express allowance for trouble, 558.

extra costs, 558, fees to counsel, *ib.*, of fines, 272, of renewal, 222, of release, 375, travelling expenses, 557; and see *New trustees*.

Account of, trustee should keep, 559. where none kept, what allowance made, *ib.*

Lien, are upon the trust estate, 560, 561; and see 222.

how far where trust extends to two estates, 562.

secus in respect of trustees' agents, e. g. solicitors, or surveyors, 101, 561.

Moderated charges may be, and how, 558.

Reimbursement of, how made, 521, 558, 564, conf. 873.

Remedy for, against c. q. t., personally, where, 562 et seq.; see 563, note (x).

Trust to pay costs, &c., construction of, 564.

**EXPRESS,**

Trusts, c. vii. s. 1, p. 140.

Technical terms, how far necessary for, 140, 141, their force when employed, 141.

Trusts, executed and executory distinguished, 144.

what are within late Limitation Act, 743, 745, note (d), et seq.  
a mere charge is not, secus as to a charge coupled with duty, 746.  
not within 42nd section of act as to arrears, 748.

**EXTENT,**

From crown, c. xxiii. s. 7, p. 673.

trust affected by, 673.

could not be sold at common law, 673, may by stat., *ib.*

equity of redemption may be sold upon, 674.

**EXTRAORDINARY OUTLAY,**

by trustee, whether he can charge, 559.

**FACTOR, 225.** See *Agent*.

Bankruptcy Act, operation of as to goods, &c., in his possession, 274, 275.

only takes special property, 275.

**FAILURE,**

Of c. q. t. of personalty by death intestate without next of kin, 198, 324.

of realty by attainder, 323.

by death intestate, and without heirs, 197, 321.

whether settlor can assert a claim, 323.

whether trustee can claim advantage, 321 et seq.

where c. q. t. has devised estate to another on trusts which fail, devisee entitled as against bare trustee, 322.

Of trustee,

relief of c. q. t. against, c. xxiv. p. 693.

by death of trustee in testator's lifetime, disclaimer or otherwise, 693.

direction to sell, and no person to sell named, 694.

**FAILURE**, *continued*.

for separate use, and no trustee appointed, 694.

of imperative power, 694 et seq. See 543; *Powers*.

**FALSE**,

Answer by corporation (pleading ignorance,) visited with costs, 878.

Denial, by agent, of his character, 205.

by trustee of claims of c. q. t. visited with costs, 877.

**FAMILY**,

Differences, settlement of a good consideration, 94.

Trust for, of freeholds, how construed, 169.

**FARM LEASES**. See *Leases*.**FATHER**. See *Advancement, Parent*.**FEE**,

Equitable, the word "heirs" not necessary to create, 141.

Fee upon a fee, distinction between legal and trust estates as to, 103.

Legal, vested in trustee by trust to sell, &c., without "heirs," 250.

so by devise to A. and his heirs upon trust to pay debts, 251.

secus where gift to A. and his executors, &c., upon trust to pay debts, &c., ib.

what estate taken under grant to trustees and survivor, and heirs of survivor, 251; what under devise, 252.

**FELONY**, 28. See *Forfeiture*.

of c. q. t., 323.

works forfeiture of equitable chattels, 677.

**FEME COVERT**,

*Generally*. See *Fine, Fines and Recoveries Act, Husband*.

Acquiescence, not bound by, in purchase by trustee, 471, generally, 777.

except as to separate property without restraint, 471, 777.

quære, where restraint, 778.

Advancement for, by husband, presumed, 216.

Breach of trust, cannot concur in, 774. unless guilty of fraud, 774.

or as to separate property without restraint, 775; see 778.

remedy for, against separate estate, 639, et seq.

by, husband liable for, 34; and see 261.

Choses in action, her disability as to (possessory or revisionary,) 26. reduction into possession of, pos-

sessory, 627, 631; whether when reversionary, 370 et seq., 627, 628.

her right by survivorship to, whether possessory (but not reduced,) or reversionary, 627, 628.

Confirmation by. See *Disabilities*, infra.

*Curtsey*, in respect of. See *Curtsey*.

Disabilities of,

cannot conform or release breach of trust, 777, as to purchase by trustee, 472.

except as to separate property if without restraint, ib.

cannot consent to trustees' relinquishment of office, 565; and see *Breach of trust*, sup.

cannot at common law pass legal estate, 35.

Disclaim, how she may interest in land, 236.

Discretion of, 34.

Dower, her title to. See *Dower*.

Election by, cannot make, 816.

secus under Fines and Recoveries Act, 817; and see *Election*.

Engagements and contracts by,

parol, how far they affect separate property, 634 et seq.; but see 639, and 778.

written, id. 633.

as to real estate under Fines and Recoveries Act, 634, note (n); and see *Power*, inf.

Equity to settlement, as against assignees in bankruptcy or insolvency of husband, 369, 370; as against husband's assignee for value, 370; none against assignee for value of life estate, ib.

in equitable chattels real, 26, 629, 630, in equitable freeholds, 632.

how asserted or waived, 628.

right by survivorship distinguished from, 628.

Executrix, assets in hands of, disposable by husband during coverture, 261.

she may make a will of such assets without husband's consent, 261.

Feoffment on condition she may make, 34.

Fraud. See *Breach of trust*, supra; *Power*, infra.

Power, she may execute power simply collateral, appendant, or in gross, 34.

FEME COVERT, *continued*.

- general, when equivalent to separate estate, 775.  
 estate appointed under, not assets, except where fraud, 768, note (w).  
 Practice. See *Equity to Settlement*, sup.; *Separate Use*, inf.  
 Property of. See *Separate Use*, inf.  
 (a) Equitable not settled to her separate use, her chattels personal, 627; chattels real, and contingent interest therein, 629; (effect of husband's forfeiture upon, 677;) choses in action, see sup.; elegit, estate by, 630; freeholds, 631; mortgage term, 631.  
 as to effect of getting in legal estate in wife's equitable term, 630.  
 (b) Legal,  
 chattels real, husband may assign, 629; secus if they cannot vest during coverture, 630; see 26; freeholds, 35; see 25, 632; 634, note (n), 817, 818.  
 Restraint against anticipation, separate estate. See inf.  
 Reversionary interests. See *Choses in Action*, sup.  
 in land, or money arising from, or charged on, 818.  
 Survivorship, her right by, 627, 628.  
 Trust, how far she can create, 25.  
 Trustee, she ought not to be appointed, and why, 34, 35; see 710.  
 Will. See *Executrix*, sup.; *Separate Use*, inf.  
*Restraint against Anticipation*, 123, what words will effect, 123; and see 129, 130, 632 note (w).  
 Arrears of income, does not attach to, 642; see 26.  
 Discharged, the clause may be, during discoverture, 124.  
 Marriage upon, the clause operates during the coverture, 128; see 124, et seq. Power of Appointment, inf.  
 second, effect of, 130; see 631.  
 Power of Appointment, how far it discharges restraint, 129, 130.  
*Separate Use*. See *Devise*.  
 Allowed in trusts, 120, though no trustee interposed, 121, 728.  
 husband, construed trustee, ib.; and see 125 note (x), 694; but see 123.  
 Arrears of, 642; and see 26, 131.  
 received by husband, what reco-

- verable by wife or her representatives, 642.  
 where wife is non compos, 644.  
 whether distinguishable from arrears of pin money, ib.  
 Assets equitable, is administered as, 642.  
 Created, by what words, 121, 122.  
 what words insufficient, 121, 122.  
 trust must be clearly expressed, 121.  
 Discharged, may be, during discoverture, 124; and see 640.  
 Engagements. See *Engagements*, sup.  
 Feme covert is considered feme sole as to separate property, 26, 632; and see *Acquiescence*, *Breach of trust*, *Disabilities*, sup.  
 Judgment, trust for separate use whether within 1 & 2 Vict. c. 110. s. 11; 666, note (a).  
 Legal estate, what trustees take where limitations for, 247, 252, 255.  
 Liabilities of feme covert in respect of. See *Breach of trust*, *Engagements*, sup.  
 enforced by bill against feme covert and her trustees, not against her personally, 640.  
 notwithstanding husband's death, 640.  
 only against arrears where restraint, &c., 641, 642.  
 after death of wife by creditors' suit, 642. See *Assets*, sup.  
 Marriage upon, the clause operates, 124.  
 effect of second, 130, 631; as to arrears, 131.  
 Possession, when c. q. t. entitled for separate use is put into, 590; see 589.  
 Power of appointment when equivalent to ownership for separate use, 775.  
 Practice as to, in proceedings in equity, 633, 640.  
 wife sues for by next friend, 858; see 348.  
 Real estate, her acknowledgment in conveyance of separate use unnecessary, 646.  
 Savings of. See *Arrears*, sup.; *Will*, inf.  
 Will, by feme covert, may dispose of separate estate and accumulations, 642.  
 undisposed of survives to husband, ib.



**FEME SOLE,**

ought not to be trustee, and why, 35.

trustee marrying may be removed, 710.

**FEOFFMENT.** Forfeiture, by, 678.

Infant, by, not void, but voidable, 26.

Lunatic, by, or idiot voidable only by heir, 27.

**FIERI FACIAS**, writ of. See *Execution*; *Judgment*.**FINE,**

Effect of, in cases of election, 817. upon equitable entails, 601, 602.

Infant feme covert, formerly conveyed by, under Trustee Act, 835, note (*u*).

Infant, idiot, or lunatic, of, 26, 27. See *Recovery*.

Nonclaim with, a bar against infant, c. q. t. of term, 721.

secus in case of fraud, ib.

a bar against constructive trust in favour of a volunteer without notice, 733.

no bar in case of notice, 224.

**FINES,**

Admission to copyholds, for, 272, 402. See *Copyholds*.

Lease of charity lands, upon, 505, 506; see 510.

Renewals on, 386, et seq. See *Renewable Leaseholds*.

Under-leases of, 392.

**FINES AND RECOVERIES' ACT.**

See *Protector*.

Acknowledgment by feme covert, under, 25, 632, 634, note (*n*).

its effect as to her reversionary interest in land, 817, 818, to be converted, ib.; legacy charged on, ib.; see note (*p*).

whether necessary for dealing with wife's separate property, 646.

Effect of, in election by tenant in tail, 822.

as to limitation to preserve contingent remainders, 411.

under settlement of husband's property to heirs of body of wife, 148.

Infant tenant in tail, conveyance by, in pursuance of Trustee Act, 835, note (*f*).

Vesting order, under Trustee Act, 1850, 885, note (*l*).

**FOLLOW.** Where c. q. t. may, trust estate itself, if wrongfully converted, c. xxvi. s. 1, 724. See *Breach of trust*, (Remedy, 1).

where property substituted in place of trust estate, c. xxvi. s. 2, 753.

where conversion in pursuance of trust, 754.

tortious, 755, et seq. See 825, *Breach of trust* (Remedy, 2).

**FORECLOSURE.** See *Abroad*; *Mortgagee*.**FOREIGN.** See *Abroad*; *Frauds*, *Stat. of*; *Jurisdiction*.

Funds, 812.

Law, whether trustee or executor presumed to know, 367.

**FORFEITURE.** See *Felon*; *Outlaw*; *Treason*.

Case of felony, outlawry, or treason, 29.

as to chattels and goods, takes place on conviction, ib.

felon, &c., may sell goods, &c., before conviction, ib.

how far he may make a settlement of, 28, 29.

Equitable interests of, none at common law, in trusts of lands, 674.

qu. under 33 H. VIII. c. 20, s. 2, 674, et seq.

equities of redemption within the statute, 677.

trust for alien, 677, how crown prosecutes its rights, ib.

of chattels, real or personal, 677. for felon's wife, ib.

Legal estate in trustee, of, chattels in trustee, subject to, at common law, 260.

secus now, 260, 286 (but see 287), and secus as to assets in hand of executor, 262.

freehold estate in trustee, subject to, at common law, 260.

secus now, 260, 285, 286, (but see 287).

Person taking trust estate under, formerly bound by same equity as forfeitor, 280.

Tenant for life by, at law from feoffment, &c., 678.

not by equitable tenant for life, ib.

**FORGERY,**

Letter of attorney, of, 372.

Trustee absconding on charge of, removeable, 711.

**FORMALITIES,**

required for creation of trust, c. v. p. 56.

and see *Averment*; *Frauds*, *Stat. of*; *Wills*, *Stat. of*; *Transmutation of Possession*.

**FOUNDER,**

Charity, of, when visitatorial power belongs to heirs of, 492.  
when heir of, unknown or lunatic, visitatorial power in crown, 495.

**FRAUD.** See *False; Fine; Suit.*

Bar, none from time whilst fraud concealed, 734, note (*b*).  
and see Stat. of Limitation, s. 26, 743.

account carried back to accruer of title, 756, note.  
secus, after discovery, 734.

By agent, 204; devisee or heir, 70.  
feme covert, 774; grantor, 178;  
infant, 39, 774.

Charged by bill, defence, whether by demurrer or plea, 735.

Ground for, account of mesne rents in equity, though upon a legal title, 754, note.

court's interference in exercise of powers, 543.

court's non interference, 137, 139, 768; conf. 178.

Laches, effect of, where plaintiff alleges fraud, 742.

Parol, may be established by, 74; and see 205.

Vitiates trust for payment of debts, 476.

**FRAUD, STATUTE OF.** C. v. s. 2, p. 60; and see *Devisee, Heir.*

Assignment of trusts, must be by writing signed, &c., 600.

Constructive trusts, how far it affects, 228, et seq.; see 206, 762.

distinction in case of will and conveyance, 230.

Devises of lands, and bequest of personal estate, how made according to statute, 65.

Interests within the act, charitable uses, 61; chattels, real, 61; copyholds, 60.

Not chattels personal, 61; lands in colonies planted before statute passed, 62; nor foreign lands, 62; nor trusts arising by implication or operation of law, 204, 228.

whether it binds the crown, 62.

Pleading the statute, as to, 62; see 137.

Trust to be proved by, not declared in writing, statute satisfied if trust manifested by subsequent acknowledgment of trustee; e. g. by answer, express declaration, letter, memorandum, reci-

tal, 63; qu. whether by bill in chancery, 63, note (*u*).

but relation to subject-matter and nature of trust must be clear, 64.  
writing must be signed, 64; by whom, 65.

may refer to unsigned paper, 64.

Trust estate, how far assets under section 10 of Act, 684.

when to be taken in execution at law under same section, 664.

**FRAUDULENT,**

Appointment of trustee, 580.

Conveyance, within Bankruptcy Act, 479, 480; within Insolvent Debtor's Act, 475.

of estate abroad relieved against, 48.

Corporators, fraudulent alienation or misrepresentation by, 847.

Dealing with executor. See *Executor, Powers*; 455, et seq.

Exercise of discretion by trustee. See 409, 415, 543.

Purchase by trustee of trust estate, repairs only allowed, 466.

**FREE,**

Grammar school, "school," (see 3 & 4 Vict. c. 77), 499, 500.

**FREEBENCH,**

attaches on legal estate in trustee, 260.

not on equitable estate in copyholds, 621.

**FREEHOLD.** See *Disclaimer.*

whether estate for life may be devised to trustee notwithstanding, 1 Vict. c. 26, 259.

**"FUNDS,"** 342.

in court, assignment of, 613, 614.

**GAME ACT,**

qualification under extended to c. q. t. of lands, 593.

**GAMEKEEPER,**

must not be appointed for pleasure of trustees, 318.

**GAVELKIND LANDS,**

Descent of money arising from sale of, 681.

trust in, 680.

Settled, how, under articles, 157.

**GENERAL ORDERS,** as to distringas, 1 to 5 of 17 Nov. 1841, 861, 862.

as to interest on simple contract debts, from decree 46th, of Aug. 1841, 490, note (*g*).

as to parties to suits, 30th and 32d of 26th Aug. 1841, 852, et seq.

as to service of petition for Stop Order, 614, note (*l*).

GENERAL ORDERS, *continued*.

as to Trustee Relief Act, 379, et seq.

## GOVERNMENT,

securities, 341, 342, 353. See *Investment*.

## GRANDCHILD,

advancement for, presumed, 216.

"GRANT." See *Covenant*.

whether inserted in conveyance by trustees, 424; see 596, note (r).

## GRANTEE,

guilty of mala fides, 178.

## GREEK BONDS, 342.

## GUARDIAN,

Advantage, cannot gain by abuse of his office, 321.

Infant cannot be, 36.

Office survives as to testamentary guardians, 300.

secus, if joint guardians appointed by court, *ib.* note (v).

## HARDSHIP,

court will not enforce against trustees contract which involves, 424.

HEIR. See 141, *Devise*; *Resulting trust*.

c. q. t. attainted, whether his heir may sue trustee, 323.

Common law heir, when entitled to proceeds of sale of gavelkind lands, 681; customary when entitled to trust estate, 680.

Engagement by, to make provision, &c., if estate allowed to descend, enforced, 70.

Failure of. See *Escheat*, *Failure of c. q. t.*, *Trustee Acts*.

Favoured, whether more than executor, 188, 805; *conf.* 181.

"Heirs female" in articles, 149.

"Heir Male" in will, 154.

Money to be laid out in land, where heir entitled to, 797, et seq. See *Conversion*.

under bequest to be settled on testator's heir, 805.

"Nemo est hæres viventis," 407.

Resulting trust. See *Trustee*, *inf.*

(a) heir takes,

upon devise on trust where trust not defined by will, 68, 181.

unattested documents, whether admissible to prove trust, *ib.*

whether case altered by parol information of trust by testator to trustee, 75, et seq.; 181, et seq.

upon devise to one without reference to trust where engage-

ment to execute unlawful trust, 71; and even though such engagement does not relate to definite part of estate, 73.

defendant must discover the secret trust, 72, 73.

case of engagement to execute trust, but no trust declared, 74.

(b) heir does not take,

upon devise to one without reference to trust, where no communication to devisee in testator's life, though testator leave unattested declaration of trust, 68; and see p. 72.

or devisee means to execute unlawful trust, 73.

heir not excluded from by mere conjecture, 181; whether by a legacy, 181.

in money or devise for conversion, where heir takes, 182, et seq.; but see 194, 197; and see *Resulting trust*.

whether resulting interest devolves as realty or personalty, 182.

Settlor, heir of, when bound by trust, 693, 694.

Specialty debts, how heir is liable to, 239.

Trustee, heir of, is bound by trust, 279; whether he can disclaim, 232.

twenty years' possession by, no bar to heir entitled to resulting surplus rents under express trust, 745.

Use, the heir is bound by, 3.

Volunteer, when the heir is, under limitation in marriage settlement to heirs of husband, 406.

## HEIRLOOMS,

Bequest of, to same uses as freeholds in strict settlement, how construed, 158, et seq. See *Executory trusts*.

c. q. t. his rights in, 594.

## HEIRS OF THE BODY. Equitable entail, may be created without these words, 141.

Construction of, in marriage articles as to chattels, 149.

as to freeholds where construed, first and other sons, 147, 148.

in wills where construed first and other sons, 153, et seq.; and see 142, 143, and *Executory trusts*.

Include daughters, 149, 156, not synonymous with "issue," 155.



**HEIRS OF THE BODY, continued.**

Purchaser with notice, whether bound by these words, 727.

**HERIOT,**

when payable as to copyholds, 272, conf. 402.

**HERITABLE bond, 53.**

"HONORARY TRUSTEES," 408.

**"HOPING,"**

may raise a trust, 168.

**HOUSEHOLD GOODS,** how c. q. t. of may use, 594.

**HUSBAND. See *Feme Covert*.**

Executrix, husband of, may administer assets during coverture, 261.

Liable for wife's breach of trust, 34.

Trustee of wife's separate estate, construed to be, 44, 121, 125, note (x), 694, 728.

husband appointed with another upon trust, (inter al.) for wife, not a trustee for her separate use, 123.

Wife's property, how far he may dispose of, chattels personal, 627; chattels real, (equitable), 26, 629, et seq.; and see 9, 12, 631, (legal), 629.

choses in action, 26, 627, and see 369; (and as to her life estates, see 370).

freeholds (equitable and legal), 631, 632.

Wife's separate estate, what arrears of can be claimed from husband, 642, as to pin-money, see 644.

if undisposed of, husband surviving, entitled to, 642.

suit as to, husband how made party and his costs, 858; see 348.

**HUSBANDRY LEASES. See *Leases*.****IDIOT. See *Lunatic*.****IGNORANCE,**

c. q. t. of, as to his rights,

Acquiescence, defeated by it, 778, and so confirmation, 472, 778.

Concurrence in breach of trust prevented by it, 774.

Laches excused by it, 471.

Law, ignorance of the, 472, 778.

Presumption of waiver, how far rebutted by it, 737.

Release defeated by it, 224, 778.

Statutory bar, not prevented by it from running in equity, 733.

Trustee of, as to his true character, 751, conf. 790.

**ILLEGAL Trust. See *Unlawful trust*.****ILLEGITIMATE CHILD,**

advancement for presumed, 216.

future, trust for not good, 131.

**IMAGINARY VALUES,**

trustee not charged with, 766.

**IMBECILITY. See *Lunatic*.****IMPERATIVE powers. See *Failure of Trustee, Powers*.****IMPERTINENCE,**

Statement of trustee's misconduct is not, 711.

**IMPLIED. See *Notice*.**

Devise, 250.

Powers, whether charge implies power of sale, 251; and see 257, 258.

Trusts, defined, 140, note (1); and see c. vii. 2, p. 167.

agreement to settle under, 173.

See *Settlement*.

Charge, under, 173. See *Charge*.

Contract for sale, under, 174, 175.

See *Purchaser*.

Words precatory from, 167, no trust created.

where uncertainty, 168, et seq.

doctrine of, discouraged, 173.

not a question of mere grammatical import, 171.

trustee of, not bound so strictly as by common trust, 172.

Words, "subject thereto," implied, 191. See *Resulting trust*.

**IMPROVEMENTS,**

Allowance for, on setting aside charity lease, 511.

purchase by trustee, 466, 468.

not allowed in case of fraud, 466.

tortious sale by trustee, 764.

Lasting, lien of trustee for, 222.

On lunatic's estate from his personality, 827.

e. g. for draining, engine at mine, inclosure, ib., conf. 830.

Ornamental by trustee, expense of not allowed, 513.

Tenant for life, whether directed at his instance, 514.

**IMPROVING LEASES,**

of charity lands, 504.

**INACTIVITY,**

of one co-trustee, 574, whether ground for appointing receiver, 870.

**INCAPACITY** of trustee, ground for appointing new trustee, 710, see 693; receiver, 870.

**INCONVENIENCE,**

of granting relief a bar to suits, 739, et seq.

how far applicable as to charities in suits for account, 787, et seq.

**INCUMBRANCE,**

trustee cannot buy up for himself, 318.

**INDEMNITY.** See *Attorney* (power of).

Advice of charity commissioners, persons acting under indemnified, 785; See *Payment*, inf.

Bond of, on appointment of new trustees, 580, 581.

on distribution of trust fund, 367; and see 721.

c. q. t. bringing action in name of trustee must give, 591; see 719.

Court trustee acting under sanction of, obtains without release, 375; and see 368, 765.

as to future instalments when one payment made under court's direction, 376.

Leaseholds when trustees and executors can require in respect of, 426; and see 223.

Legal liability, trustee who has incurred at request of c. q. t. may claim indemnity, 562; but see 563, 564.

Payment by trustee, &c., of charity funds to official trustees, 382.

into court by, under Trustee Relief Act, 377, note (x).

**INDIA.** See *Bengal, East Indies.***INFANT.** See *Advancement, Maintenance, Trustee Acts.*

Acquiesce cannot, in breach of trust, 777; purchase by trustee, 471.

Administration, durante minoritate, 834, note (l).

Assurances by, he may avoid, 37, 38, inf.

Attorney, cannot be in suit, might be to deliver seisin, 36; see *Power*, inf.

Bailiff, cannot be, 36.

Breach of trust, cannot commit, 39, 373; or concur in, 774.

unless guilty of fraud, 39, 775.

cannot acquiesce in, confirm, or release, 777.

protected after attaining 21, until he has full information, 777; and see *Remedy*, inf.

Capacity, has no legal, 35.

Confirm cannot, breach of trust, 777; purchase by trustee, 472.

Conversion of his property, not permitted, 829.

case distinguished from that of lunatic, and why, 829.

but since late Wills Act, see 831.

mortgage, &c., paid off out of his

money, considered personalty, 830.

timber cut, preceeds with accumulation remain realty, 829.

except perhaps where he is tenant in tail, and why, 830.

but necessary outlay for realty thrown on personalty, 830.

e. g. keeping up house, option to purchase at given price, repairs, ib.

seisin changed from ex parte maternâ to ex parte paternâ, on renewal of lease, 831.

Debts, confirmed by, after attaining majority, 776.

contracted by, for necessities, 485.

Deed, his delivery of, its effect.

Disability of, how remedied, 36.

See *Trustee Act*; and as to settlement of infant's estate on marriage, see 18 & 19 Vict. c. 43.

Discretion, he has not any legal, 36.

Elect, cannot, 816.

Executor, when he might formerly have acted as, 36; have appointed, 25.

Feoffment by, not void, but voidable, 27.

by custom of Kent, infant of 15 years may make for value, and semble without, 27.

Fine of. See *Fine, Recovery*, inf.

Fraud, may not practise, 39; and see 373, 775.

Gift to, presumption that he takes beneficially, 39.

Guardian to a minor, he cannot be, 36.

Laches, of his trustee, in not prosecuting legal right whether barred by, 720, et seq.; see 744.

Liable, not personally, to trustee for expenses, 563, note (x).

Limitation of suit. See *Limitation, Stat. of, Mesne Rents and Profits*, inf., and 754, note.

Mesne rents and profits, may file bill for account of, on legal title, 753, 755, notes.

account barred unless brought within six years after majority, 755, note.

carried back to accruer of title, 754, note.

but where defendant ignorant of true character as trustee only to filing a bill, 751.

Ministerial acts, he may discharge, 36; e. g. as lord of manor he may give effect to custom.

INFANT, *continued*.

- Payment to, by trustee, 372.
  - Power of attorney by, void, 37.
    - collateral cannot execute if requiring discretion, 36.
  - Receiver, he cannot be, 36.
  - Recovery of, formerly reversible only during nonage, 26.
  - Release, he cannot, 777.
  - Relinquishment, by trustee of office, he cannot consent to, 565.
  - Steward of manor, he cannot be, 36.
    - but acts by him in this character cannot be avoided, 36, note (c).
  - Tenant in tail. See *Recovery, Fines and Recoveries Act*.
  - Trust, how far he can create, 26, 27.
    - created by him would not be enforced to his prejudice, *semble*, 27.
  - Trustee, infant ought not to be appointed, 35; substitution of new trustee for, 895, note (m).
    - how infant conveyed under Trustee Act, 835, note (u).
    - for infant, how he may purchase trust property, 465.
  - Will, cannot make, 27; formerly might of personalty if 14 years of age, *ib*.
- INFORMATION. See *Duties*.  
 c. q. t. may require as to state of trust, 599; see 427.
- Ordinary remedy for breaches of trust as to charities, 779.  
 where an information proper, and where a bill, *ib*., note (b).
- adwoson where vested in trustees for parishioners, information improper, 107.
- corporation against, for removal of governors dismissed with costs, 493.  
 but where mal-administration of property court interposes, *ib*.; and see 31.
- INHABITANTS,  
 Election of clerk by. See *Parishioners*, 107, 108.
- Of a place, trustees required to be, 711.
- INJUNCTION,  
 Breach of trust, c. q. t. may have against, 723.  
 where co-trustee should apply for, 317.
- Improper sale, whether c. q. t. may have against, 422.  
 whether mortgagor, 423, note (w).
- Lands abroad, from taking possession of, 48.

- Payment into court, notwithstanding injunction, 869.
- Timber as to, 753, note.
- Waste where tenant for life threatens, trustee to preserve should apply for injunction, 408.

## INQUIRIES,

- Assignee of equitable interest should make, of trustee, 605.
- c. q. t. by, trustee must answer, 427; and see 599.
- Charity commissioners by, 784; see 779, 783.

INQUISITION, 132, 677. See *Alien*.INSOLVENCY. See *Bankruptcy, Insolvent*.

- Debts, trust for, how affected by insolvency, 475.
- Equity to settlement of feme covert as against assignees, 369.
- Limitation over, on or until, 135, et seq.
  - person cannot so limit over his own property, 136.
  - except to extent of portion received with wife on marriage, *ib*.

Maintenance, trust for, at discretion of trustees how far assignees take under, 133, 134; and see 597.

Proof under. See *Bankruptcy* (Proof).Trust estates, where they pass to assignees on trustee's insolvency, 278.  
 See *Bankruptcy* (Trust Estate).

## INSOLVENT,

- C. q. t. tenant for life, goods left in his possession not forfeited, 594.
- Co-trustee, whether necessary party to suit, 848; whether representatives of deceased are solvent co-trustees, 847.
- Judgment against future property, effect of, 29.
- Property of, up to final discharge vests in assignees, 29.
- Trust, how far he can create, 29.
- Trustee, insolvent is not absolutely disqualified from being, 40; but see 711, and note (g).
- his insolvency a ground for appointing receiver, 870.

## INSPECTION,

- Accounts of c. q. t.'s right to, 599.
- Vouchers of, 428.

INSTRUMENTAL TRUSTS, 21.

## INSURANCE,

- Company, shares in, given in succession should be converted, 812.
- Executor held not liable for omitting, against fire, 332; see *Trustee*, *inf*.



**INSURANCE, continued.**

Fines, for renewal, payable out of rents, as to insurance, 391.

Mortgagee not allowed for, in absence of stipulation, 516.

Statute, 14 Geo. III. c. 48, does not prohibit on life of A. in name of B., when both names appear on policy, 136.

Trustee, whether he should insure against fire, 516.

when liable for omitting to maintain policy, 764.

his lien for premiums, &c., advanced for, *ib.*

**INTENTION,**

will, if possible, be carried into effect in trusts, 100, 103; and see *Voluntary Assurance*.

will not control the operation of the Statute of Uses, 246.

**INTEREST,**

c. XIII. s. 4, p. 358. See *Investment*.

c. q. t. receiving on improper loan, where estopped from charging trustees, 776; *conf.* 769.

Charged against assignees, executor, receiver, trustee, &c., for moneys improperly retained by them, 358, 359; see as to retainer of charity funds, 502.

no excuse that money was not used, 359.

but delay may be explained by mistake, *ib.*; and *conf.* 790.

executors, from what period charged, 364.

not on money that never came to hand, 365; and see 329, *Rate, Trade, inf.*

Compound, charged where accumulation directed, 364; and see *Trade, inf.*

Costs, interest on, not allowed to trustee, 558.

Debts on, what allowed under trusts for creditors, 489; see *Debts*.

Fines for renewals, what interest charged in contribution for, 397.

Mesne rents and profits, not charged on account of, 752.

nor where purchase by trustee set aside, 466.

Proof for, by c. q. t. on bankruptcy of trustee guilty of breach, 771.

Rate of, £4 per cent. charged usually where simple retainer, 361, 362.

£5 per cent. where direct breach &c., 362; and see *Trade, inf.*

Trade, money employed in, by trust-

tee; c. q. t. has option of £5 per cent. or actual profits, 319, 361. whether with rests, 362, 363; and see *Trade*.

money lodged at bankers' in trustee's name considered so employed, 361.

**INTESTACY,**

C. q. t. of, as to personal estate without next of kin, executor entitled, 324.

as to fee, without heirs, whether trustee entitled, 321, *et seq.*

Mortgagor of, in fee, without heirs, mortgagee entitled, subject to mortgagor's debts, 322, 679.

Of purchaser of fee, without heirs after purchase money paid, but before conveyance, vendor keeps money and estate, 322.

Trustee, when he should avoid, as to trust estate, 265, *et seq.*

**INTESTATE,**

Trustee not within Lord St. Leonards' Trustee Act, s. 10, 838, note (*d*).

**INTIMIDATION.** See *Terror*.**INTRUDER,**

not bound by a use, 3.

**INTRUSION,**

may be of a trust, 621.

**INVENTORY,**

when desirable, 244.

trustee neglecting, may be deprived of costs, *ib.*

**INVESTMENT.** See *Receipts*.

*Construction of particular expressions, as*

"to call in securities not approved of by executors," 329; such securities as trustees may approve, 345; "consent of tenant for life," "of wife" to loan to husband, 340; see 339; "convert with all convenient speed," 329; "to lay out at trustee's discretion," 338; "to employ" 340; "to lay out on such good security as trustee can procure, &c.," 338; government or good securities, 353; and see 341, 342; "to place out at interest, or other way of improvement," 340; "to call in and lay out at greater interest," 341; trustees "required," 339, 349.

*Court of Chancery,*

Bank annuities, sometimes refuses to sell out for investment on mortgage, even where express power, 346.

Mortgage, does not call in, without previous inquiry whether advisable, 355.

INVESTMENT, *continued.*

Personal security, will not invest on, even where express power, 338; see 343.

Selects for investment £3 per cent. consols, 351; sometimes (on account of time of payment of dividends) allows £3 per cent. Red., 354.

*Duties, &c., of trustees as to investment.* See *Conversion, India.*

Bank private, trustees may invest for temporary purposes to trust account, 330, 332; but not otherwise, 336; and see 357, 361.

Call in, trustee should, personal property outstanding, 327, 328; see 329; on hazardous security, 543.

Consols or bank annuities, should not sell out to invest in irregular funds, 353.

Control, must not put money out of his own, 334; must not put money under control of co-trustee or co-executor, 316, 357.

Inquiry, should make due as to value of security, 345, 349, 350. as to reversion, 350.

as to title of borrower, 345; and see 349.

Lend, must not, to co-trustee, 338, 345; conf. 329.

Mix, must not, trust property with his own, 332, 337; see 759; or with stranger's, 350.

Part with trust money, should not, except on delivery of security, 351.

Power of investment, must construe strictly, 340; see 346.

where no express power, trustee should invest in £3 per cents., and execute declaration of trust, 351.

especially where successive estates, 352; see 812.

except where other premises specifically bequeathed, 354, 809.

Productive, should make trust fund, 336, 337; see 357, 358.

Receipts, whether power to give implied by trust for investment, 523. See *Receipts.*

Solicitor, trustees should not, when lending, employ borrower's solicitor, 358.

Tenant for life, trustees must not favor at expense of remainderman, 339, 344, 352; and see 343, 346, 348, 415, 421, 808.

Trade, must not invest in, or specu-

lation, 319, 340; see 361, et seq., 760.

Varying securities, power of trustees as to, 523; see *Receipts*, sup.

*Liabilities incurred by improper investment or non-investment.*

Capital, as to, where money improperly retained.

(a) where no direction to invest, 353.

(b) where express direction to invest in funds, and neglect so to do, 355; and see 357, 764.

(c) where direction to invest in funds or real security, 355, 764.

when stock improperly sold, 356, 772; and see *Conversion (implied and tortious).*

Interest, as to, c. XIII. s. 4, p. 358; see *Interest.*

*Securities, particular kinds, whether authorized.*

(a) Generally,

Annuity with policy, 341; bank or government annuities, 351; bank, private, 336; bank stock, 341, 352; copyholds for lives, 350; East India Company, securities of, 355; exchequer bills, 342, and note (t); foreign bonds, &c., 329, 812; funds, 342; government securities, 341, 342, 353; Greek bonds, 342; judgment, 350; leaseholds for lives, 349; for years, ib.; long annuities, 340, 350, 352, 810; Mexican bonds, 329; mortgage, see inf.; real securities (as to second or joint, 350); navy £5 per cents., 353; personal security, inf.; public securities, 352; purchase, 349; railway mortgages, 345; reversion, 350; shares of canal, insurance, railway, &c., companies, 812; South Sea Stock, 341; stock of private company, ib.; £3 per cent. consols, 351; £3 per cent. reduced, 354; £3½ per cent., 340; tolls and road bonds, 346; trade, 340; and see *Trade.*

(b) Personal,

executor should call in investments on, 328, 329.

trustee should not invest on; and see instances, 337, 338.

unless where express authority, 338; what equivalent to such authority, see 338, 341. See *Court, Trade*, sup.

INVESTMENT, *continued*.

whether on bank stock, &c., 341,  
note (p); exchequer bills, 342.

## (c) Real,

1. where not expressly authorized,  
quære, whether trustees may  
invest upon, 342, 343; and  
see 523.

not where express direction to  
invest in the funds, 344; and  
see *Court*, *supra*.

2. where expressly authorized,  
trustees may retain existing  
mortgages, if sufficient, 346;  
and see 329.

trustees may sell out stock, and  
invest on mortgage, 344, 346.  
should not do so for mere ac-  
commodation as to secure  
equal amount of stock and  
interim dividends, 344.

secus, where security for equal  
amount and interim inter-  
est, *ib*.

3. what property it authorizes.  
not loans on railway mortgages,  
345.

nor on leaseholds for lives, with  
policy, 349; (secus as to lease-  
holds renewable for ever, *ib*.)  
nor personal security with judg-  
ment entered up, 350.

qu. as to leaseholds for years,  
349; reversion, equity of re-  
demption, joint mortgage,  
350.

when it authorizes road bonds  
and mortgages of tolls, 346.

when mortgage of real security  
in Ireland under 4 & 5 W. 4,  
c. 29, 347.

purchase, 349; and see 421.

4. generally,

trust, how kept out of sight on  
mortgages and transfers, 346,  
347.

IRREVOCABLE trusts, 481, et seq.  
See 101, *Debts*.

IRELAND. See *Jurisdiction*.

lands in, within Lord St. Leonards'  
Trustee Act, 835, note (s).

as to Trustee Act, 1850; see s. 55,  
901, note (c).

partition of lands in, not decreed  
here, 50.

semble, unaffected by Thellusson Act,  
120.

"ISSUE." See *Executory trusts*.

construed in articles, where to mean  
first and other sons, 147.

distinguished from heirs of the

body, 155.

Includes daughters as well as sons,  
149, 156.

Purchase, a word of, not of limitation,  
156.

## JOINT,

Account, payment to, 330; money  
belonging on, 347.

Contract, effect of disclaimer as to  
237.

Co-trustees, their joint and several  
liability for breach of trust, 767,  
772.

exercise joint office, 298. See *Co-  
executor*, *Co-trustee*.

JOINT TENANT. See *Copyholds*,  
(Fines).

Devise to two as joint tenants, where  
one an alien, 39; and comp. 73.

Forfeiture by one joint tenant, of  
chattels, 260.

Renewal of lease by, 218.

## JOINT TENANCY,

Construed in articles, tenancy in  
common, 152.

secus in executory trusts in wills,  
163.

except where testator provides  
for children or puts himself  
in loco parentis, 164.

Implied, in equity, where purchase  
by several contributes equally,  
201.

secus where contribution unequal,  
202.

not implied in advance on mort-  
gage, 201, or in partnership,  
202.

whether implied at law by grant to  
two and survivor and heirs of  
survivor, 251; whether on a  
devise, 252.

Minors between, whether it can be  
severed, 152.

## JOINTURE,

power to charge not authorized in  
executory trusts by "usual pow-  
ers," 165.

JUDGMENT. See *Bond*, *Decree*.

Charging order of stock, shares, &c.,  
under 1 & 2 Vict. c. 110, s. 14,  
670.

3 & 4 Vict. c. 82, s. 1, 670,  
note (l).

by whom and when made, 670,  
671.

its effect, 671.

Effect of, in equity.

as to trusts by *fi. fa.*, 648, 662.

by *levari facias*, 649.



JUDGMENT, *continued*.

- by *elegit*, 649, et seq.
- (a) cases in which judgment creditor has remedy in equity, after death of conusor, 663.
- for redemption of mortgage, 650.
- for removing legal impediment, 650, 658.
- against equitable interest, 650, 651, 652, 658, note (v); whether as against assignee of owner of equitable interest, 653.
- money to be laid out in land, 796.
- whether against land subject to trust for conversion, 653.
- vendor's interest after contract for sale, 654.
- surplus proceeds under trust for sale, or power of sale in mortgage, 656; see 657.
- under 1 & 2 Vict. c. 110, 656, 666.
- against mortgagee, 657, note (t).
- (b) how equity facilitates by sale, 658; see notes (v) and (w), 663, 664.
- (c) how much of estate taken in execution,
  - formerly moiety of trust, 658, 659; see note (y).
  - entirety of equity of redemption, 660.
  - trust by way of mortgage, qu., 661.
  - now entirety under 1 & 2 Vict. c. 110, s. 11, 666.
- (d) when *elegit*, &c., must be sued out, 662; and see note (i).
- Effect of, at law,
  - at common law, 646; under Statute of Westminster, 647.
  - execution at law of trust estate, under Statute of Frauds, 664; under 1 & 2 Vict. c. 110, s. 11, 666, 669.
- Insolvent, entered up against, 29.
- Late statutes, relating to,
  - 1 & 2 Vict. c. 110, 666.
  - 2 & 3 Vict. c. 11, 668.
  - 3 & 4 Vict. c. 82, 669, 670, note (l).
  - 18 & 19 Vict. c. 15, 669; see 657, note (t).
- Register county, priority of judgments as to lands in, 672.
- Registration and re-registration of, 668, and note (e).
- old law applicable, as to purchasers without notice of registered

judgment, 668.

purchaser, &amp;c., not bound by unregistered judgment, 669.

Searches for, 668.

Tacking, 660; see note (b), and 662.

Trustee's estate, judgments bind, 279.

but c. q. t. will be protected, ib.

## JUDGMENT CREDITOR,

Postponed to prior equitable mortgagee, 280, and note (y).

Purchaser for value, judgment creditor is not, ib.

Taking trustee's legal estate in execution bound by trust, 261, 280.

JURISDICTION. See *Abroad, America, Demerara, Ireland, West Indies, Scotland, Sicily, Trustee Acts*.

equity can enforce trust of personal property out of, if parties within, 47.

equities of lands out of, if parties within, and if no obstacle to execution of decree, 47; not if such obstacle exist, 49.

case where *lex loci* does not permit equitable estate, nor limitations of legal estate, 53.

trustee on voyage to India not out of, under Lord St. Leonards' Trustee Act, 838, note (e).

## JUROR,

c. q. t. of lands, when qualified to be, 592.

## JUS DISPONENDI,

of c. q. t., 21, 595, et seq.

## JUS HABENDI,

of c. q. t., 21, 585, et seq.

## KENT,

custom of. See *Infant*.KING. See *Crown*.KNIGHT OF A SHIRE. See *Member of Parliament*.LACHES. See *Acquiescence*.Bar from, to relief in equity, 373, 741, et seq. See *Limitation*.

account restricted to filing of bill, 756, note.

constructive trust to, 224.

impeaching fraud of executor to, 459.

resulting trust to, 207.

setting aside trustee's purchase, 470.

Not imputable to persons in distress, 471; and see 737.

or in ignorance, 471.

to remainderman of renewable leaseholds during life of tenant for life, 402.

LACHES, *continued*.

Trustee of, in enforcing covenant, 765; investing trust property, 764; insuring, 764.

shall not prejudice c. q. t., effect of the rule, 719, et seq.

LAND. See *Resulting trust*.

converted to be taken as money. See *Conversion*.

Discharged from trust where money has been raised, 428.

Tortiously sold by trustee, c. q. t. may require purchase of other lands of equal value, 763.

or may take proceeds of sale with interest, 764.

or present estimated value of lands sold, allowing for improvements, *ib*.

Trust money tortiously invested in, by trustee, may be followed, 206, 762, 763; but see 757.

## "LANDS,"

devise of will pass money to be laid out on land, 796.

## LAND-TAX,

of lunatic's estate, redeemable by sale of timber fit to be cut, 826.

## LAPSE,

of time. See *Laches, Time*.

## LAPSED LEGACY,

out of real estate. See *Legacy*.

LAWFUL TRUSTS, 22, c. vi. s. 1, p. 103. See *Unlawful trusts*.LEASE. See *Charities. Leasing, power of*.

Covenants, indemnity against, executor of lessee entitled to, 426; unless he has assented to bequest, *ib*.

trustee for sale cannot insist on where settlor is an assignee, 426; and see 223.

what inserted, when lease granted by devisees, or to executors, 425, note (*k*).

Duration of building, 510.

of husbandry, 508, et seq.

Trustees, their power to grant generally, 522.

not to or for benefit of themselves, 462, 505.

for sale cannot grant, 416.

LEASEHOLDS. See *Renewable Leaseholds, Renewals*.

Converted, they should be when bequeathed in succession, 808.

unless contrary intention can be collected, 809, et seq.

Power to purchase, 349.

Security, when authorized as, 349.

## LEASING, POWER OF,

Effect of in determining legal estate taken by trustee, 259; see 257. as to effect of trust for leasing, see 256.

"Usual power," is a, 164; so of granting building or mining leases where property requires, *ib*.; but see 165.

where inserted under executory trust, silent as to powers, 164.

LEGACY. See *Legatees, Residuary Legatee*.

Devised real estate out of, and which lapses or is void, sinks for benefit of devisee, if by way of charge, 179, 189, 193.

if by way of exception, results to heir, 193.

unless subject to residuary devise under 1 Vict. c. 26, s. 25, 195.

whether it can be passed under gift of residuary personal estate, 196, 197.

Executor may appropriate, 517; his assent to, 243, 426, 454; he may claim though he renounce probate, 234; in East Indies to, for trouble, may be disclaimed and commission taken instead, 547.

Heir to, will not necessarily rebut resulting trust, 181.

Limitation, Stat. of, when legacy is barred by, 744, note (*x*).

Sale of estate, charged with legacy not yet payable, 430.

LEGAL CHARGE. See *Charge, Purchaser*.

trust distinguished from, 18; and see 282.

## LEGAL ESTATE,

Assign it, trustee may, 262; but assignee bound by trust, unless purchaser without notice, 279.

Bankruptcy of trustee, how it is affected by, 273, and see 287.

assignees, if they take trust estate, are bound by trust, 280.

Burdens annexed to legal estate in trustee. See *Privileges, &c.*, *inf*.

Chattels, devolution of, to administrator or executor of trustee, 260; subject to trust, 279; and see *Execution, Executor, Probate* (*Prerogative*).

Curtsey, is subject to, in trustee, 260; but tenant by, bound by trust, 279.

Devise it, trustee may, or bequeath it, 262.

when it passes under general

LEGAL ESTATE, *continued.*

- devise, 262, et seq. See *Devise*.  
 when trustee should devise trust estate, 265.  
 whether devisee can execute the trusts, 268; as to leaseholds, see 267.  
 Disseisor of trustee is not bound by the trust, 287.  
 Dower is subject to, in trustee, 260, but dowress, bound by trust, 279.  
 Equitable, compared with, 44, 103.  
 Escheat, estate in trustee formerly subject to, *secus* now, 260.  
 whether lord taking by, bound by the trust, 280, et seq.  
 as to copyholds and customary freeholds, see 283, 284.  
 as to equity of redemption, see 284.  
 Forfeiture, estate in trustee formerly subject to, *secus* now, 260; see 286.  
 but the lord was liable to the trust, 280.  
 Heir, devolution of trust estate to, 260; bound by trust, 279.  
 Insolvency of trustee, how it is affected by, 278. See *Bankruptcy*, *sup.*  
 Judgments against mortgagee, against trustee bind trust estate, but c. q. t. protected, 278, 279; and see 280.  
 Outlawry of trustee, its effect, 287.  
 Privileges, &c., annexed to legal estate in trustee, 268, et seq.  
 e. g. he brings actions, 269; see 590, 591, proves in bankruptcy, presents to living, appoints steward, 269; pays admissions for copyholds, 272; liable to rates, 271; trading as trustee is amenable to bankrupt laws, 272; title deeds as to, 592.  
 whether entitled to vote for coroner, 269; see 592; not for member of parliament, 271.  
 Settlor, becoming re-vested in, will not defeat trust, 99.  
 Trustee in, c. xi. p. 246. See 512, 590, *Privileges*, &c., *sup.* *Uses*, *Stat. of*, *inf.*  
 (1) commensurate with trust if possible, 249; see 252.  
 legalestate, enlarged, 250; supplied in toto, e. g. by nature of trust for feme covert; by appointment of "trustee,"

"trustee of inheritance," by devise to A. as trustee, and nomination by codicil of B. "as trustee" in place of A., 250.

## (2) legal estate curtailed, from nature of trust, 252.

limitation in fee to trustees to preserve when cut down, 253.  
 fee where trustees take without "heirs," 251, et seq.

where given to trustees on partial trust, remaining interest executed by Stat. of Uses, 253, et seq.; see 252, 257, and Uses, Statute of, *inf.*

exceptions, e. g. where trusts for separate use intervene, 255, 256; trust for leasing, to raise money by sale, 256; discretionary powers in trustees, 257; *secus*, if such powers do not affect fee, 258.

late Wills Act, its effect on devises to trustees, 259.

Uses, Statute of, when legal estate executed by, in c. q. t., 246; partially, 252, 253.

special trusts are not within, 247.

e. g. under trust to "apply rents," "convey" estate, 247, see 252; "hold for separate use," 247, see 255; "pay rents," 247; see 252; "preserve contingent remainders," "raise money," "sell," 247—trustee takes legal estate,

*secus* where trust under deed "for A. &c., for her separate use," 247; to permit A. to receive, 248, see 252; copyholds "to be transferred," 248; or mere charge of debts, 248, see 251.

whether under trust "to pay unto, or permit to receive," 249.

## LEGAL POWERS,

distinguished from equitable, 525.

## LEGAL TITLE,

relief upon in court of equity; see 752, note (1).

LEGATEE. See *Legacy*.

Accounts may require inspection of, but no copy, 599.

Fraudulent sale of assets by, executor may impeach, 459.

Payment, may claim, when exclusively interested in legacy, 597; legacy to purchase annuity, *ib.*

Trust cannot be averred against, 59.



## LESSEE,

not prejudiced where purchase by trustee for sale set aside, 467.

## LETTER,

may prove declaration of trust, 63.  
how far parol evidence may be admitted to writer of, 64.

## LETTERS PATENT,

necessary for declaration of a use by crown, 59; see 24.

LEVARI FACIAS. See *Judgment*.

execution under, as to equitable estates, 649.

legal estates, 646.

writ of, from the crown, 646, note (1).

LEX LOCI. See *Jurisdiction*.

descent of trust is subject to, 680; see 681.

LIABILITY. See *Corporation, Co-trustees, Executor, Investment*.

c. q. t. of, who has concurred in breach of trust, 771; see 353, 392, 768, 846; for trustees' expenses, 562; see 873.

Feme covert, separate property of, 633, et seq., 639, 640, 642. See *Feme Covert*.

Husband of, for wife's breach of trust, 34; see 261.

Solicitor, of, for wilfully advising or concurring in breach of trust, 763, note (d).

Trustee, of, for breach of trust; see *Breach of trust*; for destruction of contingent remainders, 406, 409; 410; for improper sale, 415; for misrepresentation, 604, 847; for parting with fund after notice of incumbrance, 605; and see *Conveyance*.

LIFE. See *Tenant for Life*.LIEN. See *Mortgage (Equitable)*.

c. q. t., of, on property into which trust estate is tortiously converted, 756, et seq., 759, 763.

not against land properly sold for misapplication of proceeds, 428.

Creditor having specific lien, as to proof of debt by, 485.

whether he releases by executing trust deed for payment of debts, 486.

Joint tenant, of, for improvements, 202.

Judgment creditor, of, 689, 691.

Purchaser with notice of lien, bound by, 725.

Tenant for life of, who renews for contribution from remainderman, 398, 400.

Trustee, for expenses, 560.

who has renewed for improvements, 222, see 224; renewal, 222.

on policy for money advanced for premiums, 764.

persons employed by trustees have no lien upon trust fund, notwithstanding charges of expenses, 101, 561; and see *Solicitor*.

## LIMITATION,

*Generally*, how far,

chattels capable of, at law, by will, 104; as to deed, ib.

by way of trust, 104.

words of, how far required to create equitable fee under a will or deed, 141.

*Of suits in Equity*. See *Mesne Rents and Profits, Statutes of*, inf.

(a) by analogy to statutes, 731, et seq.

twenty years an equitable bar by analogy to statute of James, 733.

when time ran as against remainderman of equity of redemption, 733.

five years in case of fine by volunteer without notice of constructive trust, 733.

notwithstanding distress, ignorance, mistake, poverty, 733, note (z); see 737.

secus in case of concealed fraud, 734, note (b); and see 743, 754, note, and 756, note.

how defendants should plead statute, 734; and in case of fraud, 735.

(b) from inconvenience, 739, et seq.; as to charities, 787, et seq.

when parties dead, and vouchers, &c., lost, 739; see 741.

whether mere lapse of time a bar, 739, 741, 742.

(c) from laches in application to court, 741, et seq.

where alleged fraud, 460, 742; accounts between partners, 742.

purchase by trustee, or of reversion, 470, 741, 742, 776; specific performance, 742.

where there is a Statute of Limitation, 742, 743.

(d) from presumption, 735, et seq.; as to charities, 786; corporation, 790.

when raised, 735; ground of, 736; favoured in law, ib.

raised within twenty years where aided by evidence, 736; see 224.

LIMITATION, *continued.*

- secus where rebutted by evidence, 736; see 224.
- waiver and acquiescence distinguished, 737.
- not raised in case of ignorance, 737; weakened by distress, *ib.*
- not raised against a class as against individuals, 471, 738, 777.
- defendant cannot avail himself of by demurrer, 738.
- Statute of.*
- Generally,
  - apply as between c. q. t. or trustee and stranger, 719, 720.
  - claiming by adverse possession, 288, 720, 747; see 735, note (1).
  - purchaser with notice, 725; and see 722, 745 (as to volunteer claiming under trustee, see *inf.*)
  - even where c. q. t. is an infant, 720; and see 744.
  - do not apply as between c. q. t. and trustee in direct or express trusts, 719, 729, 745; see 748, 752 note (1), 763, and volunteers claiming under trustee, 745; and see 279, 724.
  - secus in constructive trusts, 729; see 733, 746.
  - charities, whether they apply to, 786; and see 749.
  - debts, how far applicable to trusts, for payment of, 484, 485, 747.
  - to charges for payment of debts, 746.
  - debts, whether executor liable for paying debts barred by, 520.
  - pleaded, how they should be, 734, 735; as to rents and profits, 751, 754, note.
- Late statute of, 743 et seq.; its effect as to,
  - Acquiescence, 743.
  - Arrears of rent &c., six years, 744; as to pleading statute, see 751, 754, note.
  - but in case of express trust c. q. t. may recover all, 748, 752, note (1).
  - or where subsisting term under which trustee may recover possession, 748, 749.
  - as to case of express trustee ignorant of his true character, see 751.
- Charities, whether within the Act, 749, 750, 786.

## Charge, 744, 746.

coupled with duty, 746; and see 747.

Constructive trusts, not saved by section, 25, 746.

Disabilities, 744.

Disseisor, 747; see 288.

Dower, arrears of, 755, note.

Express Trusts, what are within the Act, 743, 745 et seq.; and see 748.

Fraud, 743, distinguished from mere charge, 746; and see 747.

Interest, arrears of, 744, 748.

Lands, 743, et seq.

Legacy, 744.

Possession, effect of, 744; by one of several *cs. q. t.*, 748.

adverse, 747.

Purchaser, as against, 743, 745.

under marriage settlement, 745.

Remainderman, 745; see 722, and compare, 733.

Rents, see *Arrears of*, *sup.*

Residue or share of, 744, note (x).

Volunteer claiming under trustee, 745.

## LIS PENDENS,

effect of upon powers, 523, 544, 581.

See *Decree, Suit.*

trustee appointed during, should be sanctioned by court, 544, 582.

may during *lis pendens* solicit discharge by petition or motion, 583.

## LOANS,

trust for, 502.

## LONG ANNUITIES, 340, 352, 353.

where to be converted, 808.

when to be enjoyed in specie, 809, et seq.

LORD OF MANOR. See *Escheat.*

infant may give effect to custom, 36.

LORD CHANCELLOR. See *Chancellor.*

## LOST,

where part of trust estate is, how court makes appointment of new trustees, 244.

## LOTS,

whether trustee for sale may sell in, 423.

LUNATIC. See *Chancellor, Committee, Trustee Acts.*

Conversion of his estate made for his own benefit, 825, 826; otherwise not; see 828.

real estate sold for payment of debts, 826.

timber cut on estate *ex parte*

LUNATIC, *continued.*

- paternâ, applied to relief of estate ex parte maternâ, 826.
- proceeds of, applied to pay debts, redeem land tax, 827.
- not required, go to next of kin, 827.
- so when felled tortiously by stranger, 828, 829.
- should not be purchased for repairs, &c., (to serve committee's interest), where it might be cut, 828.
- personalty applied to bring action of trespass; to relieve charge on realty; for improvements; necessary expenses, e. g. repairs; renewal or admission fines, 827, 828.
- as to building farm-house, see 827, note (x).
- Conversion not suffered but where clearly for lunatic's benefit, 828.
- Deed of void, 27; feoffment voidable by heir, *ib.*
- Disability, how remedied where mortgagee, trustee, &c., 832, 895 note (m); and see *Trustee*, *inf.*
- Elect, cannot, 816.
- Fine or recovery by, valid unless reversed, 27.
- Heir of founder of charity lunatic, visitatorial power exercised by crown, 495.
- Trust declared by, court may set it aside, 27.
- but would not interfere against purchaser without notice, *ib.*
- Trustee, disability of; see *Trustee Acts*, and 16 & 17 Vict. c. 70; *Lunacy Regulation Act*, 1853, s. 137, et seq.
- Trustee Relief Act, repayment ordered to guardians out of lunatic's funds of expenses incurred for his support, 375, note (q), see p. 376.

## MAINTENANCE,

- Assignees in bankruptcy, &c., take under trust for maintenance, &c., of bankrupt, &c., 133, 134; see 598.
- Discretion of trustees, fund applicable at, 542.
- Infant may be allowed to by executor out of interest of legacy, 517.
- in what cases out of capital, 517.
- Power of, whether authorized by, executory trust silent as to powers, 164, note (x).
- Reference to ascertain whether pro-

per, 697.

Trust, for a special trust, 247.

## MAJORITY,

- of cs. q. t. cannot consent to trustee's relinquishment, 565.
- of co-trustees, 298. See *Co-trustees*.
- Transfer directed at their instance under Trustee Relief Amendment Act, 381.
- of creditors, whether they can sanction purchase by trustee, 464.

## MANDAMUS,

- to compel admission of trustee to copyholds, 324.

MANAGEMENT. See *Powers (General)*.MARRIAGE. See *Feme Covert*, *Feme Sole*, *Husband*.

- of eldest son justifies destruction of contingent remainders, 409.

- a valuable consideration, 745; to whom it extends, 406.

## MARRIAGE ARTICLES,

- construction of executory trusts in. See *Executory trusts*.

MARRIED WOMAN. See *Feme Covert*.

## MASTER,

- of school trust for finding, 501; and see as to salary, 502.

## MEETING-HOUSE, 497, 498.

## MEMBER OF PARLIAMENT,

- trustee cannot now vote for, 270; but c. q. t. may, *ib.*, and 593.

MEMORANDUM. See *Writing*.

- may prove declaration of trust, 63.

## MERGER,

- takes place where legal and equitable estates meet, if commensurate, 16, et. seq.

MERITORIOUS CONSIDERATION. See *Consideration*.

## MESNE RENTS AND PROFITS,

- Account of on equitable title, see 752, Note 1, Part I., at commencement, 752; Part II., 755.

- Charitable trusts in, extent of, 786, et seq.; and see 789, for limits adopted.

- compromise with attorney-general, 789.

- how affected by inconvenience, 787, et seq.; by mistake of trustee, 790; in case of parish, 791.

- Constructive trusts in, 224, 750, et seq.; see 752, note (1).

- prima facie from time when rents intercepted, 751, note (y); and 756, note.

- exception 1, if statute pleaded, only for six years, 751.



MESNE RENTS AND PROFITS,  
*continued.*

- 2, where defendant has no notice of plaintiff's title, only from filing of bill, 751, though plaintiff an infant (see 554, 555, notes), or defendant, (in fact) express trustee, 751.
- 3, where plaintiff guilty of laches only from filing of bill, 751. or from decree in great laches, 752.
- Express trusts in, from time when rents were withdrawn, 752, note 1, 748.
- secus where trustee ignorant of his true character, 751; and see *Charitable trusts*, sup.
- Form of order to account, 752.
- Person to account in first instance, assignee but without interest, 752.
- if assignee insolvent, trustee personally liable, 752.
- Purchase by trustee for sale on, 466.
- Relief bill for, followed by bill for account, 752.
- Renewal of lease by trustee, &c., on, 224.
- (a) on legal title where account independent of other relief, cannot be had in equity except where account complicated, plaintiff infant, or in case of mines or tithes, 753, note; qu. after death of person an account of assets, ib.; qu. timber, ib.; if had in equity, is confined to legal limit, 754, note.
- where former legal remedy has expired equity will not assist, 754, note; except where defendant at fault, 755, note; or fraud or mistake, 754, note.
- (b) on legal title where account is incident to other relief, cannot be had in equity, 755, note; unless plaintiff doweress or infant, ib.; or where plaintiff applies to equity to aid action at law, he may come back for account, ib.; or being obliged to come to equity on one ground and to avoid circuitry, ib.
- if had in equity, is confined to legal limit, 756, note.
- unless where defendant guilty of concealment, fraud, or misrepresentation, ib.

but if plaintiff guilty of laches confined to filing of bill, ib.

MILL. Suit to, 505.

## MINES,

account of profits of, may be sought on legal title in equity, 753, note.

MINING LEASE. See 504, *Leasing*, *power of*.

MINISTER. See *Chapel*.

MINISTERIAL, or instrumental trusts, 21.

MISCONDUCT of trustee ground for appointment of receiver, 870, 871. fixing him with costs; see *Costs*. for his removal, 711.

MISREPRESENTATIONS. See *Fraud*.

Liability of trustee for making fraudulent, 847; to purchaser of equitable interest, 604; making as to accounts, &c., 877.

Defendant by, where plaintiff kept out of estate by, account of rents from accruer of title, 756, note.

## MISTAKE,

Grantee does not take beneficially, where mistake of grantor, 178.

Ground, for refusing accounts of mesne rents, &c., against trustees for charities, 790.

for seeking account of rents in equity upon legal title, 754, note.

Presumption of release, mistake rebuts, 737.

Settlement rectified where mistake, 148, note (h).

Statutory bar, mistake does not prevent from running in equity, 733; but see note (z).

Trustee by mistake as to rights of parties is at his own expense, 365.

investing in bank stock instead of bank annuities, 342.

person assuming office of, by mistake, accountable as trustee, 244, 765.

## MIXTURE OF TRUST AND POWER, 22.

distinguished from trust to which power is annexed, ib., and see 526.

MONEY. See *Resulting trust*.

At home, 800, 804; see 823.

Bills and notes, distinction between and money, 758.

Deposited, may be in bank to trust account, 296.

Distributed, how it may be to creditors by assignees, 294; and see *Distribution*.

MONEY, *continued*.

Earmarked, when, 757, 758; see 275.

Followed in equity, where, 757, et seq.; mixed with trustees' money, 759; paid into bank to account of trustee, 760; into land even by parol, 206, 762.

Land, money to be laid out in, treated as land. See *Conversion*, c. q. t. may elect to take as money, 598; see *Election*. results on failure of purpose to executor for next of kin, 187.

Transmitted, may be through a bank, &c., 295.

Trust to raise, is a special trust, 247, and see *Legal Estate*.

MORTGAGE. See *Demerara, Equity of Redemption, Mortgagee, Mortgagor, Renewable Leaseholds*.

Assets, may be left outstanding on, by executor, 329.

Conversion of, into 3l. per cent. whether required where successive estates, 354.

Costs, dower trustee of mortgagor not entitled to, against mortgagee, 872.

Devise mortgage in fee passes under "Securities" for money, 264.

Executor or administrator may, make of personal estate, 453. with power of sale, 454.

Equitable, as to lands in Scotland, 48.

overrides subsequent judgment, 280, note (y).

Infant's realty of, whether relieved by his personality, 830.

Investment on. See *Investment* (real securities), in case of accumulations from charity estate, 504, 505.

as to value of security, &c. See 345, 349, 350, 351, 358.

whether trustees can release part of security, 521.

trust how kept out of sight on, or on transfer, 346, 347.

Judgment creditor, may redeem, 650; as to tacking, 660.

his right against entirety of equity of redemption, 660, 661.

against surplus proceeds under power of sale in, 656.

Limitation, Statute of, where equity of redemption barred by time, 733.

Lunatic's realty, relieved, of by his personality, 827.

Paid off, the heir of mortgagee is trustee for mortgagor who may present petition for re-conveyance, 836, note (x).

Power of sale in, who are assigns within meaning of, 420, 529, 530.

mortgagee may exercise without mortgagor's concurrence, 427. exercising covenants against his own acts only, 425.

mortgagor whether, he can restrain sale under, 422.

surplus under is real or personal estate of mortgagor according as sale takes place before or after his death, 808.

survives, 419.

Reconvey, by what description mortgage should, 595. See *Paid Off*, sup.

Suit for foreclosure or redemption necessary parties to, 842, 855, 856.

Tacking. See 660, 662.

Tenancy in common, implied in equity, on joint advance on, 201; see 202.

Trust to, will not authorize sale, 417; survives, 419.

to sell whether it authorizes mortgage, 416.

whether included in the word "trust," under Lord St. Leonard's Trustee Act, 836, note (x); see 882.

Trustees. See *Assets, Investment*, sup.

MORTGAGEE. See *Equity of Redemption, Mortgage, Mortgagor*.

Agent, &c., he may employ, 556.

Charge, whether he may buy in for his own benefit, 319, note (s). he cannot, for insurance in absence of stipulation, 516.

Disability of. See *Trustee Acts*.

Equity of Redemption, in fee, he takes (subject to mortgagor's debts), where mortgagor dies intestate without heirs, 322, 679.

Fee in, heir of, trustee for mortgagor, after mortgage paid off, 836, note (x).

he and his heirs, trustee for himself and his executors, 17, and see 799.

so where foreclosure, or release after his death, 18, and see note (1).

infant, &c., 835. See *Trustee Acts*.

**MORTGAGEE, continued.**

- Judgments against, 657, note (t).
- Proof by, in administration suit, bankruptcy or trust for creditors, 485.
- Purchase, he may from mortgagor, 465.
- Renewal of lease by, 218; see 221.
- Sale by. See *Mortgage* (Power of sale).
- Trustee, how far a mortgagee is to be so considered, 318, 516.

**MORTGAGOR,**

- Fee in dying without heirs and intestate, 322, 679.
- heir of, may require exoneration out of personalty, 799; but see *Mortgage* (Power of Sale), and 17 & 18 Vict. c. 113.

Notice with, of trust, should see to application of trust money, 365.

Trustee for sale, under Lord St. Leonards' Trustee Act, where equitable mortgagee has obtained decree for sale, 836, note (x), 837, note (f).

**MORTMAIN,**

Accumulations from charity estate, whether they may be invested (1) in purchase of land, 504, (2) on mortgage, 504, 505. See *Charity Commissioners*.

Charity trusts, of realty for, what formalities required for creating, 132.

Defendant bound to answer whether legal estate devised to him on secret trust for, 71, 73.

Devise upon trust to sell and pay part of proceeds to charity, how far avoided by, 182, note (i).

upon secret trusts for, whether void at law, or only in equity, 78 et seq.

Legacy to charity, charged on realty, 192 et seq.; see 195, note (x).

**MURDER.** See *Attainder*.**NATURALIZATION,**

act of, see 39, and note.

**NEGLECT,**

of trustee, as to calling in estate, 328; costs of trustees in case of, 876; investment, 337; legal proceedings, cause of, 558; to pay premiums, enforce transfer, 764; see 766.

**NEPHEW,**

advancement for presumed, 216.

covenant to stand seised extends to, 96.

**NEW TRUST,**

created without intervention of new trustees, 91.

**NEW TRUSTEES,**

Court of Chancery, appointment by. See *Trustee Act*, s. 32; *Trustee Extension Act*, s. 9.

application for, under Lord St. Leonards' Trustee Act, 713, 834, et seq.

under Trustee Act, 714; see *Trustee Act*, ss. 32, 37, 43, App.

under Bankruptcy Act, 714, et seq.

in case of charitable trusts, 716, 718, and note (b).

charity corporation, 716, 717.

appointed by court, cannot exercise arbitrary powers, &c., 712; but as to receipts, see 450.

court will not give to, power of appointing other trustees, 713; and see *Trustee Act*, s. 33.

how satisfied as to fitness of proposed, 712, 715, 895, note (p); and see 583.

appointment of by court, c. xxv., s. 1, p. 710.

where no trustee, or not proper number, &c., 710.

on bankruptcy, &c., death, marriage (of feme trustee), misconduct, opinions (of charity trustees), refusal to act, residence abroad, &c., 710, 711, and note (g).

where power to appoint which cannot be exercised, 713.

not from mere caprice of c. q. t., or misunderstanding of duty by trustee, 712.

c. q. t. in remainder may apply for, 710.

**Generally,**

breach of trust trustee should not retire in favour of one who intends to commit, 580.

charity where endowment does not provide for appointment, 408.

costs of appointment payable out of corpus, 582; and see *Trustee Act*, 1850, s. 51.

if no fund, then often paid by tenant for life, *ib.*; and see 584.

case of trustee removed for misconduct, 711.

directory power to appoint when trustees reduced to given number, 527, 580.

impartial exercise of power should be, 574.



NEW TRUSTEES, *continued*.

- ineffectual attempts to exercise, powers of old trustees remain, 581; and see 570.
- legal estate transferred without conveyance on appointment by court of trustees for charity, 717; and see *Vesting Order*.
- lis pendens*, after decree trustees should not exercise power without sanction of court, 544, 581; see 582.
- lost, when part of trust estate is, how court appoints, 244.
- powers, what exercisable by trustee appointed under power, 533; appointed by court; see *Court*, *sup*.
- severance of estate from powers, 535; of trusteeship relating to several estates, whether proper, 579.
- tenant for life who has sold or mortgaged his estate, whether he can exercise, 580.
- Number to be appointed; see 40, 41.
- court does not limit itself to original number, 575; see 895, note (*p*).
- two trustees retiring, appointment of single successor improper, 574.
- one of two retiring, appointment of co-trustee sole trustee improper, 577.
- appointment of one in place of several improper, 577.
- cases in which such appointment has been supported, *ib*.
- single trustee retiring should not appoint two successors, 574; unless authorized, 575, 576.
- Persons proper for office. See *Trustee* (who may be).
- should be within jurisdiction, 40, 576, 577; see 574, 710.
- c. q. t. or near relative undesirable, 40, 579; c. q. t. sometimes appointed by court, 579.
- fitness of, how shown, 712, 715, 895, note (*p*).
- Power to appoint, usual form of and suggested additions, 566.
- (a) Construction of,
  - "acting," 571, 578, and see 415, 449, 612; "incapable to act," does not extend to bankruptcy, and *qu*. whether to residence abroad, 574; "refusing or declining," includes "disclaiming," 571; or retiring after having acted, 572; "re-

fusing or declining or other," 578; "survivor," 570; "unfit," extends to bankruptcy and semble to residence abroad, 574; and see 710, 711.

trustee surviving testator may appoint new trustee in place of one who predeceased testator, 572.

power for tenant for life with consent of "surviving, continuing, or acting trustee" to appoint, how construed, 573.

(b) Mode of appointing under, where power to surviving or continuing trustees or trustee, and both, or the survivor, are to retire, two appointments usual, 578.

*secus*, where power to surviving continuing or other trustee, 578.

mode of vesting trust estate in new trustees, 568.

as to money in funds, &c., 568; see App. IV.

chattels real, &c., 568; see App. V.

freeholds, 568, 569; see App. VI, VII, VIII.

whether necessary to complete appointment, 567, 568.

(c) Trustee should see that power contemplates precise case, 570, 581.

## NEXT OF KIN,

c. q. t. dying intestate without leaving, 198.

Construed "nearest of kin," 707.

Entitled to undisposed interest of money to be laid out on land, 187. See *Resulting trusts*.

but not to undisposed proceeds of sale of land. See *Residuary Legatee*, 183, 197.

## NOTES,

may be followed in equity, 757, 758. See *Bank Notes*.

NOTICE. See *Purchaser*, *Volunteer*, Assignee of equitable interest by, 604; its effect, 92; see 280, note (*y*). How given to trustees, 605; and see 611, 612.

to one of several trustees good during his life, 609.

not after his death, 610.

to all trustees and all dying, 611.

time of giving, 612; and to whom (written or unwritten) it should be given, 612; and what it should state, 613.

NOTICE, *continued.*

where trust fund consists of share in company, 612.

fund in court, 613, 614. See *Stop Order.*

Priority of charge from priority of notice, 605.

as against assignees in bankruptcy in case of choses in action, 607.

whether doctrine applies to real estate, 605, 606.

whether second incumbrancer giving notice, but without making inquiries, preferred, 608.

want of, whether an objection to title, 612.

Purchaser, with or without. See *Purchaser.*

to one purchasing from executor, that debts are not paid, 357.

Recitals presumed from, 224.

Solicitor, implied notice by employing, 358.

Trustee of equitable interest should give to holder of legal estate, 327.

to, of paramount title, 325.

Voluntary assignment of equitable interest, whether it requires notice, 92, 280, note (y).

Will of, notice of its contents, 454, see 457.

## NUMBER OF TRUSTEES, 710.

See *Co-trustees, New trustees.*

only four allowed of bank annuities, except in special cases, 41.

what is proper, 40; and see 574, et seq., 577.

## NUMEROUS,

cs. q. t., when some may sue or defend for all, 851, 852.

## OFFICE,

of trustee, its general properties, c. XII., p. 289.

## OPERATION OF LAW,

Trusts by, distinguished from implied and constructive trusts, 140, note (1).

how affected by Statute of Frauds, 228.

constructive trusts; see *Constructive trusts.*

intention from, expressed or presumed, that grantee or devisee should not take beneficial interest, c. VIII. s. 1, p. 176; and see *Resulting trust.*

purchases in names of third persons upon, c. VIII. s. 2, p. 199; and see *Resulting trust.*

OPINION. See *Counsel.*

Charity commissioners of, its indemnity, 785.

trustees of chapel holding, contrary to those of founder, 497, 499, 711.

## OPTION,

to purchase whether exercise of effects retrospective conversion, 808, and see note (p).

## ORDER AND DISPOSITION, 277.

See 594.

"ORDERING AND DIRECTING," may raise a trust, 168.

## ORPHANAGE SHARE,

money to be laid out on land in favour of child formerly not brought into hotchpot, 797; see note (w).

OURLAWRY, 28. See *Forfeiture*; of trustee, 287.

## OVEY-PAYMENT,

by trustee, 373; and see 376, note (t).

## OVERSEERS AND CHURCHWARDENS,

how they hold property by parliamentary succession under 59 Geo. 3, c. 12, s. 17, 106.

not as corporation having common seal, 106.

Act extends to freeholds and chattels real, 106.

if held on trust exclusively parochial, 107; not otherwise, 106.

not to copyholds, 106; nor to land vested in existing trustees, 106.

## PAPISTRY ACTS. See 137.

purchase in contravention of, does not raise resulting trust, 203.

## PARAMOUNT,

title to trusts, notice of to trustee, 325.

## PARCELS,

by what description trustee should convey, 595.

whether trustee can be required to divest himself of trust estate in, ib.

## PARENT,

cannot urge meritorious consideration against child, 95, note (f).

## PARISHIONERS,

Acquiescence, whether bound by, 777.

Advowson trust of, enforced for by bill, not information, 107, and see note (y).

Breach of trust by, retrospective account not ordered upon, 791.

Clerk, election of, prima facie in trustees, 107; when in parishioners, 108.

PARISHIONERS, *continued.*

meaning of "parishioners and inhabitants," 108; of "chiefest and discreetest," *ib.*; of "rate-payers," 109.

vestry not usually the representative of a parish for an election, 109.

votes, whether women, children, and servants entitled to, 108.

PARLIAMENT. See *Index of Statutes; Member of Parliament.*

Act of, necessary for total alteration of scheme of charity, 499.

Resulting trust not implied in evasion of, 203.

PAROL EVIDENCE. See *Averment.*

Acceptance of trust, admissible on question of, 243.

Advancement, how far it may prove or rebut presumption of, 214, 215.

Crown not admitted to prove declaration of trust by, 24. See *Pension.*

Disclaimer, whether it may be by, 236. See 234, 235.

Election, whether it is sufficient to express, 824.

Executors, how far admitted against title of executors to residue, 59. See *Executor.*

Investment of trust money on land, admissible to prove, 206, 762.

Purchase with another's money, admissible to prove, 204.

how far on purchase by agents, *ib.*

Resulting trust not rebutted by, when devisee or grantee is expressly made trustee, 68, 182.

secus if arising from mere presumption, 181.

on purchase in name of stranger may be rebutted by, 206. See *Resulting trust.*

whether admissible against defendant's denial by answer, 205; whether after his death, 205, 206.

Trust is inadmissible to prove, since Statute of Frauds, 178; see 60, 62, 65, 600.

(where admissible to rebut, 181, 205, 206, 214, 215.)

secus in case of chattels personal, 61; but in case of a will, see 66.

## PARTIES,

In suits respecting trusts, c. xxix. s. 1, p. 841.

*Generally.*

General practice, 841, et seq.

under 30th order of 26th Aug. 1841, where trustees under devise may represent *cs. q. t.*, 852, 853.

under 32nd order of 26th Aug. 1841, as to plaintiff having joint and several demand, 853, 854.

under Chancery Amendment Act, rules of, s. 42, 854, 855.

where, under rule 9, trustees may represent *cs. q. t.*, 855.

under s. 47, as to real estate in trustees by devise, 856, note (m).

under s. 51, court may adjudicate in presence of some only of parties interested, as to portion only of trust estate, and without taking accounts, 856; and see 865.

under Trustee Relief Acts. See *Trustee Relief Acts.*

Bank. As to making the bank a party, 33, note (n), 859.

Order and manner in which trustees and *cs. q. t.* ought to appear on the record as plaintiffs or defendants, c. xxix. s. 2, p. 856.

Trustee in suit for determining equities, should see that proper parties are before court, 368.

*Suits between Parties interested, inter se under trust*, 845.

(a) As to *cs. q. t.*, general rule; all *cs. q. t.* necessary, 845, 849.

*c. q. t.* abroad, how suit may proceed, 849.

entitled to aliquot share of ascertained fund, whether other *cs. q. t.* necessary, 850.

having assigned his interest unnecessary, *ib.*

*cs. q. t.*, numerous, where some may sue or defend for all, 851.

*c. q. t.* standing out process, how suit may proceed, 850.

suit by trustee to recover funds, *cs. q. t.* unnecessary, 851, 852.

recent variations in practice, whether 30th order of 26th Aug. 1841, applies, 853.

as to rules of Chancery Amendment Act, s. 42, and particularly rule 8, see 854, 855.

(b) As to co-trustees, general rule: all co-trustees necessary, 845.

even though future suit necessary to adjust equities between co-trustees, 845, 846; see 768; or though co-trustee insolvent, 848; trustee becoming bankrupt, 854;



PARTIES, *continued*.

so third party, who by reaping benefit of trust becomes quasi co-trustee, 846; see 768, 771.

exceptions:

purchaser without notice, 846; or stranger dealing with trust fund without notice, and who has parted with fund, 846; trustee of outstanding term or mere equity, 848.

trustee who is mere agent, and whose authority revocable unnecessary, 848; so trustee who has assigned to new trustees, 848; or who has disclaimed, 847; trustee of mere equity or outstanding term, 848.

trustee guilty of fraudulent or wrongful act, co-trustees not necessary parties, 846, 847; e. g. in case of corporators' company, 847.

representative of deceased co-trustee, whether necessary, when co-trustee insolvent, 847; no party to breach of trust, 849; and comp. 853; not personally charged by bill, 849; relief waived, 847, but see 854.

trustee out of jurisdiction, or who cannot be found, how suit may proceed, 847, see 900.

where two classes of trustees, 849.

*Suits by or against Strangers.*

General rule, all cs. q. t. and trustees necessary, 841 et seq.; for modifications of rule, see 852, et seq.

Assignees of bankrupt, &c., sue or are sued without presence of creditors, 843.

Creditors. See *Real Estate*, inf.

Marriage articles, specific performance of, 844; and see *Settlement*, inf.

Mortgagee foreclosing,

mortgage to A. in trust for B., A. necessary, 841.

cs. q. t. interested in mortgage or equity of redemption, whether necessary, 842; and see now 855.

Mortgagor redeeming, 842; see now, 855.

Real estate in trustees for payment of debts, &c., whether cs. q. t. necessary, 843.

whether persons having specific charges on, 843.

under s. 42, rule 9, of Ch. Am. Act, 855; as to devise and effect of

(1) 30th order of Aug. 1841, see 852; (2) Ch. Am. Act, s. 47, see 856.

Representative specially constituted for all purposes, c. q. t. unnecessary, 844.

Settlement setting aside, cs. q. t. necessary, 855. See *Marriage Articles*, sup.

Specific performance,

if trustees contract as principals, cs. q. t. unnecessary, 844.

if as agents, principals are necessary, ib.

contract to convey to A. in trust for B., A. necessary, 842.

Term, trustee of, in annuity deed, when necessary, 842; see 848.

PARTITION. See *Ireland*.

cases of, excepted from Lord St. Leonard's Trustee Act, 339; see now, 894, note (c).

whether powers to "sell," "to sell and exchange," authorize, 417.

PARTNER,

Accounts by partners against estate of deceased partner when barred by laches, 742.

Jus accrescendi, excluded, 202.

Payment by trustees to, 373.

Renewing a lease is trustee for partnership, 218.

PAYMENT. See *Receipts*.

Assignees, by 294.

Bank, into, to account of trust, 296; where co-trustees, to their joint account, 330.

Instalments by, directions as to under Trustee Relief Act, 375, note (g), p. 376.

Legatee, when he may claim payment of legacy to buy annuity, or when accumulation directed, 597.

Trustee by, to agent, 372; comp., 294.

husband of feme covert, 627; infant, 372; partner, 373.

Trust money or charity of, to official trustees, 382.

PAYMENT INTO COURT,

*Compulsory.*

At the hearing, where made though not on motion, 868.

On motion, must be founded on admissions in answer, 865, 866, note (a).

but payments mentioned in answer may be verified by affidavit, 867.

answer must contain admission of plaintiff's title or probable title, 866.

**PAYMENT INTO COURT**, *continued*.

and this, upon the equity alleged by bill, sufficient, if defendant admits that he once received the money and has parted with it improperly, 866, 867.

or that he is debtor to trust estate, 868.

admission that he made interest amounts to receipt, 867.

but generally not ordered on admissions from which liability merely inferred, 867.

notice of, on whom it must be served, 865.

Parties, what must be before court, 864, 865.

Rise of stock where purchase money paid into court and invested, 467.

Share of fund when it may be ordered into court, 865.

Title sufficient if plaintiff have a partial title, 864; and he may move on a possible title if all parties before the court, 865; see 868.

*Under Trustee Relief Acts.* See *Trustee Relief Acts*, p. 375, et seq.

**"PAY THE RENTS,"**

trust to, not within the Statute of Uses, 247, 248; and see 252.

**"PAY UNTO, OR PERMIT AND SUFFER TO RECEIVE,"**

whether within the Statute of Uses, 249.

**PENSION,**

from crown to A., trust cannot be raised by parol for B., 57.

**"PER,**

assign in the," meaning of expression, 279.

**PERFECT,**

trust where under voluntary assurance, 81, et seq.; see *Voluntary Assurance*.

once created not subsequently defeasible, 99.

**PERISHABLE PROPERTY.** See *Wasting Property*; and 594.

**PERJURY**, 205.**"PERMIT AND SUFFER A. TO RECEIVE RENTS,"**

within the Statute of Uses, 248.

**PERPETUITY,**

cannot be obtained through medium of a trust, 103, 111, 132.

trust for accumulation must not lead to 110, et seq.

**PERSONAL,**

Contract with A., B., and C. jointly, effect of disclaimer by A., 237.

Estate of testator must, properly speaking, be such at his decease, 196.

gift of, will not pass undisposed of proceeds of sale of lands, *ib.*

unless proceeds directed to be taken as personal estate, *ib.*

or intention collected from will specially worded, *ib.*

secus where testator himself entitled to money, 807.

how far intention gathered from blending real and personal estate, 196; and see 183.

**Incapacity.** See *Feme Covert, Infant, Incapacity, Lunatic, Trustee Acts*.

Representative of trustee, bill against, for trustee's breach of trust, 765; and see *Parties*, 3.

entitled to proceeds of real estate to be converted, 807.

Security, assets must not be left outstanding upon, 328. See *Investment*.

**PETITION,**

Lord St. Leonards' Trustee Act, under, 839; as to service of, see 837, note (a).

Of right, whether open to the subject where the crown is trustee, 31.

Restraining order, for 860, 863.

Romilly's Act, under, 780, et seq.; see 782, 783.

Stop order for, 614, note (l).

Trustee acts, under, 896, note (t); 897, note (v); 903, note (c).

Trustee Relief Act, under, 378, note (y); 380 note (a); 381, note (b).

**PIN-MONEY,**

arrears of, whether recoverable, 644, and note (t); and see *Feme Covert*.

**PLEADING,**

Frauds, Statute of, whether it must be pleaded, 62. See 137, 138.

Limitations, statute of, how defendant avails himself of, 734, 735. as to accounts of mesne rents, &c., 751, 754, note.

Presumption in matters of, 738.

**POLICY OF INSURANCE.** See *Insurance*.

**POOR OF A PARISH,**

Limitation to, void at law, 44, 105, and see 836, note (w).

Trust for, good, 105; applied to education of, 501.

who take under such trust, 105; see note (k); and see *Parishioners*.

# POOR OR NECESSITOUS RELATIONS,

Gift to, how construed, 698, note (1).  
Power of distribution amongst, how construed, 698.

# PORCTIONS,

Power to charge not authorized in executory trusts by "usual powers," 165.

Time of raising, by trustee, 420; see 430.

# POSSESSIO FRATRIS,

of a trust, 618, 680.

# POSSESSION,

c. q. t. of, when a bar to Statute of Limitations, 744, 748.

where entitled as to chattels, 593;  
as to lands, 585, et seq.

his right recognized in equity only, 591.

Transmutation of, where necessary to the creation of a trust, 81; and see *Voluntary Assurance*.

Trustee for sale should not give up, before payment of purchase money, 424; whether receiver appointed if he do so, 871; comp., 351.

# POSSIBILITY,

in a trust assignable, 12, 600.

# "POST,

assign in the," meaning of expression, 279.

# POVERTY,

Laches, whether it will excuse, 471.

Presumption of release of right, its effect as to, see 737.

Statutory bar, it does not prevent from running in equity, 733.

Trustee of, whether ground for appointing receiver, 870, 871.

# POWERS. See *Appointed*; *Appointees*; *Appointment*; *New trustees*; *Feme Covert*; *Infant*; *Uses*.

Arbitrary, 526, 538, 694; and see *Court*, *Survivorship*, inf.

Assignment of estate, its effect on powers, mere conveyance of estate will not carry powers, 533.

new trustees appointed under a power take powers, 533.

appointed by court, whether they take special discretionary powers, 533; see 450.

they cannot exercise such legal powers as are unassignable, 712.

whether power will remain in trustee after alienation of estate, 534.

court may sanction severance of estate from power, 535.

Bare powers, and powers coupled with trust, distinguished, 526, 695; and see 22, 701.

Construction of powers, 527, et seq. to A. and his assigns, 529; to sell in mortgage, ib.

to trustee and his executors, 530; to A. and B. and their heirs, 527; to trustees and the survivors of them, 531, and see note (w); to trustees and survivor of them, 531, and see note (x); to executors, sons-in-law, trustees, trustees for the time being, 530; during continuance of the trust, 531, 532, and see note (z).

Court, its control over powers, 538, et seq. See *Imperative*, inf.

(a) court cannot interfere with mere discretionary powers, 538, et seq.

e. g. to advance legacy, 538; to approve A.'s conduct, 540; to pay annuity, 539; to purchase leaseholds, 541, but see 542; to sell at request, 540; to treat with creditors, 541.

nor where trust imperative, but mode of exercising it discretionary, 542.

e. g. maintenance of children at trustees' discretion; distribution of fund among testator's relatives; selection of objects of charity, ib.

whether trustees should state reasons for their choice, 543; see 542.

(b) court will interfere where fraud, misbehaviour, or trustees decline to exercise discretion, 543.

e. g. upon improper investment or improper leases, ib.

Decree in suit paralyzes trustees' powers, 524, 544.

secus as to mere institution of suit, 524.

Delegation of discretionary trusts not permitted, 296; see 449.

Directory explained, 527.

Disclaimer upon, continuing trustees may exercise special powers, 532, 533; and see 534.

Discretionary, 526, 701; see 22, 386, and *Arbitrary*, sup.

Distinguished, 524; and as to mixture of trust and power, see 22; and see *Gift*, inf., and 429.



POWERS, *continued*.

Executory trusts, what powers may be introduced under, 164, et seq.

Equitable distinguished from legal powers, 525.

may be annexed to estate or simply collateral, *ib*.

General powers of trustees, c. XIX. s. 1, p. 512.

trustee may do without suit what is compellable by suit, 513, 519.

as to advancement, 518, 519; alienation of charity estates, 515, and see 503, and *Sale*; appropriation of legacy by executor, 517; bill in parliament opposing, 515; promoting, 516, and see 494; debts admitting, 522, and see 487; compounding, paying, or releasing, 520, 524; improvements, 513, 514; insurance, 516; investment, see *Investment*, and 524; leasing, 522, see 416, and *Leases*; maintenance, 517; mortgaging, 416, 417, see *Executor* (powers); receipts, see *Receipts* and *Executor* (powers); reimbursements of expenses, 521; releasing, see *Debts*, *sup.*, and *Release*; repairs, 513, 514; sale, see *Executor* (powers); timber, as to, 515, and see *Timber*; varying securities, 523.

Gift, words of, distinguished from words of powers, 700.

Imperative, 526, 536, 694, 701, et seq. court will execute on failure or default of trustee, 696; and see 543.

where settlor has prescribed any rule, court adopts it, 696.

where no rule, equality is equity, 700; see 707.

in favour of what objects court will execute where immediate exercise is contemplated, 703, see note (*d*).

where immediate exercise is not contemplated, 704; where power testamentary, *ib*.; not merely testamentary, *ib*.; by deed or will, 705.

"next of kin," in favour of, construed "nearest of kin," 707.

"relations," in favour of, how construed, 705, et seq.; poor "relations," 698, note (1).

to whom donee of power may appoint, 705, 706; to whom court may appoint, 706, 707; whether

per stirpes or per capita, 706, 707, and note (*s*).

when to one of a class exclusively, 707, 708.

Implied; see *Implied Powers*.

Legal; see *Construction*, *Equitable*, *sup*.

New trustees of, appointing; see *New trustees*.

"Proper," what authorized by this term, 164.

Sale of, authorized under settlement by reference, 165; and see *Sale*.

distinguished from trust for sale, 429.

Selection of; see *Selection*.

Special powers of trustees, c. XIX. s. 2, p. 524; see *Assignment*, *Construction*, *Control*, *Disclaimer*, *sup.*, *Survivorship*, *inf*.

Strict, explained, 527.

Survivorship of, mere power to several does not survive, 536.

trust or power imperative survives, *ib*.

where given to trustees by name, *semble*, 538.

qu. as to arbitrary power annexed to trust, *ib*.

"Usual," 164.

Will to appoint by, contemplates those who answer description at death of donee, 170, 704.

PRACTICE. See *Answer*, *Bill*, *Costs*, *Information*, *Parties*, *Pleadings*, *Petition*.

Alterations in, 368, et seq.; 852, 854, 865.

Application to lord chancellor, when visitor of charity, by petition to great seal, 495.

Appointment of new trustees, 583. See *New trustees*.

Distringas, as to, 858. See *Distringas*.

Feme covert, having separate estate, as to, 633, 640, 858.

Payment of money into court, as to, 864. See *Payment of money into court*.

Receiver, as to, 869. See *Receiver*. Stop orders, as to, 613, 614.

Wilful default, account with, not ordered on further directions, 765. conf. as to interest, 359.

PRÆCIPE, equitable tenant to, 604.

PREACHER, gift to find a, 495; and see *Minister*.

## PRECATORY WORDS,

force of, 167.

will not create trusts where objects or subject-matter of trust uncertain, 168, et seq.

PRECAUTIONS to be adopted by trustee. See *Duties of trustee, Investment*.PREROGATIVE. See *Probate*.

## PRESENTATION,

trust to purchase in favour of a particular person within statutes against simony, 136.

trustee presents, but at discretion of c. q. t., 269, 318.

PRESUMPTION. See *Advancement, Resulting trust*.Bar from to relief in equity, 735, (see *Limitation of suits*); how far applicable to trusts for charities, 787.

Election of, by c. q. t., 823, 824.

Infant, gift to, presumption that he takes beneficially, 39.

Of law, may be rebutted by parol evidence, 181.

## PREVENTION,

of breach of trust; rights of c. q. t. in c. xxv. p. 710. See c. q. t.

PRINCIPAL. See *Investments (Liabilities)*.

has absolute property, factor has only special property, 275.

release of, discharges accessory, 777.

PRIORITY. See *Notice, Stop order*.

## PRIVATE,

Contract, whether trustees, &amp;c., may sell by, 422.

Trusts, 23; limits of their duration, 23; see 103, 111.

## PRIVILEGES,

of c. q. t., 592, et seq. See c. q. t. of trustee, 268.

## PRIVITY,

as applicable to cestui que use, explained, 3; where released as to trusts, 11.

estate, of, explained, 3, 18; extent of term "privity of estate," 18.

person, of, explained, 19.

## PRIZES,

taken in war, 25, 101. See *Crown*.

## PROBATE,

Duty not payable on proceeds of land to be converted into money, 807.

Prerogative, when required, 261; sovereign, will of private property of, not admitted to, 25.

## PRODUCTION,

Documents of, how trustees should

MAY, 1858.—51

covenant for, 425.

Vouchers of, trustee must make, 428.

See 599.

## PROHIBITION,

issued against spiritual court interfering in a trust, 20.

PROMISSORY NOTE, 338. See *Bill of Exchange*.

## PROOF,

bankruptcy in. See 269, *Trustee*, inf.

mortgagee, by, in administration suit, bankruptcy, and trust for creditors, 485.

Trustee, on bankruptcy of, 357; and see 771, 772.

## "PROPER POWERS,"

to tenants for life, what powers authorized by, 166.

## PROPERTY,

what may be subject of trust, c. iv. p. 45.

how far property out of jurisdiction, 47; and see *Abroad, Jurisdiction*.

## PROTECTION,

C. q. t. of. See c. q. t. (*Protection*), *Distringas, Payment into Court, Receiver*.Trustee, of. See *Indemnity, Trustee Relief Acts*.

## PROTECTOR,

Of settlement under Fines and Recoveries Act, 411, 412.

Consent of, to vesting order under Trustee Act, 885, note (1).

Disclaimer, how he must make of office, 237.

Special, whether one will be appointed of settlement, in pursuance of executory trust, 157.

Trustee he is not, in respect of his power of assent, 412.

## PROVING WILL,

an acceptance of trust, 239; but see 240.

## PROXY,

appointment of, distinguished from delegation of office, 297.

## PUBLIC,

POLICY; see 497. Securities, 352.

Trusts same as charitable trusts, their duration permanent, 23.

PUR AUTRE VIE. See *Copyholds* (for lives).

not within stat. de donis, and cannot be entailed, 603, note (1).

limited to one and heirs of his body, not a fee conditional, ib.

## PURCHASE,

Power to purchase by way of investment, 349.

**PURCHASE**, *continued*.

Resulting trust, where created by purchase in name of third person, 199 et seq. See *Resulting Trust*.

not when in name of child, &c., 207, et seq. See *Advancement*.

Trustees by, reversion of renewable leaseholds, 225.

Trustees for sale by, of trust property, 460, et seq. See *Sale*; *Tenant for Life*.

**PURCHASE MONEY**,

whether bound by judgments against vendor, 654, 656.

**PURCHASER**. See *Settlement* (Rectification).

Accidental damage to estate purchased, he must bear, but is entitled to improvements, 174.

Application of purchase money, where he must see to, 430, et seq. See *Receipts*.

C. q. t., purchaser is a c. q. t. sub modo, 175; see 799.

Charity estate, of, 503, 504. See 515, 782, note (*w*).

Chose in action of, from trustee bound by same equity as trustee, 729.

Dying intestate and without heir, after payment of purchase money, but before conveyance, vendor keeps estate, 322.

Equitable interest, of, must inquire of trustee as to prior incumbrances, 604.

must give notice of his own, 605; (and see *Notice*); how he takes priority, 729.

Equity to settlement of feme covert, as against, 370.

Heir taking as, see 17, 148, 680.

Judgment creditor, is not a purchaser, 280; and see 668, note (*d*).

Legal charge, purchaser bound by, whether with or without notice, 18, 282.

Lunatic or idiot, purchaser from without notice, 27.

Notice. See *Equitable interest and Legal charge*, *Lunatic*, sup.; *Trust and Use*, inf.

Security to solicitor for costs, set aside even as against purchaser, 550.

Trust, where bound by, purchaser of legal estate with notice bound, 725.

rule applies to constructive trusts, equitable incumbrance, or lien, 725.

to conveyance by fine, 224.

notice presumed from recitals, 224.

without notice, not bound, 725. See 224, 406, 469.

whether he can protect himself by getting in legal estate, 726.

with notice from purchaser without, not bound, ib.

without notice from purchaser with, not bound, ib.

in case of equitable interest, see 729.

but rule does not apply to charitable use, 726.

trustee selling to purchaser without notice, and then becoming owner, trust revives, 726.

whether purchaser bound by notice of doubtful equity, 727; of title long neglected, 728; and see *Chose in action*, and *Equitable interest*, sup.

Voluntary settlement of realty not good as against purchaser, 92, 93. See *Voluntary Settlement*.

**QUALIFICATION**,

of c. q. t. to be juror, 592.

**QUASI-TRUSTEE**,

person becoming, by reaping benefit of breach of trust, 768, 771, 846. See 244.

**QUEEN**. See *Crown*.**QUEEN'S BENCH**,

civil corporations visited by, 495.

**"QUI PRIOR TEMPORE**,

potior jure," 606; and see note (*g*).

**QUORUM**, 299. See *Co-trustees*.**RAILWAY SHARES**,

bequeathed in succession, converted into £3 per cents., 812.

**RATES**,

trustees liable to, unless where trustees exclusively for public purposes, 271, 272.

trust, in aid of, 496; in aid of church rates, 107.

**RATE-PAYERS**, 109. See *Parishioners*.**REAL**,

Estate in trustees for creditors, &c., what parties necessary for suit, 843, see 855.

Securities. See *Investment*.

**REALTY**,

effect of blending into one fund with personalty under a will, 183, 196.

**REBUTTER**,

of resulting trust upon advancement,



REBUTTER, *continued*.

214; presumption of law, 181, see 182; purchase in name of stranger, 206.

## RECEIPTS,

Agent or attorney of, 372.

Breach of trust; see *Trustee*, inf.

Charge of debts implies power of giving receipts, 433, 440.

who can give receipts in case of, 440; true principles, 448.

1. Devise to trustees; trustees and executors can sell together, 440.

whether executors have legal power and can pass the estate independently of trustees, *qu.*, 441; and see 443 and notes.

2. Beneficial devise, with charge of debts, 443.

devisee where executor also can make a title, 444.

and semble devisee, without concurrence of executor, can make a title, *ib.*

3. Where no devise of estate, 444.

heir cannot give good receipt, semble, and why, *ib.*

whether executor takes legal power of sale, 445.

executor takes equitable power of sale, semble, 445, 446, note (*r*).

and on his exercising it conveyance must be made by person having legal estate or under Trustee Acts, 446.

4. Simple devise which lapses, 447.

whether executor can take power of sale, *qu.*, 447.

5. Where estate subjected to various limitations, *ib.*

semble, executors take an equitable power of sale, 448.

Co-administrators on same footing as co-executors, 316.

Co-executor liable for joining in pro forma, 310, et seq.

unless his joining nugatory, 311, or ex necessitate, 314; and see *Executor*.

Co-trustees must all join in giving, 298, 330.

even co-trustee who has conveyed estate to the others, 449.

secus as to co-trustee who has disclaimed, *ib.*

co-executor, 310.

co-trustee joining in but not actually receiving, not liable, 304; secus where money improperly

raised, 306.

but joint receipt conclusive at law of actual receipt, 305; and see 313.

and involves onus probandi that co-trustee did not receive, 305; see *Co-trustee*, *Indemnity*, *Investment*.

Discharge of, 428, 430; see *Power of Giving*, inf.

Executor, where his receipt will discharge a purchaser, 453, et seq.; see *Executor* (Powers).

Executory trusts silent as to powers whether it authorizes power to give, 164, note (*x*).

Husband of feme covert, of, 627.

Infant, of, 372.

Liability for joining; see *Co-executors*, *Co-trustees*, sup.

Official trustees, of charitable funds of, 382.

Partner of, 373.

Power of giving; see 451, *Charge of debts*, *Executor*, sup., *Purchaser*, *Time*, inf.

1. Express, 430; see 331.

2. Implied, 431, et seq.

(1) By direction in power of immediate sale, 431; see 330.

e. g. when future distribution of proceeds directed, 431.

or *cs. q. t.* are infants, 432.

*qu.* as to *cs. q. t.* abroad, 432; see 453.

(2) By special trust annexed to purchase money,

e. g. trust for investment, 433; and see 523.

to pay debts, 434; debts and legacies, 435.

secus where for particular debts, 435.

or legacies only, *ib.*; as to legacies not yet payable, see 430.

Exceptions, purchaser is not indemnified (1) where collusion;

(2) after institution of suit; or

(3) where notice of intended misapplication, 436, and see 331, 458; (4) where sale not justified, 428.

Purchaser discharged by receipts of executors; see *Executors*, sup.

when by receipts of trustees, 430; see *Power of giving*, sup., and 428.

practical directions where several purchasers and no power to give receipts, 451.

principle of requiring him to see

RECEIPTS, *continued*.

to application, 430; new principle suggested, 452.

Time, purchaser from administrator or executor after lapsed, 458.

from trustee after lapse of, 436.

power of signing receipt a question of intention at date of deed or of testator's death, and not altered by subsequent events, 436, 437.

Trustees; see *Charge of Debts, Power of giving*, sup.

appointed by court, their power to give, 450.

assignee of, whether he can give receipts, 449.

breach of trust after, whether their receipts are good, 450.

who intend, *id.*, 331, 436.

receipts, they retain the vouchers for, 428.

sale, should see that it is justified, 428, 430; see *Sale*.

where no money passes to trustee, 451.

whether they must actually receive purchase money, 451; see 330, 422.

Varying securities, power of, whether it implies power to give receipts, 523.

## RECEIVE,

rents, whether trust to, identical with trust for possession, 588.

trust money, how trustees should, 296, 330.

## RECEIVER,

Appointed by court,

at instance of all *cs. q. t.*, but usual recognizances necessary, 869.

at instance of individual *c. q. t.*, 870.

where trust estate in danger from circumstances, or conduct of trustees, or unprotected, 870; see 871, note (*l*).

where executor drunken, &c., and in great poverty, 870.

executrix feme covert, and husband abroad, *ib.*

tenant for life of renewable leaseholds refuses to renew, 402, 722.

trustee of bankrupt or insolvent guilty of misconduct, waste, &c. or incapable of acting, 870.

where all trustees disagree or are abroad, *ib.*

not appointed on slight grounds, 870, 871.

*e. g.* where one co-trustee abroad has disclaimed, or is inactive, 870.

not generally discharged at mere instance of party procuring appointment, 871.

exception where new trustees, *ib.*

Direction to employ A. as, with proper salary, constitutes a trust, 101.

*secus* as to mere recommendation, 102.

Infant cannot be appointed, 36.

Interest, he will be charged with, for improper retainer, 359.

Salary, case of receiver appointed without, 590.

Time or trouble, he cannot charge for, 546.

Trustee cannot be appointed at a salary unless mere trustee to preserve, &c., 314.

## RECITAL,

Declaration of trust, it may prove, 63.

False, effect of, 875.

Notice by recital of surrender of former lease, 224.

Trustee executing trust deed should see that recitals are correct, 238.

## RECOMMEND,

may raise implied trust, 168, but see 102, 172.

RECONVEYANCE. See *Mortgage*.

## RECOUR,

right of trustee to, after making over-payment, 373.

## RECOVERY,

Equitable entail, its effect on, 601, *et seq.*

how it must have been suffered, 604.

Infant tenant in tail conveyed by, under Trustee Enabling Acts, 835, note (*u*).

Infant, of, formerly only reversible during nonage, 26.

Lunatic or idiot, of, formerly valid unless reversed, 27.

Trustees to preserve when they could have prevented, 404.

Vacation, could not be suffered in, 819.

## RECTIFYING,

settlement: see *Settlement*.

## REDEMPTION OF LAND TAX,

of lunatic's estate, may be effected from proceeds of timber, 827.

## REDUCTION,

into possession of feme covert's chose in action, 26, 370, 627, 628, 631.

**REDUCTION, continued.**

not where reversionary, 370, et seq., 628.

into possession of trust estate, c. XIII. s. 1, p. 326; and see *Investment* (Duties).

**REFERENCE,**

words of, creation of trusts by, 167.  
creation of powers by, 433, note (b).

**REFUSAL,**

of trustees to act, 710; and see 543, 696.

to convey or transfer, at request of c. q. t., 595, 600.

how remedied under Lord St. Leonards' Trustee Act, 837, see note (a); 838, see note (f).

how under Trustee Acts; see *Trustee Acts*.

**REGISTRY,**

Acts, as to register, counties, 672; ships, 203.

Decrees, judgments, &c., of, 667, 668, note (e); 669.

**REIMBURSEMENT,**

of trustees' expenses, 521; and see c. XX. s. 2, p. 557; *Expenses*, and 873.

**RELATIONS,**

Bequest to poor relations, how construed, 698, note (1).

Power in favour of, how to be executed by donee, 705; see 542.

on failure of trustees by court, 706; see *Powers* (Imperative).

Trust for, how construed, 170.

Trustees whether they should grant leases to, 505.

undesirable to have relations as trustees, 40; but see 789.

**RELATORS,**

necessary in information on account of costs, 779.

**RELEASE,**

Breach of trust from, by c. q. t., requisites of, 777, 778.

by feme covert or infant, 777.

C. q. t., by, in ignorance of his rights, 224.

Co-trustee, of one, discharges another, 773; secus as to bond not to sue, ib.; comp., 854.

Consideration, what sufficient for, 737.

Creditor of, by accepting composition, 486.

Debts, whether trustee may release, 520.

Equity of redemption of no value, whether trustee may release, 521.

Mortgage security, release of part,

whether trustees may make, 521.

Principal, of, discharges accessory, 777.

Seal under, its effect, and whether trustee may require, 373.

Trust from, how trustee can obtain, 289. See *Relinquishment*.

Trustee paying under direction of court not entitled to, 375.

whether trustees on payment to trustees can require, 374.

expense of release to trustees and by whom prepared, 375.

**RELIEF.** See *Trustee Relief Acts*.**RELIGION,**

Established, when court executes trust in favour of, 497.

**RELINQUISHMENT,**

of trust by trustee, how effected, c. XXI. p. 565.

(a) Consent, by, of all cs. q. t. if sui juris and in esse, 565, 566.

(b) Court, by application to, 582, and see 584.

by representative of deceased trustee, 584.

where no new trustee can be found, 582.

application, how made and costs of, 583.

when new trustee appointed on petition under Bankruptcy Act, 714; Lord St. Leonards' Trustee Act, 713, 834; Trustee Acts, 714; see *Trustee Acts*; and s. 36 of Trustee Act.

(c) Power by virtue of a, 566; see *New trustees*.

**REMAINDERMAN,**

Election, how far he is capable of, 818; see *Election*.

Equity of redemption of, when time runs against, 733.

Limitations, Stat. of, whether s. 25 abridges rights of c. q. t. in remainder, 722, see note (r); 745; as to receiver of renewable leaseholds, 402, 722.

Remedies of bill to have number of trustees filled up, 710, and comp. 368, 723, 733, 868.

Renewable leaseholds of, fines apportioned between him and tenant for life, 305.

leases not imputable to him during life of tenant for life, 402.

Trustee must not favour tenant for life at expense of, 339, 344, 348, 415, 418, 421.

**REMAINDERS, CONTINGENT.**

See *Contingent Remainders*.



## REMEDY,

c. q. t., of, is in chancery, 19.

not in common law court for breach of implied contract, 20.

nor in spiritual court, ib.

for breach of trust, see *Breach of trust* (remedy).

Trustee of (where breach of trust), against (1) c. q. t., 353, 392, 768, 771, 846; (2) co-trustee, 317, 767, 768, 845; and see 309.

where construction of trust doubtful, 367, 368, and 375, et seq.; see *Trustee Relief Act*.

## REMOVAL OF TRUSTEES, 710, 711.

## RENEWABLE LEASEHOLDS,

C. xiv. p. 383; see *Constructive trusts*.

Accumulations for renewal, who entitled to when renewal cannot be obtained, 392.

Copyholds vested in trustee, admission fines how raised, 402, 403.

Fines for renewal, whether out of annual rents or by mortgage, (a) where fund pointed out by settlor, 386, et seq.

as to leaseholds for years: how to be raised "out of rents and profits," 386; "out of rents and profits or by mortgage," 387, 388.

as to leaseholds for lives: whether to be raised out of annual rents and profits, 388, et seq., and see 391; payable out of insurance may be adopted, 391.

(b) where no direction by settlor, 393, et seq.

fine may be raised by tenant for life and remainderman, or one of them, 393; if they refuse, how far mortgage by trustee is feasible, semble application to the court necessary, ib.; see note (r).

apportionment of fines (if necessary), how made, 395, et seq. tenant for life and remainderman pay in proportion to their actual enjoyment, 397; see 387, 391, 400.

court will not act on speculative calculations, 395; but see case in same page.

proportion, how ascertained as to leaseholds for years, 397.

compound interest allowed te-

nant for life on his share, and for what period, ib.

tenant for life having had no enjoyment does not pay, 398.

how ascertained as to leaseholds for lives, 398, 399, and see 400 and 394.

contribution, how secured, 398, 400, 402.

if made by tenant for life he has a lien, 400, and see 398.

if made out of trust fund or by remaindermen, tenant for life gives security, 402; see 398, 400.

when by appointment of receiver, 402, 722; or sequestration of rents, 402.

but suit for compensation cannot be instituted till death of tenant for life, 402; until then remainderman not guilty of laches, ib.

Liability of trustees and tenant for life for neglect to renew, 392; see 769, et seq.

Obligation to renew, 383, et seq.

obligation not necessarily imposed where successive estates limited but no trustee, 383.

implied in articles for settlement, 385, 386.

whether implied by interposition of trustee, 384, and see note (l).

whether implied in marriage settlement, 385.

discretionary renewals, construction of, "it shall be lawful for trustees to renew," &c., 386.

Person renewing when a constructive trustee, 218.

Tenant for life entitled to fines paid by under-lessees, 392.

when regarded as a trustee, 402.

RENEWAL OF LEASES. See *Renewable Leaseholds*.

Lunatic, leases of, may be made out of his personal estate, 828.

Right of, trustee, &c., cannot sell, 220.

RENT. See *Mesne Rents*, *Renewable Leaseholds*.

Arrears of, what recoverable under Statute of Limitations, 744, 748.

Charity estate of, increasing surplus how applied, 198.

Grantee of, dying without heirs, rent sinks into land, 321.

Rack, 505.

"Raised, not to be," construction of as to charities, 506.

**RENUNCIATION.** See *Acceptance, Disclaimer, Executor.*  
of the trust not permitted after acceptance, 289.

**REPAIRS.** See *Expenses.*

Allowances for, when made by trustees, 513; upon setting aside purchases by trustees for sale, 466.

Infant's lands, upon, may be made out of his personalty, 830.  
so as to lunatic, 827.

Tenant for life, by, 514.

Trust for, a special trust, 247; and see *Legal Estate.*

repairing chapel, 496, see 501.

**REPUTED OWNERSHIP,**  
of chattels; see *Order and Disposition.*

**REQUEST,**

Order of court not considered as "request" of party, 839, note (g).

Power of sale at request, 540.

Purchase to be made at, 807; sale at, 419.

"REQUESTING."

may raise a trust, 167.

**REQUIRED,**

to lend, 339; to purchase, 349, and see 542.

**RE-SALE,**

of property purchased by trustees for sale, upon what terms ordered, 467; see 465, *Sale.*

**RESIDUARY,**

Bequest passes proceeds of lands, subject to trust for conversion, 807.

will not pass resulting trust of proceeds of sale of lands, 195.

unless such proceeds directed to be taken as personal estate, 196, 197.

where it passes void or lapsed legacy out of land directed to be sold, 196.

passes, accumulation void under *Thellusson Act*, 118.

Devise, whether it passes resulting trusts in real estate, 195; accumulation void under *Thellusson Act*, 118.

"Executor," 195.

Legatee, distinction between claim of and of next of kin to undisposed proceeds of sale of land, 197; and see 184.

takes under present law in case of bequest with insufficient declaration of trust, 68.

"RESIDUE," 195; within "legacy" in s. 40 of late *Limitation Act*, 744,

note (x).

**RESTRAINING ORDER,**

under 5 Vict. c. 5, s. 4; see *Distingas*, 860, 863.

**RESTRAINT,**

against alienation, 132.

against anticipation; see *Feme Covert.*

**RESULTING TRUST,** c. viii. p. 176.

*On Disposition of Legal but not of Equitable Interest.*

Arises (a) by expression of intention. e. g. on conveyance, grant, or bequest "upon trust" where trust is not declared vague or fails, 181; see 118.

parol evidence inadmissible to rebut, 182.

(b) by presumption; see *Implication*, infra.

whether on voluntary grant of whole estate to stranger, 177; see note (d).

conveyance to wife or son; an advancement, ib.

case of mistake or fraud, transfer of stock, or delivery of money, 178.

conveyance, devise, or bequest where trust declared of part of estate, 179; see *charge*, infra.

devisee or legatee, effect of relationship, 180; not necessarily excluded from beneficial gift by use of "trust," "trustee," ib.

parol evidence admissible to rebut, 181; see 178.

Charge distinguished from exception out of devise, 191; from partial trust, 179.

of debts on devise to A., no resulting trust, 179.

of legacy for charity, 192, et seq.; contingent or which fails, 190.

of sum to be appointed, and no appointment, 190.

"subject thereto," effect of, 191; when implied, ib.

Charities, in gifts to, 198; legacy for, 192; see *Charities.*

Failure of c. q. t. by, 197.

Heir, 176, 184; see *Heir, Land, Money*, infra.

Implication, when partial trust raised by, surplus does not result, 173.

Land devised on trust for sale, undisposed of proceeds result to heir, 182.

notwithstanding direction that proceeds shall be considered personalty, or that nothing shall

**RESULTING TRUST**, *continued*.

- result to heir, 182, 183, note (c); or blending of realty and personalty, 183, but see 196.
- whether as realty or personalty, 184; and see 118, 177.
- secus if resulting interest disposed of, what disposition sufficient, 194, et seq.; see 197.
- effect of blending realty and personalty: "personal estate," 196; "residue," "residuary executor," 195; and see 184.
- Money to be laid out on land, undisposed of interest results to executor for next of kin, 187.
- Parol evidence, when it may rebut resulting trust, 181, 182; see 178.
- Personal estate of for next of kin, effects of residuary bequest, 197.
- Purchase in cases of:*
  - (a) Purchase in name of stranger generally constitutes resulting trust, 199.
  - so on a joint purchase in name of stranger, 199, 201.
  - so tenancy in common is implied in case of joint loan, 201; or where two, possessed of mortgage term, purchase equity of redemption, 202.
  - in joint purchase where purchasers contribute unequally, 202; or in joint undertaking in trade, ib.
  - but where contribution is equal, joint tenancy is implied, 201; and see *Joint Tenancy*.
  - how far rule applies in purchase of copyholds for lives, 202; and as to personalty, 200.
  - rule does not apply to advance by A. not in the character of purchaser, 200.
  - nor to purchase in contravention of Papistry Acts, of ship, or for giving votes, 203.
  - Laches, resulting trust may be rebutted by, 207.
  - Parol, purchase is provable by, though otherwise expressed in purchase deed, 204; or against defendant's denial, 205, note (i).
  - or after death of nominal purchaser, semble, 206.
  - but evidence must be clear, 205; and see *Frauds, Stat. of*.
  - secus where purchase by agent and no money paid by employer, 204.
  - resulting trust may be rebutted by, 206.

subsequent declaration, effect of, 207.

- (b) Purchase by father in name of child, &c., implies advancement, not resulting trust, 207, et seq.; see *Advancement*.

**RETAINER**,

of trust funds by assignees, 359; executors, 358, 875, 876; receiver, 359; trustees, 358; of charities, 502.

**RETIREMENT**,

of trustee from the office; see *New Trustees, Relinquishment*.

**REVERSION**,

Laches, effect of, in suit to set aside purchase of, 742.

Mortgage of, 350.

Renewable Leaseholds of, how far trustee purchasing is a constructive trustee, 225.

**REVOCABLE**,

trusts, 25, 101, 481; see *Debts, nature of*, 483.

**ROBBERY**,

of trust property, 332.

**ROMILLY'S ACT**, 779, et seq.**RULE OF COURT**,

when with 1 & 2 Vict. c. 110, s. 18, 667, note (c).

**SALE**. See *Abroad, Purchaser, Receipts, Specific Performance, Voluntary Settlement, Trustee Acts* (petition).

Charity lands, of, 503, 504, 515, 782, note (w).

Contract for, raises implied trust, 174.

Decree for, person to convey under a constructive trustee, 839, note (l); comp. Trustee Act, ss. 29, 30; Extension Act, 5, 2.

Devise upon trust to sell passes the fee, 250; see 247.

Direction for in will raises a trust, 173.

Power of; see *Executors* (power), *Mortgage*.

implied where by charge, 251; see 257.

personal estate on deficiency of, 428.

partition is not authorized by, qu. whether by power to sell and exchange, 417.

usual in settlement, effect of, 417, see 421; whether exercisable unless trustees have another purchaser in view, 418.

Trust for, whether a ministerial trust,



**SALE, continued.**

21; survivorship of, 419; see *Sale, Trustees for*.

to mortgage, does not authorize a sale, 417.

**SALE, TRUSTEES FOR.** See *Mortgagee; Sale, Trust for; Timber. Generally,*

Attested copies, when they must give, 425.

Conveyance by, concurrence of cs. q. t. where necessary, 427; covenants, what, trustees must enter into, 425, note (*k*); for production, 425; of indemnity on sale of leaseholds, 426; grant, effect of, 424, note (*i*); see 596, note (*r*); power of attorney, form of, on assignment of choses in action, 427.

Court, trustees may sell without applying to; secus where suit pending, 414, 429.

Discretion of trustees sale at, purchaser cannot question its exercise, 417.

Duties of: should sell to greatest advantage of all cs. q. t. impartially, 414, and see 418.

should not delegate the trust, 422; see 415; and see *Court, sup., Preliminaries, Quantity, Time, inf.*

Mode of conducting sale, agents, by, 422; auction or private contract, by, ib.; buying in, conditions of sale, as to, 423; lots, trustees may sell in, 423; possession to purchaser, when to be given, 424, see 871; receipt of purchase money, 422; see *Receipts*; and *Preliminaries, Quantity, inf.*

Personal estate, trust for sale on its insufficiency for debts, 428.

Powers of: leases they may not grant, 416, and see 462; mortgage, whether they may make, 416, 417; and see *Receipts*; and *Quantity, infra.*

Preliminaries: advertisements, if by auction, 422; title should be investigated before sale, 421; value of property should be ascertained, ib.

Quantity, whether trustees may sell larger than trust requires, 429.

Request, sale at, &c., how it must be testified, 419.

Specific performance, costs of, 421, 872; not enforced if involving breach of trust, 415; whether when involving hardship, 424.

Time for sale: reasonable time allowed, 415; trust to sell with "all convenient speed," 415, see 527; "after death of A.," 419; within limited period, 416.

where legacies not yet raisable are charged, 430; where portions are raisable, 420, 430.

*Their disability to purchase property,* c. xvi. s. 3, p. 460; and see *Lease.*

(a) Rule applies to purchase from trustee, or co-trustee, 461; even by means of agent, or as agent for another, 462; at auction or private contract, 461; however fair the transaction, ib.; in name of trustee or another, ib.; and whatever the trust property, 460.

applies to assignees, administrators, executors, receivers, &c., 465.

does not apply to execution creditor on sale by sheriff, nor to mortgagee, 465; nor to trustee who has disclaimed, 462.

whether to trustee without active duties, 460.

(b) But trustee may purchase from c. q. t., if relation of trustee and c. q. t. dissolved, and no concealment, 463.

cases where purchase sustained from conduct of c. q. t., 464; whether c. q. t.'s solicitor can authorize purchase, ib.

cs. q. t., creditors, whether all must sanction purchase, ib.

cs. q. t., sui juris, court cannot authorize trustee to bid; secus where cs. q. t. are infants, 465.

(c) Confirmation of purchase, 471, et seq.; requisites of, 472; consideration, it does not require, ib.

(d) Laches, when a bar to relief, 470, see 742; in cases of class (as creditors,) feme covert, infant, 471.

no laches in case of ignorance, 471; whether in case of distress, ib.

(e) Terms on which purchase set aside, 466.

1. c. q. t. may pray reconveyance on payment of purchase money and interest at 4l. per cent., 466.

trustee accounts for rents (without interest,) compensates for deteriorations, but allowed for

SALE, TRUSTEES FOR, *continued*.

repairs and (unless where fraud)  
lasting improvements, 466.

trustee paying money into court  
not entitled to rise in stock, 467.

re-conveyance when ordered, 467;  
without prejudice to bona fide  
lessees, &c., ib.

2. c. q. t. (even a single creditor)  
may pray re-sale, 467, 469.

trustee, where no advance, held  
to his purchase, 468.

how allowed for repairs and  
improvements, ib.

whether re-sale in lots can be  
required, ib.

c. q. t., remedy of, in case of shares,  
469.

against subsequent purcha-  
sers, ib.

costs follow decree, ib.; not  
where plaintiff guilty of de-  
lay, 470.

(f) Time within which relief must  
be sought, 470; see *Laches*, sup.

## SALE AND EXCHANGE, Power of.

whether authorized by "usual pow-  
ers" in executory trusts, 164; un-  
der covenant to settle realty simi-  
larly to stock where power of vary-  
ing securities, 167.

whether it authorizes partition, 417.

whether it implies power to give re-  
ceipts, 433, note (u).

## SCANDAL,

statement of trustee's misconduct is  
not, 711.

## SCHOOL,

chapel for, 496.

"free grammar and free school,"

499, et seq.

trust for poor applied for school-  
house, &c., 501.

## SCIRE FACIAS, 663.

## SCOTLAND,

Equities in respect of lands in, ad-  
ministered here, 48; but see 53  
and *Jurisdiction*.

Executors here not bound to know  
the law of, 367.

The llusson act, Scotland is excepted  
from, 120.

## SECRET TRUSTS,

discovery of, where enforced, 70, 72,  
73; see *Devisee*; *Heir*.

as to, under deed enrolled under 9  
Geo. 2, c. 36, 132.

## SECURITIES,

For money, gift of in will may pass  
mortgage in fee, 264.

Negotiable, where they may be fol-

lowed, 275, 759.

SECURITY. See *Investment*.

Agent, trustee not called upon to  
require from, 295.

Tenant for life of renewable lease-  
holds, what he gives where fine  
paid by remainderman, 398, 400,  
402.

Trustee required to give for due ex-  
ecution of trust, 723.

Vary, power to, 523; a "usual pow-  
er," 164.

## SEISIN,

Infants of, ex parte maternâ of lease-  
holds may be changed to seisin ex  
parte paternâ, 831.

Ex parte maternâ, 680.

Equitable, 617; what required to  
give curtesy, 617, 622, 623.

possessio fratris of a trust, 618, and  
see note (e).

## SELECTION,

power of, 22, 542, 701, 705, 706,  
note (n).

SEPARATE USE. See *Feme Covert*.

## SEQUESTRATION,

of rents ordered where tenant for  
life of renewable leasehold refuses  
to renew, 402, 722.

## SET-OFF. See 334.

where bankrupt trustee (indebted to  
trust) has beneficial interest, 772;  
conf. 771.

## SETTLED,

account opening against solicitor  
trustee, 550.

## SETTLEMENT,

Equity to. See *Feme Covert*.

Executory trust, what directed under.  
See *Executory trusts*.

Postnuptial, executory trusts in, con-  
strued as in wills, 164.

Of realty, usual frame of 404.

effect of usual power of sale in, 417.  
re-settlement of estate, 409.

object of limitation to trustees to  
preserve in 404, 405.

Rectification of, how far by means  
of articles, 148.

not when settlement executed prior  
to marriage, 148.

unless stated to be made in pur-  
suance of articles, or where mis-  
take, 148.

seemle not against a purchaser,  
148, note (g).

Separate use of feme covert for; see  
*Feme Covert*.

Voluntary, of lands or chattels real  
(but not of personalty), defeated  
by subsequent sale by settlor, 92.

- SETTLEMENT**, *continued*.  
 of any property void as against creditors, if settlor indebted at the time, 93; see *Voluntary Settlement*.
- SETTLOR**,  
 Legal estate becoming re-vested in, will not defeat trust, 99.  
 Whether he can claim benefit on failure of c. q. t. 323.  
 Who may be, c. III. s. 1, p. 24. See also *Alien, Bankrupt, Crown, Corporation, Feme Covert, Husband, Infant, Insolvent, Lunatic*; and as to *Felon, Outlaw, Traitor*, see 28.
- SEVERANCE**,  
 of trusteeship, 579; of estate from powers, 535.
- SHARE**,  
 aliquot, payment of into court sometimes ordered, 865.  
 c. q. t., of suing, who should be parties, 850; see 856.
- SHARES**,  
 Charging order under 1 & 2 Vict. c. 110, its effect, 669.  
 Companies, in restraining order under 5 Vict. c. 5, s. 4, applicable to, 860, 863.  
 in canal, insurance, railway companies, &c., when to be converted, 812.  
 Purchase of, by trustee, 469.
- SHELLEY'S CASE**,  
 rule in, applicable to trusts executed, 142. See *Executory trusts* (heir of body).
- SHIP**,  
 no resulting trust on purchase of, in stranger's name, 203.  
 registry acts do not apply to transfers by mere operation of law, 203.
- SICILY**. See *Jurisdiction*.  
 whether trusts of land in, can be enforced here, 54.
- SIGNATURE**,  
 required for delegation of trust, 64; by whom, 65.
- SIMONY**,  
 direction to purchase next presentation in favour of person a designata falls within, 136.
- SIMPLE CONTRACT DEBTS**. See *Breach of trust*.  
 Lands of trustee trading, liable to under Sir S. Romilly's Act, 273.  
 Money to be converted into land was not formerly liable to, 796.  
 Real assets they are now payable out of, 239, 273, note (l), 285, 435.  
 as to devise for payment of debts, see 474.
- Trusts for, debts, how paid under, 484, 488; and see 843, and *Debts*.  
 interest on, not allowed, 489; but see 490, note (g).
- SIMPLE INTEREST**,  
 usually charged for improper retainer of trust money, 359, 361.
- SIMPLE TRUST**. See *Special trust*. explained, 2, 21.  
 in what the c. q. t.'s estate consists, c. XXII. s. 1, p. 585.
- SOLICITOR**,  
 Breach of trust, if he wilfully advises or concurs he may be struck off the Roll, 763, note (s).  
 effect of, in negotiating loans, &c., 358.  
 Borrower of, undesirable for lender to employ, 358.  
 c. q. t. of, whether he can authorize trustee to purchase, 464.  
 Constructive trustee, case where solicitor violating his duty held to be, 226.  
 Purchase in name of son (a solicitor), held not an "advancement" from the relation of solicitor, 216.  
 Security to for professional charges set aside, when, 550.  
 Settled account, containing professional charges opened against, 550.  
 Trustee, solicitor of, has no lien on trust fund, 561; taxation against at instance of c. q. t., 558, note (f), 561, note (g).
- Trustee who is, cannot charge for time and trouble, but only for costs out of pocket, unless where special contract, 320, 549; as to nature of contract, see 553; rule same where co-trustee is one of a firm, 320, 549.  
 proportion of costs allowed to country solicitor (executor) defending suit by agent, 320; co-trustee and solicitor acting in a suit for himself and co-trustees, ib.; none allowed to single trustee defending himself by his partner, ib., and see 550.
- SOUTH SEA**,  
 stock and annuities, 341, note (p).
- SOVEREIGN**. See *Crown*.  
 Declaration of trust by or to, 25, 59.  
 Will of, as to private property, 25.



**SPECIAL,**

Case, 368.

Conditions, 423.

Occupant, heir taking as, may disclaim, 232.

Trust, nature of, 4, 21; must be lawful, 599.

in what c. q. t.'s estate consists, c. xxii. s. 2, 597, et seq.

how converted into simple trust, 597.

proceeds till countermanded by c. q. t., 598.

Uses, Stat. of, is not within, 246, 247.

**SPECIALTY.** See *Breach of trust, Simple Contract Debts.*

heirs where bound by, 238, 239; see 692, 765.

**SPECIALTY CREDITOR,**

devise avoided against, 239, 474.

trusts for payment of debts, his claim under, 484, 488; for interest on, 491.

**SPECIE,**

where presumed that leaseholds, &c., though bequeathed in succession, are to be enjoyed in, 809.

**SPECIFIC,**

Bequest, distinguished from direction to enjoy in specie, 812; and and see note (g).

Charges on realty, persons having, where necessary parties, 843.

Performance, costs of trustee in, 421, 872.

enforced, is not, against trustees who have sold improperly, 415; whether where hardship, 424.

laches in suit for, effect of, 742. lands abroad, as to, when enforced, 47.

parties to suit for, 844; and see 842.

person who has made a previous voluntary settlement cannot enforce against purchaser, 93; but purchaser may enforce, ib.

Trustees' Acts, provision for under Trustee Acts, 839, and see 894.

voluntary contract of not enforced, 93, 94; and see *Covenant.*

**SPIRITUAL COURTS,**

have no jurisdiction of trusts, 19, 261; and see *Prohibition.*

**SPORING,**

trustees not entitled to where it can be let, 318.

qualification of c. q. t. for, under old law, 593.

**STATUTES.** See *Frauds, Stat. of;*

*Limitations, Stat. of; Wills, Stat. of; Trustee Acts; Trustee Relief Acts, and Index of Statutes.*

**STATUTE MERCHANT,**

tenant by, bound by a trust, 11. lien of, 689.

**STEWARD,**

of manor. See *Infant.*

trustee appoints but must observe direction of c. q. t., 269.

**STOCK.** See *Payment into Court.*

Charging order under 1 & 2 Vict. c. 110, 642, 649, 669, et seq.

Co-executors, transfer by, 315.

Creditor, how available to, see *Charging order, sup.*

Devises of, statutes relating to, 32, note (1).

Distringas, writ of, applicable to, 860, et seq., 863.

Dividends, c. q. t. put in possession by power of attorney, 594.

Executors' assent to bequest, effect of, 32, note (1).

Private company, trust money must not be invested upon stock of, 341; bank stock, south sea stock, ib.

Public investment upon, 351; see 354.

case of trustees improperly selling out, 356.

secus where power to do so, 344.

neglect to purchase, 764.

Restraining order, under 5 Vict. c. 5, s. 4, 860, 863.

**STOP ORDER,**

petition for on whom it should be served, 614, note (l).

priority given by, 613, 614. See *Notice.*

**STRANGER,**

Advancement for, whether presumed when purchaser has placed himself in loco parentis, 216.

Purchase in name of, where it creates resulting trust, see *Purchase.*

parties to suits respecting trust by or against, 841, et seq.; and see *Parties.*

**SUBPENA,**

origin of, 1.

**SUIT.** See *Costs, Decree, Parties.*

Barred by lapse of time, when; see *Limitation.*

Collusive, 429.

Decree in, takes administration from trustee, 414, 429, 436, 523; and see 524, 544.

Trustee for protection of, 367.

appeals at his own risk, 368.

**SUIT, continued.**

should see that proper parties are before court, 368.

sustain rather than originate, *ib.*  
for removal of, 710, 711; and see 582, *et seq.*

**SUPPLYING WORDS, in articles,** 153, and see 191, 250.

**SURRENDER.** See *Copyholds, Customary Freeholds.*

**SURVEYOR, 561.**

**SURVIVORSHIP.** See *Feme Covert, Guardian.*

Administratorship or executorship, of, 300.

not of bare power, 299, 536; or committee of lunatic, 299.

Power of sale of, in mortgage, 419.

Powers of trustees, 536. See *Powers.*

Trust of, 299; even where power to appoint new trustees, 301.

Trust for sale of, 300, 419.

**TACKING.** See *Mortgage.*

**TAXES.** See *Rates.*

**TECHNICAL,**

terms, how far necessary for creation of express trusts, 140.

their force when employed, 141; and see *Executory trusts.*

**TENANCY IN COMMON.** See *Joint tenancy.*

Elect, how far tenant in common can, 818.

Implied in case of joint loan, 201; or where two possessed of mortgage term purchase equity of redemption, 202; in joint purchase, where purchasers contribute unequally, 202; or in joint undertaking in trade, 202.

Mortgagee, tenant in common of equity of redemption, 733.

Presumption of ouster between equitable tenants in common, 735, note (1); but see 747.

**TENANT AT WILL,**

c. q. t. is to trustee, 586, 590.

or by sufferance renewal of lease by his executor, 219.

**TENANT FOR LIFE,**

Breach of trust reaping fruits of, how he contributes, 768, *et seq.*  
participating in, his interest may be stopped for compensation, 771.

Chattels or heir-looms as to, his rights, 593, 594.

Conversion income accruing before, his proportion in, 813. See

*Conversion (income).*

having received whole income, when conversion proper, liable to refund, 353.

Costs, he bears of suit instituted for relinquishment of trust by trustees on account of incumbrances by him, 584.

Dividends, how put in possession of, 594.

Feme covert, as regards equity to settlement of wife, who is, 370.

Forfeiture by, 678.

Improvements and repairs, 514.

Powers, whether having sold or mortgaged his estate, he can exercise, appoint new trustees, 580.

Real estate, of his rights, 586, *et seq.*

Renewable leaseholds of, fines entitled to on underleases, 392.

fines, apportionment of between prior remainderman, and contribution, how secured, 395, 398; and see *Renewable Leaseholds.*

liability in case of neglect to renew, 392; see 383.

refusing to renew, 402, 722.

regarded as trustee for renewal, when, 402.

renewing is trustee for those in remainder, 218, 384.

Trust for sale, he may buy under though his consent necessary to sale, 462.

Title deeds, whether entitled to, 591, 592, note (v).

Use of his power under 1 Rich. 3, c. 1, 601 note (f); see 227, in possession.

Waste by, 225, 514. See *Waste.*

**TENANT IN TAIL.** See *Uses.*

Assignment of his equitable interest, 601, *et seq.*

Election by, 819, *et seq.*; see *Election.*

Equitable, he cannot require trustee to convey legal fee, 595.

Forfeit his estates, he cannot, by disseising the remainderman of an equitable interest, 560.

**TENANT TO PRÆCIPE, 412; see** 404, 405; Equitable, 604.

**TENANT YEARLY, renewal of lease by, 219.**

**TENANT RIGHT, 225.**

**TENDER,**

of conveyance, under Lord St. Leonards' Trustee Act, 837, note (a).

**TERM,**

attendant. See *Attendant term.*

**TERROR,**

confirmation must not be obtained by, 473, 778.

**TESTAMENTARY DISPOSITION.**

See *Will*.

**THELLUSSON ACT**, 112, et seq.  
See *Ireland, Scotland*.

Accumulation can be for one only of the periods allowed by statute, 113.

commencing after testator's death, must end at 21 years from such death, 113.

trust exceeding limits is good pro tanto, 113, 114.

Act applies to simple and compound accumulation, and where enjoyment suspended, though right vested, 113.

whether act applies where accumulation only implied by instrument of trust, 115, 116.

Exceptions from the act, and their construction, 119; see 120.

Excess, to whom it belongs, 116, et seq.

resulting for heir, when it devolves as personalty, 118.

Subsequent limitations not accelerated, *ib*.

Wills Act, under, void accumulations of realty go to residuary devisee, of personalty to residuary legatee, 118; and where residue is settled form capital, *ib*.

void accumulations from residue itself result, if realty to heir, if personalty to next of kin, *ib*.

**TIMBER,**

Account of, in equity on legal title without injunction, *qu*. 753, note.

On infant's estate, see *Infant*.

On lunatic's estate, see *Lunatic*.

Trustees may not buy wood estate in favour of tenant for life, sans waste, their power to cut, 515; with power of sale, may not sell separately from estate, 421.

**TIME,**

Bar from. See *Laches, Limitation of Suits*.

Trust for sale, within what it should be executed, 415; and see 419, 420, 429, 436, 458.

Trustee not entitled to any allowance for his time, 545; and see *Trouble*.

**TITHES,**

account of, in equity on legal title, 753, note.

**TITLE,**

power of vendor to sign receipt for

purchase money, a matter of, 430.  
trustee for sale bound to make a good title, 421.

**TITLE DEEDS,**

Custody of, who entitled to, where legal estate in trustee, 591, 592.

where all estates legal, 592, note (*v*).

Holder of, how far a constructive trustee for remainderman or part owner, 227, 228.

Purchaser, if not delivered to assignees, must give attested copies, and covenant for production, 425.

**TORTIOUS,**

Conversion of trust property, 275, 754, 825; and see *Conversion, Follow*.

Sale of land by trustee, 763.

of stock by trustee, 356.

**TRADE,**

Allowance for management is given to constructive trustee, 548; secus as to express trustee, 549.

Bank, money lodged in to executors' account considered to be traded with, 361.

Following trust, property employed in, 760.

Tenancy in common implied on joint advance for, 202.

Trustee employing trust money, charged at option of *c. q. t.* with profits, 361, 362, see 319; or with interest at 5*l.* per cent. 362.

whether with compound interest, 362, 363.

**TRADER.** See *Bankrupt, Debts*.

**TRANSMUTATION OF POSSESSION.** See *Voluntary Assurance*.

where there is, the trust though voluntary will be enforced, 81, 99.

and where there is not, if trust be perfectly created, 81.

**TRAVELLING,**

Expenses, trustee allowed when proper, 557.

**TREASON**, 28. See *Forfeiture*.

**TROUBLE.** See *Trade*.

Allowance, none for to trustees generally, 545.

nor to committees of lunatics, executors, mortgagees, receivers, &c., 546; and see *Solicitor*.

Commission, whether allowed to executor in East Indies, 547; and see note (*n*).



**TROUBLE, continued.**

when to trustees of West India estates, 546.

Contract, whether trustee may, with c. q. t. for allowance for, 551, et seq.

must be fulfilled to the letter, 553.

trustee may, with court, before accepting trust, 553, et seq.

whether mortgagee may, for allowance, 556.

Settlor may direct the trustee an allowance, 550.

it will not cease on institution of a suit, 551.

amount where not known, settled by reference, 551.

**TRUST.** See *Abroad, Advowson, Alien, Breach of trust, C. q. t., Feme Covert, Infant, Overseers, Trustee, Will.*

Accumulation for, 110, et seq.; see *Accumulation, Thellusson Act.*

Alienation, restriction of, not allowed by way of trust, 132; but see 123.

Avorable at common law, 56.

Charitable or public trusts, 23; see *Charities.*

Classified, c. II., p. 21.

Consideration for, 81, et seq.; see *Consideration, Covenant, Voluntary Assurance.*

Construction of, 141, et seq.; see *Construction.*

Constructive, c. IX., p. 217; distinguished, 140, note (1); see *Constructive trusts.*

Contingent remainders, for preserving, c. XV., p. 404. See *Contingent Remainders.*

Created, how; see *Creation of trusts.*

Creditors for, c. XVII., p. 474; see *Debts.*

cannot be defeated by means of trust, 132, et seq.

Declared, how trusts may be, 56, et seq.; see 62, 65.

Defined, 15.

Delegation of, not permitted, 290, et seq.; see *Delegation.*

Discretionary, 21; see *Discretionary.*

Duration of, 23, 103, 111.

Enforced, where consideration valuable or if perfectly created, 81.

Estate tail in, 46, 604.

Executed and executory distinguished, 144; see *Executory trusts.*

Express, c. VII., p. 140; within Stat. of Limitation, 745, 748; see *Ex-*

*press trusts.*

Frauds, Stat. of, how it affects trusts, c. v. s. 2, p. 60. See *Frauds, Stat. of.*

Imperfect, p. 81, et seq.

Implied, c. VII. s. 2, p. 167, et seq.; distinguished, 140, note (1).

Instrumental, explained, 21.

Intention will be followed, where lawful, 44, 100, 103.

Lawful, c. VI. s. 1, p. 103; see 22; and *Unlawful trusts.*

Law, by operation of, 140, note (1); see *Operation of Law.*

Limitation of, compared with legal limitation, 44, 103, et seq.

Ministerial, explained, 21.

Money followed into land, 206, 762; see 753, et seq.

Mortmain in, 132. See *Mortmain.*

Nature and origin of, 1; of modern trust, 8.

administered at first on the principles of uses, 9; afterwards treated as an estate, 11, 12.

Objects of, c. VI., p. 103.

Parol, as to chattels personal, 61; but see 66.

Perfect, 81, et seq.; see *Consideration, Voluntary Assurance.*

Perpetuity cannot be created by, 23, 110, 132; but see *Public trusts.*

Powers, distinguished from, 22, see 536, 701, et seq.

Precatory, 167, et seq.; see *Implied trusts.*

Principles governing at present day, 13.

Properties of, in analogy to legal estates, c. XXIII. p. 600.

assignment of a trust, 600, et seq.; assets, a trust as, 681, et seq.; curtesy and dower of a trust, 621, et seq.; descent of a trust, 680, et seq.; devise of a trust, 615; escheat, whether it affects a trust, 678; extents from the crown against a trust, 673, et seq.; feme covert, her estate in a trust, 627, et seq.; forfeiture of a trust, 674; judgments, how they affect trusts, 646; seisin and disseisin of a trust, 617; and see these *Titles.*

Property, what may be made the subject of a trust, c. XIV. p. 45.

Public explained, 23.

Recommendation, whether raised by, 102; see 168.

Renewable leaseholds of, c. XIV. p. 383; see *Renewable Leaseholds.*

TRUST, *continued*.

Resulting, c. viii. p. 176; see *Resulting trusts*.  
 Sale, c. xvi. p. 414; see *Sale, trustees for*.  
 Secret, 71, et seq., 132; see *Heir, Devisee*.  
 Separate use of, feme covert for, 120, et seq., 631, et seq.; see *Feme Covert*.  
 Settlor, who may be, c. iii. s. 1, p. 24; see *Settlor*.  
 Simple, 2, 21, 585, et seq.; see 597.  
 Special, 2, 21, 597.  
 Stat. de donis, not within, 603.  
 Survivorship of, 299; see *Survivorship*.  
 Unlawful, 22, 131, 599; see *Unlawful trusts*.  
 Uses, Stat. of, special trusts not within, 8, 247.  
 Voluntary, 81, 101; see *Debts, Voluntary Assurance*.  
 Word "trust" may raise a trust, 168.

TRUSTEE. See *Acceptance, Accident, Breach of trust, Charities, Constructive trust, Contingent Remainder, Corporation, Costs, Co-trustees, Debts, Disclaimer, Dower trustee, False, Forgery, Fraud, Implied trust, Indemnity, Insolvent, Insurance, Investment, Judgments, Lien, Misconduct, Mistake, Neglect, Notice, Quasi-trustee, Receipt, Sale, Solicitor*.  
 Actions, where to be brought in his name; see *Actions*.  
 Accounts, he must be ready with, 599; and see 427, 559.  
 Advantage, shall not derive from trust, 318; see *Advantage*, but see *Failure of c. q. t.*  
 Allowances to, c. xx. 545; see *Costs, Expenses, Trouble*.  
 Bankruptcy of, 273, 287, 711, 714, 771, 854; see *Bankruptcy*.  
 Bare, see 318, 460, 536.  
 Bare equity of, 596, 848.  
 Burdens of, 268, et seq., 271.  
 Claim adversely to c. q. t., trustee must not, 325; see 878.  
 Conveyance by, at request of c. q. t., 595; of assignee of c. q. t., 600.  
   on sale, 424, et seq.; see *Conveyance*.  
 Custody of trust chattels by, 332.  
 Delegation, may not make, of his office, 290; see *Delegation*.  
 Disability of; see *Sale, Trustee Acts*.

Discharge of, how obtained; see *Indemnity, Release, Relinquishment*.  
 Distribution of trust fund by, 365, et seq.  
 Duties, how compelled to observe, 718, 723; and see *Duties*.  
 Failure of, remedy of c. q. t. against, c. xxiv. p. 693.  
 Injoined, may be against breach of trust, 723.  
 Laches of, its effect as to right of c. q. t., 719, et seq.; see *Laches*.  
 Legal estate in its devolution, properties and quantity taken by trustee, c. xi. p. 246; see *Legal Estate*.  
 Liability of; see *Co-trustees, Liability*.  
 New, appointment of; see *New trustees and Trustee Acts*.  
 Number of, what is proper, 40, 41, 710; see *Number*.  
 Outstanding trust estate he should get in, 326.  
 Payment by, 372; see *Payment, Receipts*.  
 Possession of trust estate, how he may obtain in court of law, 324, 590.  
 Powers of, general, 512; special, 524; and see *Powers*.  
 Privileges and burdens of, 268, et seq.  
 Purchase of trust estate by, 460, et seq.; see *Sale, trustees for*.  
 Receiver, he cannot be of trust estate, 319.  
 Release by or to, 373, et seq.  
 Relinquishment of office, c. xxi. p. 565; see *Relinquishment*.  
 Renewal of lease by, 383, 392; see 402.  
 Suit by, 367, 582, 768, 846, 850.  
 Tort of, see 755, 825.  
 Who may be, c. iii. s. 2, p. 30.  
   alien may be, of chattels personal, but not of freeholds or chattels real, 39; bank of England cannot be, 32; bankrupts and insolvents not absolutely disqualified, 40, see 711; c. q. t. or relative generally undesirable, 40, 579; corporation may be, except where in contravention of Statute of Mortmain, 31; crown may be, but qu. as to remedy of c. q. t., 30; feme covert or sole may be, but undesirable, and why, 34, 35, see 710; infant ought not to be appointed, 35, 895, note (m); person domiciled

TRUSTEE, *continued.*

abroad generally not a fit trustee, 40; and see 574, 576, 710.  
 Words "trustee," "trustee of inheritance," construction of, in devise, 250.  
 TRUSTEE ACTS, *Generally*, c. xxviii. p. 832.  
 Construction of,  
 7 Anne, c. 19, infancy (as to lands), 832, 833.  
 4 Geo. 2, c. 10, lunacy (as to lands), 833.  
 36 Geo. 3, c. 90, infancy, lunacy, &c. (as to stock), 833, 834.  
 amended by 1 & 2 Geo. 4, c. 114, 834.  
 6 Geo. 4, c. 74, consolidating and extending previous acts, 834.  
*Lord St. Leonards' Trustee Act*, 11 Geo. 4, & 1 W. 4, c. 60, 834, et seq.  
 sections relating to infants (as to land), 835.  
 to lunatics (as to land and stock), 834, 835.  
 to persons out of jurisdiction, &c. (as to land), 835; (as to chattels real,) 837; (as to stock, &c.), 838.  
 mode of application to court, 839, notes (i) and (k).  
 cases of constructive trusts, specific performance, trustee having interest, 839. See *Trustee Act*, ss. 2, 30.  
*Trustee Act*, 1850, and *Extension Act*, 840; in extenso, 880, et seq.  
 Colonies, as to, ss. 54, 56.  
 Contingent rights; see ss. 4, 8, 11, 12, 16, 18.  
 Conveyance under, 889, note (t), see 895, note (g); as to copyholds, 893, note (f); see s. 30.  
 of legal estate sufficient where all parties before the court, 881, note (b).  
 Costs under, generally, 901, note (a); infant trustee, &c., ib.  
 in case of lunatic mortgagee or trustee, 883, note (i); of sale, 903, note (c).  
 Decree for conveyance, exchange, partition, sale, specific performance, under, 893, 903; see sec. 30.  
 Difficulty or expediency of appointing new trustees, &c., 895, notes (m), (n), (o).  
 Durham and Lancaster, lands in, s. 21.  
 Evidence on petition, 895, note (p);  
 MAY, 1858.—52

of trustees' assent of trustees' fitness, ib.; and see 890, note (w),  
*Orders*, inf.  
 Existing trustee, where none, court may appoint new trustees, see 895, note (p); Extension Act, s. 9.  
 Infant trustee or mortgagee, ss. 7, 8; Extension Act, s. 3; see 894, note (k), 895, note (m), 901, note (a).  
 Ireland; see ss. 55, 56, p. 901; see note (c).  
 Jurisdiction, trustee out of, ss. 9, 10, 11, 12, 22; mortgagee, s. 19.  
 Lunatic, personal representatives, s. 6; trustee or mortgagee, see ss. 3, 4, 5, 6.  
 Mortgagee, see ss. 4, 5, 7, 8, 19.  
 Number of trustees appointed by court, 895, note (p).  
 Orders made under by court, on allegation evidence thereof, s. 44.  
 Petition, who may present, 896; in case of sales, see note (t); in lots, 903, note (c); service of, 897, note (v); and see 890, note (w); 891, note (a).  
 Refusing trustee, ss. 23, 24; Extension Act, ss. 2, 4, 5; mortgagee, 19.  
 Scotland, Trustee Act does not extend to, s. 54; see s. 56.  
 Unborn trustee, s. 16.  
 Unknown heir, &c., of trustee, 13, 14, 15, 22; of mortgagee, 19.  
 Vesting order, see ss. 26, 27, 28, 35; Extension Act, s. 2; as to copyholds, 893, note (e); 904, note (d); chose in action, s. 27.  
 in devisees of mortgagor subject to charge, 884, note (k); to uses to bar dower, ib.  
 as to estate tail, 885, note (l).  
 in new and continuing trustees as joint tenants, 896, note (r).  
 as to stock, 896, note (s), 905, note (g).  
 TRUSTEE RELIEF ACTS. See *Lunatic* (Majority).  
 10 & 11 Vict. c. 96, p. 375, et seq.; General Orders under, 379, 381; Amendment Acts, 12 & 13 Vict. c. 74, p. 381; and as to money, &c., belonging to charity, see 18 & 19 Vict. c. 124, s. 22, p. 382.  
 affidavit by trustees, 379, 376, note (s); *Petition*, inf.  
 application by petition (not motion, nor in the first instance at chambers,) 378, note (y).  
 account, heading of, 376, note (u); and see note (t).



TRUSTEE RELIEF ACTS, *continued*.

- costs of trustees, 376, note (s); 378, note (y); 380, note (a); see 377, note (x).
- out of what fund, 380, note (a).
- on petition by tenant for life for payment of dividends, *ib*.
- discharge, how far payment into court is, 377, note (x).
- inquiry or issue, court may direct, 377, note (w), 378, note (z).
- payment into court, after, proceedings must be under the act, 376, note (r); see also 377, notes (v) and (w).
- petition, trustees can, but should not, present, 378, note (y).
- by claimant in forma pauperis, *ib*.
- how far it should set out affidavit of trustee, 378, note (y).
- what order may be made upon, 378, note (y).
- service on trustee, 380, note (a); on claimant, 381, note (b).
- subject matter of payment or transfer, what may be, 375, et seq., 375, note (c).
- suit, when directed, 378, note (y).

## UNCERTAINTY,

- Implied trusts not raised where it exists, 168.
- of objects of trusts, 169; of subject matter of trust, 170.
- Resulting trust, on conveyance where trusts too vague, 181.

## UNDER-LESSEES,

- finer of, 392.

## UNFITNESS,

- of trustee, 574, 710, 711.

## UNLAWFUL TRUSTS,

- C. VI. s. 2, p. 131; and see 22, 71, 73, 182, 599.
- Alien for, 132; alienation (restraint against,) 132, et seq.; charity for, 132; chattels, limitations of, 131; corporation for, 131.
- illegitimate child (future), 131; maintenance, 133; simony, 136; splitting votes, 137; and see those titles and *Cohabitation, Mortmain, Secret Trusts*.
- Consequences of creating, 137.
- estate may be recovered by person claiming under settlor, 138; or by settlor himself, where no fraud, 139; otherwise court will not interfere, 137, et seq.

## USAGE,

- how far evidence in construction of

religious trust, 497.

## USE,

- Avorable, 56; but not where deed required to pass estate, 57; and see 6, note (1).
- Charitable. See *Charitable Uses*.
- Defined, 2.
- Devisable before statute, 615.
- Disclaimer of, 236.
- Estate on which it could be declared, 5; whether on a feoffment in tail, 5; and see 7, note (1); whether upon an estate for life, 5, 6, note (1), 7, note (1).
- Executed under statute, whether designated as trust or use, 246, 254.
- Powers before Statute of Uses, 537, note (1).
- Trusts, special, and of chattels excepted from, 7, 247.

## USUAL POWERS,

- what powers authorized by these words, 164, note (x), 165.
- how qualified by context, 165.

## VALUATION,

- how trustee for sale should make, 421.

VALUE. See *Consideration, Investment*.

## VARY,

- power to vary securities, 523; see 169.
- whether it implies power to give receipts, 523; a "usual power," 164.

## VENDOR,

- a trustee sub modo for purchaser, 175.
- accountable to purchasers for rents, &c., unhusbandlike farming, wilful waste or neglect, 174.

VESTING ORDER. See *Trustee Acts*.VESTRY, 109. See *Parishioners*.

## VISITOR,

- Crown is in civil corporations, by Court of Queen's Bench, 495.
- may be in eleemosynary corporations, by terms of foundation, or where heir of founder unknown or lunatic, 495.
- visitatorial power committed to lord chancellor, 495.
- Office of, he must follow statutes of the founder, 492.
- whether his decision can be appealed against, 492.
- new donations distinguished, in respect of visitatorial power from original endowment, 493.

- VOID.** See *Infant, Lunatic.*  
**Accumulation.** See *Accumulation, Thellusson Act.*  
**Trust.** See *Duration, Mortmain, Perpetuity, Uncertainty.*  
**VOIDABLE.** See *Infant, Lunatic, Voluntary Settlement.*  
**VOLUNTARY AGREEMENT.** See *Covenant.*  
 not specifically executed though under seal, 93, 94, and comp. 207.  
 how far provable in equity as a debt, 94, note (e).  
**VOLUNTARY ASSURANCE.** See *Consideration, Meritorious.*  
**Trusts supported if perfectly created,** 81.  
 not perfectly created when further act intended, 81.  
 once perfectly created is not subsequently defeasible, 99; comp., 207, 215.  
 distinction between voluntary assignment of expectancy and interest, 92.  
 no trust unless intention to create it, 100.  
**Equitable property, of, where settlor declares himself trustee, trust is perfectly created,** 82.  
 where settlor appoints stranger trustee, assignment to new trustee sufficient, 89.  
 and good against assignor without notice to former trustee, 91; see 280, note (y).  
 where new trustee created without new trustee, 91.  
 assignment to stranger for his own benefit, 91.  
**Legal property where settlor declares himself trustee, trust is perfectly created,** 82.  
 where settlor appoints stranger trust transfer necessary, if possible, e. g. in land, chattels, or stock, 84.  
 case of legal property incapable of legal transfer, e. g., chose in action, 85; and see 89.  
**VOLUNTARY SETTLEMENT,**  
 Land or chattles real, of, defeasible by subsequent sale by settlor, 92.  
 but not by settlor's heir or devisee, 93.  
 c. q. t. cannot prevent sale or obtain redress, 93.  
 settlor cannot enforce contract for sale against purchaser, but purchaser may against settlor, 93.  
 power of settlor to defeat by sale, not a disposing power under 1 & 2 Vict. 110, s. 11, 13; 666, note (a).  
 real or personal estate, of, by one indebted, defeasible by creditor, 93.  
**Trustees of, bound to preserve contingent remainders,** 405.  
**VOLUNTARY TRUST.** See *Debts, Voluntary Assurance.*  
**VOLUNTEER,**  
 Assign of trust estate presumed to have notice, 19; and see 224, 228, 279, 406.  
 Trust estate followed in his hands, 724.  
 Time no bar in case of express trust, 745.  
 as to constructive trust, see 729, 733.  
**VOTES.** See *Member of Parliament, Parishioners.*  
 purchase for purpose of giving, 137; does not raise resulting trust, 203.  
**VOUCHERS,**  
 c. q. t. may inspect, but must pay for copies of, 428; and see 599.  
 Trustees may keep, 428.  
 need not be kept for ever, 741; lost, 739.  
**WAIVER,**  
 what is, 737.  
 what consideration sufficient for, 737.  
**WARD.** See *Guardian.*  
**WASTE,**  
 Equitable, 225.  
 Permissive, by equitable tenant for life, 514; by legal tenant for life, 514, note (u).  
 Tenant for life without impeachment of, trustees should not purchase wood estate in his favour, 421.  
 Trustees to preserve, their duty to prevent, 408, 413.  
**WASTING PROPERTY,**  
 as leaseholds, long annuities, where to be converted, 808, et seq. See *Conversion.*  
**WEST INDIES,**  
 equities relating to estate in, enforced here, 47; and see *Jurisdiction.*  
 trustees for estates there, whether entitled to commission, 546.  
**WESTMINSTER,**  
 Stat. of, 647.  
**WIFE.** See *Feme Covert.*  
**WILFUL DEFAULT,**  
 account for, not given on further directions, 765.

**WILFUL DEFAULT**, *continued*.

where directed, 752, see 766.

**WILL**. See *Deed*. Wills, Stat. of.

Ambulatory till testator's death, 66.

Consideration it implies, 58, 167.

Copyholds of, 45, see note (a), 60 ;

see note (1) ; of equitable estate in, 45, 615, 616 : where no custom to devise legal estate, 45, 616.

under late Wills Act, 60, 617.

Customary freeholds, of, 617 ; equitable estate, in, 617.

Executory trusts, construction of in wills, 153, et seq. ; see *Executory trusts*.

Feme covert of, as to separate estate, 642.

Freeholds of, under Stat. of Frauds, 65 ; equitable estate, in, 615.

under late Wills Act, 617.

Infant of fourteen might formerly make, of personal estate ; secus now, 27.

Land of, to be converted into money, 807.

Money of, to be laid out in land, 796.

Power to appoint by, contemplates those who answer description at death of donee, 170, 704 ; and see *Assets*.

Personal estate of, under Statute of Frauds, 65 ; under late Wills Act 617.

Settlement, will distinguished from as regards duties of trustees to preserve, 410.

Sovereign of, 25.

Stock of, how formerly made, 32, note (1).

Use, devise of, 615.

devise to uses, construction as to, 258.

**WILLING AND DESIRING**,

may create a trust, 167.

**WILLS**,

STATUTES OF, c. v. s. 3, p. 65 ; see *Legal Estate*, *Residuary*

(devise).

trusts cannot be created by devise or bequest without formalities required for wills, 66 ; see as to personal estate, 68, and see 69, note (a).

except in case of charge of debts and legacies on real estates before 1st Jan., 1838, 69 ; (and how far exception extends), and in case of fraud, 70.

devise to uses, 258.

**WISHING AND REQUESTING**.

**WORDS**. See *Consent*, *Construction*, *Executory Trusts*, *Grant*, *Investment*, *Technical Terms* ; "heirs," 141 ; "heir male," 154 ; "heirs female," 149 ; "heirs of the body," see this title ; "issue," 149, 156 ; "it shall be lawful," see 386 ; "shall and may," in act of parliament, 301, note (c) ; "request," "require," see these titles, "subject thereto," 191 ; "trustee," "trustee of inheritance," 250.

implying restraint against anticipation, 123, 632, note (w) ; separate use, 121, et seq. ; trust, 167 ; but see 170, 171.

supplied in articles, 153.

**WORSHIP OF GOD**,

construction of trust for maintaining, 497, et seq.

**WRITS OF**,

*distringas*, see *Distringas*, 860, et seq.

execution at common law, 646.

**WRITING**,

Assignment of equitable interest by, 600.

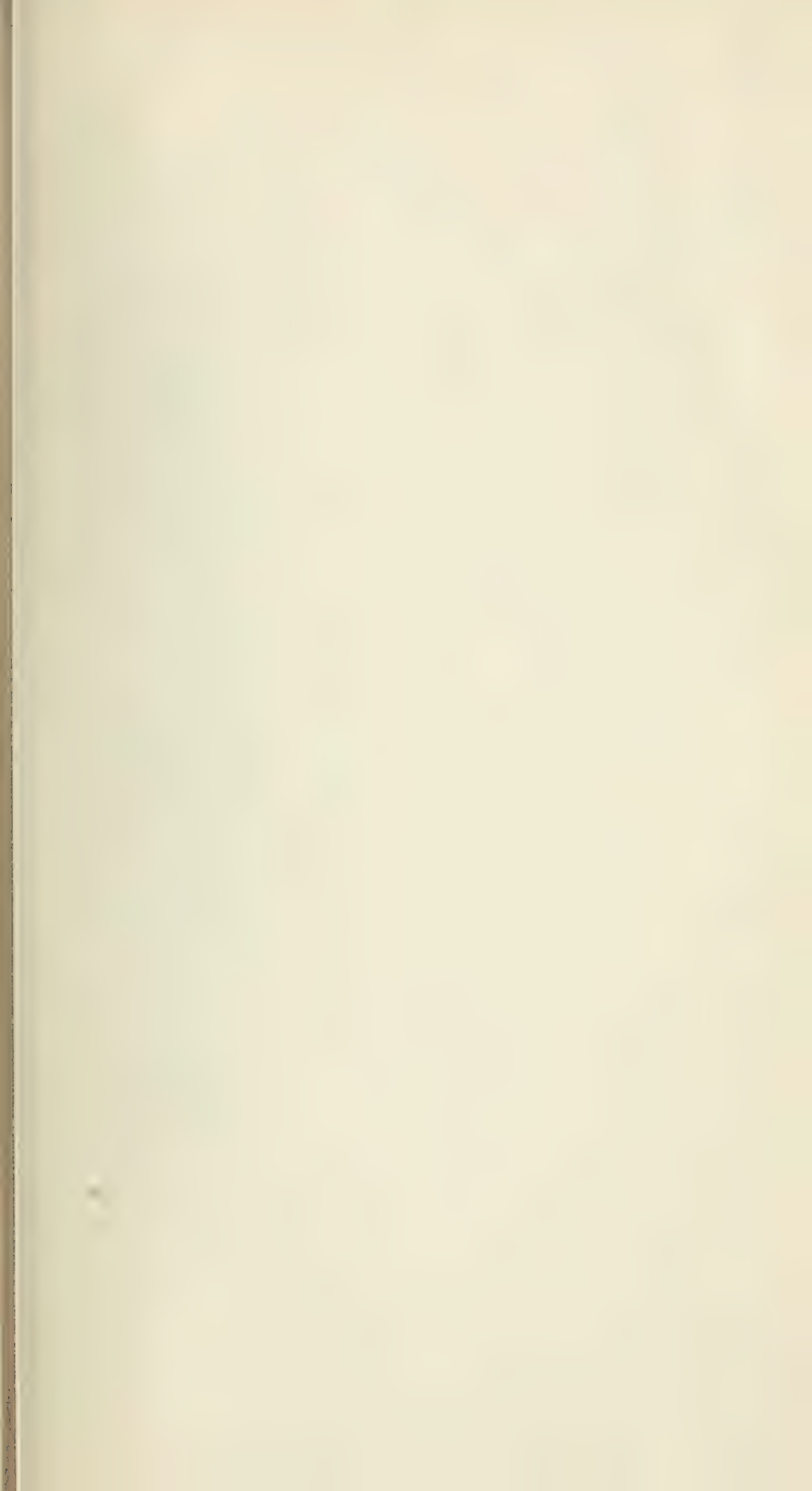
Request for sale to be testified by, 419.

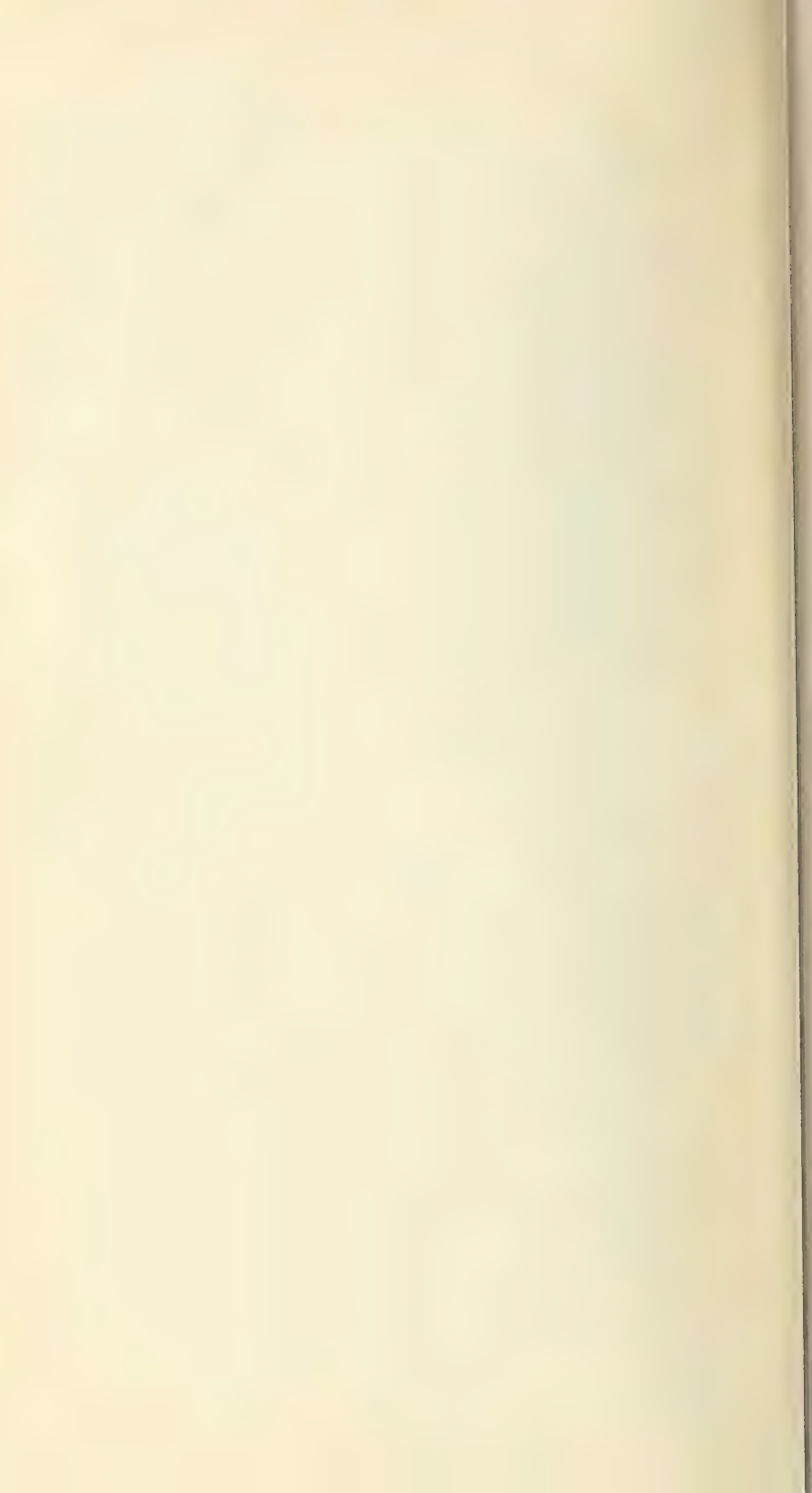
Trust, note in (not under seal) sufficient to declare, 56.

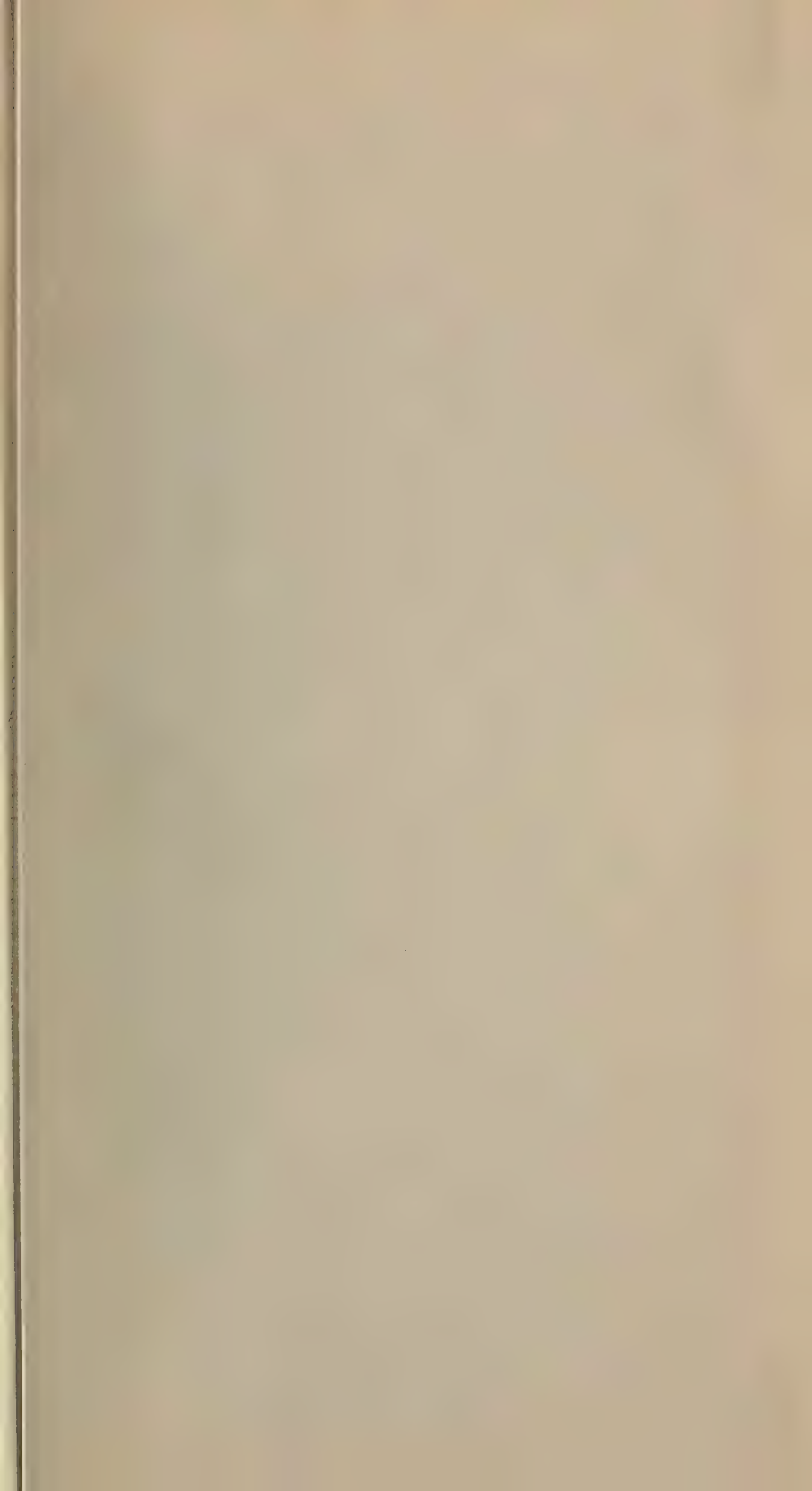
but in case, of wills, see 66, 68, and 69, note (a).

Trustee may sue before having accepted the trust by, 243.

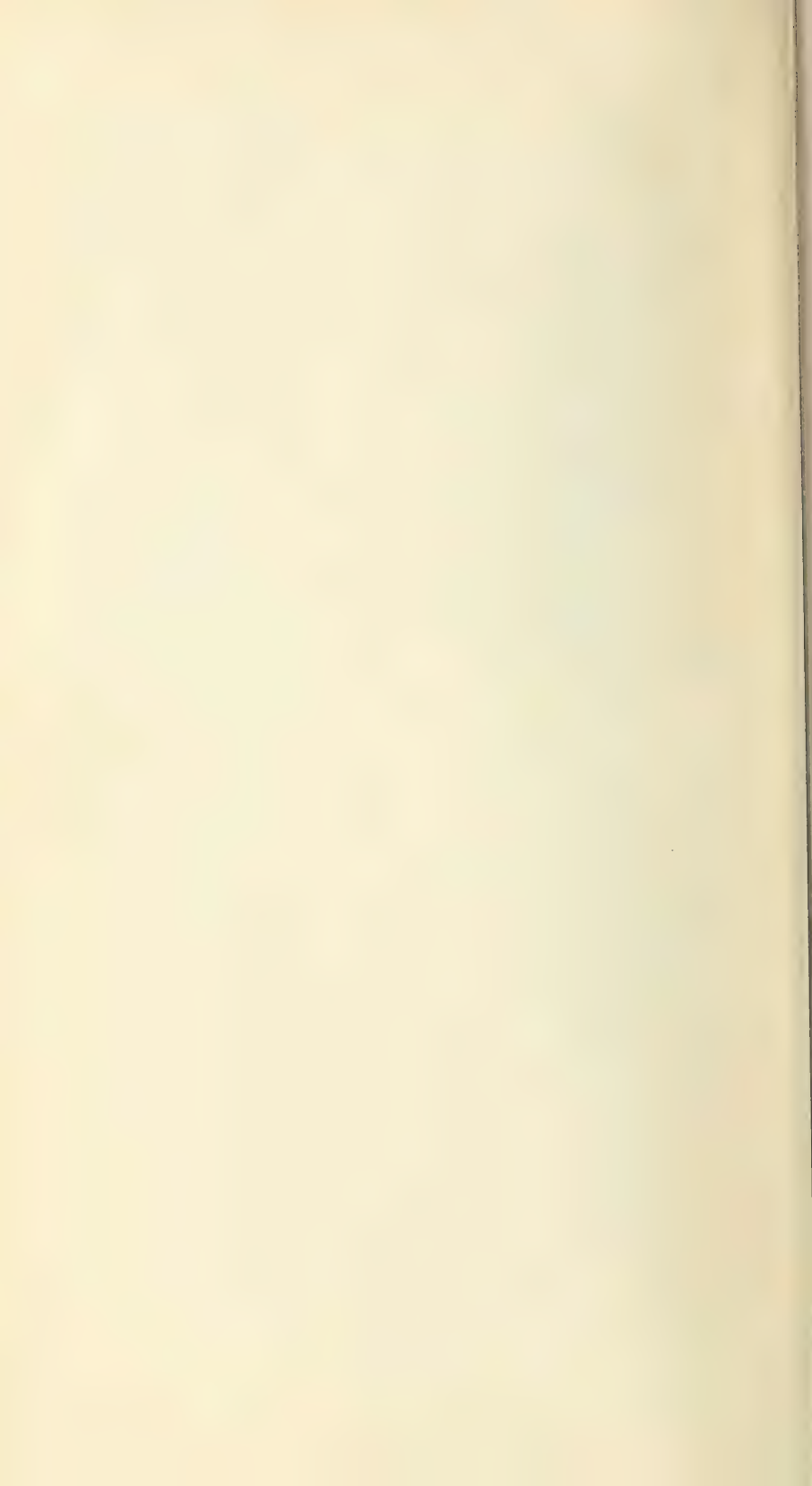


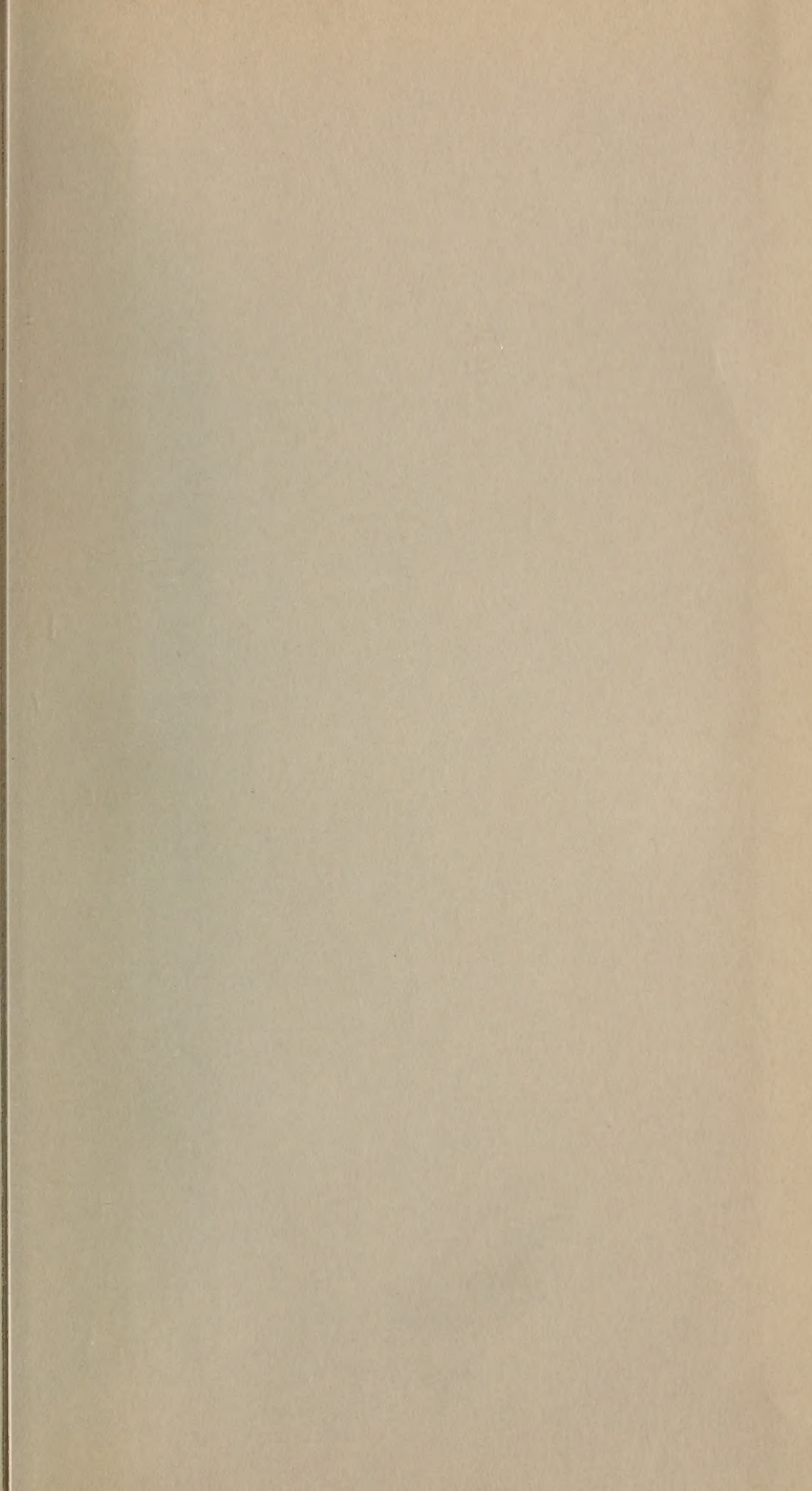
















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